

ISTRIA’S ARTISTIC AND SPIRITUAL HERITAGE IN ABEYANCE: INTERNATIONAL COOPERATION AND CULTURAL COMMUNITY RIGHTS*

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Abstract

This article deals with the contested status of two groups of cultural objects – a collection of priceless artworks, and fifteen church bells – originating from Istria, precisely from the present-day territory of the Slovenian and Croatian Littorals, and preserved in Italy since the turbulent, tragic times of the Second World War. It argues that the ownership title to such objects does not lie at the centre of the current controversy between Slovenia (and potentially Croatia) and Italy. Instead, it seems that the fundamental issue in this regard refers to the recognition and realization of cultural community rights to such heritage, affected by political, territorial and ethnic transformations. This article discusses various international legal regimes that might be applicable in this case of Istria’s contested cultural heritage, with special focus on the enhancement of cultural human rights and international cultural cooperation. It also touches upon the concept of procedural justice, built on the principles of participation, voice and transparency, which are perceived as crucial in negotiating and managing cultural heritage matters and controversies.

Keywords: cultural rights; cultural heritage; State succession; armed conflicts; restitution; international cooperation; procedural justice; participation.

1. INTRODUCTION

Cultural heritage constitutes a truly value-laden, powerful concept in international law. Sometimes it is also associated with “global common goods” or “global

* Francesca Fiorentini has written sections 2, 2.1., 2.2, 2.3, 2.3.1, 2.3.2, 3, 3.1, 4.1; Andrzej Jakubowski has written sections 1, 3.2, 3.3, 4.2, 4.3, 5. The authors wish to acknowledge that some of the research for this article was carried out and co-funded by the European Union within the project “HEURIGHT – The Right to Cultural Heritage – Its Protection and Enforcement through Cooperation in the European Union”, ERA-NET, JPI Heritage Plus “Cultural Heritage and Global Change”.

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public goods” as referred to by the UN Development Programme on various occasions.¹ In this guise, cultural heritage would belong to “human-made global commons”, of which humanity as a whole would be both the beneficiary and custodian.² Such a conceptualization of cultural heritage appears very attractive and tempting, particularly in light of the seemingly universal notions of “cultural heritage of all mankind” or “world cultural heritage”, terms stemming from the expanding law-making and standard-setting activity of UNESCO. Significantly, the latter notion, introduced by the nearly universal 1972 World Heritage Convention,³ is usually associated with “global commons”, entailing a shared duty to co-operate in order to safeguard and conserve world heritage in the general interest of humankind.⁴ Acts against such cultural heritage sites are perceived as a violation of this general interest and as serious threats to international peace and security, thus giving rise to both State responsibility and individual criminal liability. Indeed, the consolidation of international regimes for combating violations of the general interests of humankind in protecting cultural heritage may arguably be perceived as a “global common good”. Interestingly, the realm of responsibility *lato sensu* is perhaps the area where the global concerns on the protection of cultural heritage face the most interesting and vivid developments, at the levels of both the theory and practice of international law.

Parallel to the rise of global concerns about the protection of cultural heritage for the sake of peace, stability and development, the link between the international protection of cultural heritage and human rights law has been enhanced owing to the gradual recognition of the significance and value of cultural aspects of human existence for the protection and promotion of all human rights. These developments have occurred at the level of international treaty law within originally distinct or separate areas of legal regulation. A number of cultural law instruments have linked their implementation with the observance of human rights and freedoms, enhancing the role of the human dimension in implementing cultural and cultural heritage policies. In particular, the works of the UN experts in field of cultural rights, based on their extensive research into international practice, have comprehensively sub-

¹ See, e.g., KAUL et al. (eds.), *Global Public Goods: International Cooperation in the 21st Century*, New York, 1999, p. 453.

² MESKELL, “Heritage and Cosmopolitanism”, in LOGAN et al. (eds.), *A Companion to Heritage Studies*, Chichester, 2016, p. 489 ff., pp. 481-487.

³ Convention Concerning the Protection of the World’s Cultural and Natural Heritage, 16 November 1972, entered into force 17 December 1975.

⁴ JAKUBOWSKI, “A Constitutionalised Legal Order: Exploring the Role of the World Heritage Convention (1972)”, in JAKUBOWSKI and WIERCZYŃSKA (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry*, Abingdon/New York, 2016, p. 183 ff., pp. 188-202.

stantiated the importance of cultural heritage for the safeguarding, enjoyment and enhancement of all human rights.⁵

At the same time, these developments concerning the universalization and humanization of cultural heritage law regimes have had, however, little effect on the traditional conceptualization of culture and cultural heritage as seen through the prism of State sovereignty and State identity. In fact, cultural heritage, being a vehicle of collective memory and cultural identity, continues to be one of the last bastions of State sovereignty.⁶ Even though nation-States' competences may seem diminished or limited by the processes of globalization, cultural heritage still lies at the core of States' identities, defining their statehood and international standing. Thus cultural heritage objects often become "hostages" of States' interests, at the expense of those individuals and communities (both local communities and the international community as a whole) who might have an intrinsic human link with the cultural heritage – a link which might not be (fully) coincident with a given State's interests.

Such situations usually arise in cases of cultural objects originating from contested or conflict-ridden territories. The question often emerges as to the existence of, and the legally binding character of rights, other than sovereign rights, to the cultural heritage that might be at play when it comes to cultural heritage matters, in particular the right of individuals and/or minorities to have access and enjoy cultural heritage.

This article deals with the aforementioned questions in relation to two groups of cultural objects – a collection of artefacts (mostly paintings) and fifteen church bells – both originating from Istria, precisely from the present-day territory of the Slovenian and Croatian Littorals, and preserved in Italy since the turbulent, tragic times of the Second World War. As is well-known, as a result of a series of post-war decisions, particularly the London Memorandum of 1954⁷ and the Osimo Treaty

⁵ See Report of the independent expert in the field of cultural rights, Farida Shaheed, 21 March 2011, UN Doc. A/HRC/17/38; and Report of the Special Rapporteur in the field of cultural rights, 3 February 2016, UN Doc. A/HRC/31/59.

⁶ Inasmuch as it was conceptualized, since the Age of Enlightenment, according to the idea that national art and culture had to be the basis for the formation of national States and had to be placed in national museums: JAYME, "Antonio Canova, la Repubblica delle arti ed il diritto internazionale", RDI, 1992, p. 889 ff., pp. 894-900. On the use of art as propaganda tool to pursue the political goal of the formation of national States see (regarding France) MCCLELLAN, *Inventing the Louvre: Art, Politics and the Origins of the Modern Museum in Eighteenth-century Paris*, London, 1994, p. 7; and SAX, "Heritage Preservation as a Public Duty: The Abbé Gregoire and Origins of An Idea", Michigan Law Review, 1990, p. 1142 ff.

⁷ Free Territory of Trieste: Administration of Zones A and B by the Italian and Yugoslav Governments. Memorandum of Understanding, with Annexes, between the United States of America, the United Kingdom, Italy, and Yugoslavia, 5 October 1954, entered into force 5 October 1954.

of 1975,⁸ nearly the entire region of Istria, which before the war belonged to Italy, became the sovereign territory of the Socialist Federal Republic of Yugoslavia (SFRY). Following the dissolution of Yugoslavia, Slovenia, one of the SFRY successor States, asked for the return of the paintings to the places where they had been commissioned and from where they had been taken by the Italian governmental authorities. Although with less emphasis than for the paintings, there has also recently been some interest expressed, particularly by local religious communities, with respect to the Istrian bells' restitution to the original municipalities.⁹

The case of Istrian cultural heritage may be seen as belonging to those controversies concerning the allocation and ownership of title to cultural assets in the context of both armed conflict and State succession. However, this article argues that the ownership title to such objects – intended as the classical concept of ownership elaborated in both civil and common law contexts in the eighteenth and nineteenth centuries as an exclusive absolute right pertaining either to the State (public ownership) or to private (non-State) entities (private ownership) – does not lie at the centre of the controversy. Instead, it appears that the fundamental issue relates to the recognition and realization of community cultural rights to a heritage affected by political, territorial and ethnic transformations.

In such a guise, this article discusses various international law regimes that might be applicable to the case of Istria's cultural heritage, with special focus on the principles of protecting the integrity of cultural heritage sites and international cultural cooperation, on the one hand, and on the protection of minority rights and the enhancement of cultural human rights, on the other. Accordingly, this article endeavours to shift the focus of the prevailing doctrinal analysis – from the realm of cultural heritage disputes between sovereign States towards a more holistic cultural rights' approach. This approach includes the concept of procedural justice, built on the principles of participation, voice and transparency, perceived as crucial in negotiating and managing cultural heritage matters and controversies.

2. WHOSE HERITAGE IS IT? THE COMPLEX LEGAL HISTORY OF ISTRIA

The region of Istria is an emblematic European borderland. For centuries it has constituted a multi-ethnic and multicultural territory, frequently changing political masters. Moreover, it experienced all the great historical vicissitudes – from

⁸ Treaty between Italy and Yugoslavia on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947 (with Annexes, Exchange of Letters and Final Act), 10 November 1975, entered into force 11 October 1977.

⁹ See JAKUBOWSKI, FIORENTINI and MANIKOWSKA, "Memory, Cultural Heritage and Community Rights. Church Bells in Eastern Europe and the Balkans", *International Human Rights Law Review*, 2016, p. 274 ff.

the Napoleonic wars to the trauma of the Second World War – that have shaped present-day Europe and its nations.

2.1. Political, Cultural and Ethnic Background: Istria between Venetian and Austrian Influence

In the 933 A.D. Peace of Rialto, the Republic of Venice obtained rights of navigation and commerce along the rocky Istrian coastline.¹⁰ Around this time, Slavic and Italian ethnic groups began settling there, although the political and cultural domination of Venice over Istria was established only in the twelfth century.¹¹ It reached its maximum of territorial extension in 1535 (Lodo of Trento),¹² which lasted until the conquest of Venice by Napoleon in 1797.¹³ However, already by the end of the fourteenth century, the Habsburg Monarchy controlled some of the northern and eastern territories of Istria. The Austrian domination of these territories lasted, with only minor interruptions, until 1918. This created an early dichotomy in Istria, both in terms of political control and culture, which lasted until the Napoleonic conquest of Venice. During this long period the coastal area of Istria was profoundly Venetian: Istrian coastal towns were Venetian-speaking and Venetian Italian was not only the language of local government and administration, but also of commerce and culture.¹⁴ With the fall of Napoleon and the 1815 Congress of Vienna, the territory of Venice, i.e. Veneto, Venice itself, Istria and Dalmatia, passed under the domination of the Habsburg Monarchy, which already controlled Trieste and Rijeka as important commercial cities. The Province of Istria was established in 1825 by uniting the coastal former Venetian domains of Istria with the Austrian territories.

With the rebellions in Venice in 1848-1849 – in the context of *Risorgimento italiano* aimed at the unification of Italy – the base of the Habsburg Navy moved from Venice to Pola, and this event caused a major demographic and commercial expansion of both Pola and of Istria as a whole. Under Austrian rule, Italians,

¹⁰ Treaty between Venice and the Marquis of Istria, signed on 12 March 933. See JACKSON, *The Shores of the Adriatic, the Austrian Side: The Küstenlande, Istria, and Dalmatia*, London, 1908, p. 94.

¹¹ See DE VERGOTTINI, *Lineamenti storici della costituzione politica dell'Istria durante il Medio Evo*, Roma, 1924.

¹² The pretensions of Venice to certain territories in Friuli were heard by a court of arbitration in Trento. The verdict was delivered on 17 June 1535. See ALBERI, *Istria: storia, arte, cultura*, Udine 1997, p. 863.

¹³ The Treaty of Peace between Napoleon and Venice was signed on 16 May 1797 (Martens, 2nd Series, VI, 391). But soon afterwards, with the Treaty of Peace of Campoformio between the French Republic and the Austrian Empire on 17 October 1797 (Martens, 2nd series, VI, 420), Venice was passed under Austrian rule.

¹⁴ CACCIAVILLANI, *Istria veneziana*, Milano, 2012.

Croats, Slovenes, Vlachs/Istro-Romanians and even a few Montenegrins lived in Istria. However, after 1866 the Habsburgs, with a view toward reducing the Italians' inclination towards irredentism, favoured the Slav element of the Istrian population, which produced a gradual emigration of Italians, whose numbers decreased in relative terms until the time of the First World War.¹⁵ Yet, it is certain that Italians lived on coast, while the Slav groups lived mainly inland, and that at this time the Italian élites retained much of the political control and cultural influence in Istria.¹⁶ Significantly, the ethnic and nationalistic conflicts, which were instigated by the Austrian rule during this time, have been considered as “Italy’s Austrian heritage”, meaning that – along with other factors – they were at the root of the subsequent ethnic conflicts characterizing the Istrian region in later times and under subsequent political regimes.¹⁷

2.2. *Territorial and Human Transfers (1919-1956): The “Exodus” of the Istrian Italians*

After the First World War, under the Treaty of Saint-Germain-en-Laye (1919)¹⁸ and the Treaty of Rapallo (1920),¹⁹ Istria passed to the Kingdom of Italy, together with the cities of Trieste, Gorizia, Pola and Zara. With the advent of Fascism in Italy after 1922, a policy of forced cultural and economic Italianization of the region began, which led to the expulsion of a large part of the Slav population from their lands and houses and during which settlement of Italians in the same areas was promoted by the government.²⁰ The Italian anti-fascists, as if by premonition,

¹⁵ However, it should be noted that estimates concerning the ethnic composition of the Istrian population at the time of the First World War are contested and therefore not fully reliable: PERSELLI, *I censimenti della popolazione dell’Istria, con Fiume e Trieste, e di alcune città della Dalmazia tra il 1850 e il 1936*, Trieste/Rovigno, 1993, p. 469.

¹⁶ BARTOLI, *Le parlate italiane della Venezia Giulia e della Dalmazia*, Grottaferrata, 1919.

¹⁷ RUSINOW, *Italy’s Austrian Heritage: 1919-1946*, Oxford, 1969; Italian translation *L’Italia e l’eredità austriaca 1919-1946*, Venezia, 2010, “Introduction” by CATTARUZZA, pp. IX-XX.

¹⁸ Treaty of Peace between the Allied and Associated Powers and Austria, 10 September 1919, entered into force 16 July 1920.

¹⁹ Treaty between the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, 12 November 1920.

²⁰ For instance, Slovenian and Croatian teachers in Slovenian and Croatian schools were replaced by Italian teachers, because Italian had to be the only official language taught at school: *Riforma scolastica Gentile*, Law No. 2185 of 1 October 1923. In addition, the forced Italianization of surnames of Croats and Slovenians, as well as the Italian denomination of some places inhabited by the other two ethnic groups, were imposed by Royal Decree No. 494 of 7 April 1927 and Royal Decree No. 800 of 29 March 1923, respectively. Art. 1 of the Royal Legislative Decree No. 1796 of 15 October 1925 prohibited the use at trial of acts and documents in languages other than Italian. At the basis of the economic persecution of the Slavs was the destruction of their co-operative system of financing the peasantry, which led to requisitions of their property. A Special Tribunal for Public Security condemned to death mostly Slav people accused of counteracting

condemned these acts as oppressive and abusive, potentially endangering the living conditions of Italians in Istria,²¹ which indeed happened afterwards. During the Second World War, and particularly after the Armistice of 8 September 1943, the Italians of Istria had to remain under the direct administration of the German occupants with regard to the area called the Adriatic Littoral (including the provinces of Udine, Gorizia, Trieste, Pola, Rijeka and Ljubljana), while the central and southern part of Istria was *de facto* controlled by the Yugoslav partisans, and very soon thereafter both Croatian and Slovenian rebels proclaimed the annexation of the domains in Istria under their influence and control.²² It was at this moment, as a reaction against the previous fascist policies and practices of Italianization, that the first persecutions of Italians in these territories began, and in this context the tragic foibe took place, i.e. the summary execution of people, rightly or wrongly perceived to have been involved with Fascism and the disposal of their corpses in the karst sinkholes. These events count among the most controversial and least divulged in Italian contemporary history.²³

The German administration of the Adriatic Littoral collapsed only with the final defeat of Germany in the war, when Istria was freed by the Yugoslav Army of Josip Broz Tito in 1945, who succeeded in the effort only shortly before the arrival of the Allies. The latter reached – and freed – only Gorizia and Trieste. The competing territorial claims of the two parties were settled under the Belgrade Agreement of 9 June 1945, according to which two areas of military occupation were established: Zone A under the Anglo-Americans (Trieste and the military base of Pola); and Zone B (the rest of Istria) under the Yugoslavs. The Yugoslav domination of most of Istria was substantially confirmed by the 1947 Treaty of Peace with Italy.²⁴ Under this Peace Treaty, the area of the city of Trieste and the Istrian Littoral of Koper, Piran and Izola were not “ceded territories” within the meaning of Article 21(4) but formed the separate Free Territory of Trieste (FTT). This was divided between the Allies, who maintained control over the Northern territories of Zone

Italian institutions: see, e.g., PUPO, “Violenza politica tra guerra e dopoguerra: il caso delle foibe giuliane 1943-1945”, in VALDEVIT (ed.), *Foibe. Il peso del passato*, Venezia, 1997, pp. 33-58.

²¹ See, e.g., BARTOLINI and BARONTINI, *Fascismo antislavo: il tentativo di bonifica etnica al confine nord orientale*, Pistoia, 2008; APOLLONIO, *Venezia Giulia e fascismo, 1922-1935: una società post-asburgica negli anni di consolidamento della dittatura mussoliniana*, Gorizia, 2004; and PUPO, *cit. supra* note 20.

²² Decision of Pazin (Pisino) of 13 September 1943 by the Croatian National Liberation Committee, and Decision of 16 September of the same year by the Liberation Front of the Slovene Nation.

²³ See, e.g., MILETTO, *Istria allo specchio. Storia e voci di una terra di confine*, Milano, 2007, p. 14; PUPO, “L’esodo degli italiani da Zara, da Fiume e dall’Istria: un quadro fattuale”, in CATTARUZZA, DOGO and PUPO (eds.), *Esodi: trasferimenti forzati di popolazione nel Novecento europeo*, Napoli, 2000, p. 183; and LA PERNA, *Pola, Istria, Fiume 1943-45. La lenta agonia di un lembo d’Italia*, Milano 1993.

²⁴ Treaty of Peace with Italy, 10 February 1947, entered into force 15 September 1947. Under this Treaty, Pola experienced an overturning, because it passed to Yugoslavia.

A, including Trieste, and Yugoslavia, which controlled the Southern Territories of Primorska, i.e. Zone B. With the London Memorandum of 1954 the administrative powers over Zone A passed to Italy, and those over Zone B to SFRY. Eventually the issue of the borders was definitively settled by the Treaty of Osimo of 1975, which passed the sovereign powers over the two Zones to Italy and SFRY, respectively.

The outcome of this complex territorial division was a massive transformation in the ethnic and cultural composition of the population of Istria, which took place from 1945 to 1954 and thereafter. This is not the place to discuss whether or not the word “exodus” applies in the Biblical sense to the Istrian Italians, but certainly significant population transfers took place in this relatively long time span, resulting in a massive reduction in number of the Italians in the Istrian population. At the same time, Article 19(2) of the 1947 Treaty of Peace gave the Istrian Italians the option of choosing Italian citizenship. However, according to Article 19(3), Yugoslavia could force those Italians availing themselves of this option to move into the Italian territories. It should be stressed that the Yugoslav government did not have an official policy of mass expulsion of the Italians, although they did expel fragments of society they deemed dangerous for their government. The 1954 London Memorandum included an attachment with a Special Statute for the national minorities in the two zones, but by this time the “exodus” was impossible to stop. During this process, the formation of the “iron curtain” at the level of international politics became an intertwined factor, as the Italians’ departure was also motivated by fears of losing political stability, national identity, and the protection of property and human rights under the Communist SFRY regime.²⁵ Be that as it may, what needs to be stressed for our purposes is that the effect of this evacuation from Istria of a large social, cultural and economic component that had been dominant for centuries had no precedent in previous transfers of sovereignty, and caused a deep shift in the history and collective memory of the region.

2.3. *The Status of Istria’s Relocated Cultural Heritage*

These momentous events in the history of Istria also impacted on the destiny of Istria’s cultural heritage. With particular reference to cultural movables, the transfer and relocation of some important pieces of art, which had begun at the outset of the Second World War, led to controversies between SFRY (and later its successor States) and Italy. These disputes are not yet resolved and concern competing interests and claims not only between the various States, but also among the different communities criss-crossing the borders of these States.

Among the Venetian artistic legacy in Istria are hundreds of works of art (paintings and sculptures) that were commissioned, mainly by religious or public institu-

²⁵ PUPO, *cit. supra* note 23, p. 187.

tions of the coastal towns of Istria between the fourteenth and the eighteenth centuries, to Italian artists. Included among them are about twenty paintings by famous Venetian artists like Paolo Veneziano, Benedetto and Vittorio Carpaccio, Cima da Conegliano, Alvise Vivarini, Jacopo Palma il Giovane and Giambattista Tiepolo. Following some vicissitudes and various territorial changes, since 2006 these pieces have been, and continue to be, on display in the Museo Sartorio in Trieste.

Their history overlaps with the history of other Istrian artworks, which followed a similar yet different path. This is the case of the church bells of the Istrian coastal towns and villages, which were often the product of Italian and Venetian artists between the sixteenth and the seventeenth centuries and therefore are an important part of the panorama of Italian and Venetian art in the whole Adriatic region. A collection of fifteen of those bells are now stored in the Museo Miramare in Trieste, but have never been accessible to the public since the end of the Second World War.

While the history of these art objects and bells is traced here separately, they are part of an ongoing process in the history of Istrian symbols of collective memory of various communities and territories, sought-after by different political entities and scattered throughout different territories, which intersected in 1940 at the beginning of the Second World War.

2.3.1. “*Histria Collection*”

Up until 1940 the paintings and other artworks now gathered in the “*Histria collection*”²⁶ were in their original location, i.e. in three coastline municipalities of Italian Istria: Koper (Capodistria), Piran (Pirano) and Izola (Isola). In 1940, as a consequence of Italy’s entry into war on 10 June, the Italian authorities decided to evacuate the most valuable works of art from the Eastern borderlands, including objects from the churches and museums. The removal order was contained in Law No. 1041 on the “Protection of artistic, historical, bibliographical and cultural objects from destruction in case of war”, promulgated on 6 July 1940,²⁷ which was in conformity with then-existing international and domestic law and was even approved by local and Church administrations.²⁸

²⁶ For a thorough analysis of the case in light of international law principles, see JAKUBOWSKI, “Legacy of Serenissima. State Succession to ‘Istria’s Jewels’”, in ODENDAHL and WEBER (eds.), *Kulturgüterschutz – Kunstrecht – Kulturrecht, Festschrift für Kurt Siehr zum 75. Geburtstag*, Baden-Baden, 2010, pp. 227-250.

²⁷ *Legge sulla protezione delle cose d’interesse artistico, storico, bibliografico e culturale dalla distruzione in caso di guerra*, GU 8 August 1940, No. 185.

²⁸ MAGNANI, “1940-1946. La Soprintendenza ai Monumenti e alle Gallerie della Venezia Giulia e del Friuli e la protezione delle opere d’arte in Istria”, in CASTELLANI and CASADIO (eds.), *Histria. Opere d’arte restaurate: da Paolo Veneziano a Tiepolo. Catalogo della mostra (Trieste, 23 giugno 2005-6 gennaio 2006)*, Milano, 2005, pp. 31-39.

In the beginning, the objects were gathered together at a collecting point in the province of Udine, Villa Manin. In 1943, some of them were returned to their owners, including a group of priceless paintings from the Saint Anne Church and Monastery in Koper. However, the majority of these works of art were sent to Rome, where they remained sealed in wooden crates for the next sixty years. Indeed, under the SFRY the question of allocation of the Istrian paintings was left outside the restitution agreements of 1961, which did not include the (cultural) properties from Zone B of the FTT. Nor did the 1975 Treaty of Osimo contain any provisions regarding the restitution of these properties. It seems that Yugoslavia never reclaimed these artworks for nationalistic reasons, because they showed that their Istrian places of origin had once been part of the Italian and Venetian cultural area.²⁹ Only in 1992, after the dissolution of SFRY, did Slovenia (one of its successor States) start negotiations with the Italian government, and this process led Italy to promulgate a special Law No. 72 on the “Protection of historical and cultural heritage of the community of Italian exiles from Istria, Fiume and Dalmatia”, adopted on 16 March 2001.³⁰ This law ordered the opening of the crates in Rome and the renovation of those artworks that were found to be in a deplorable state. These objects, mainly paintings and some statues, were then put on display in a temporary exhibition in Museo Revoltella in Trieste in 2005-2006.³¹ Eventually the works ended up in Museo Sartorio, also in Trieste, where they remain on display until now in a special room. However, the diplomatic discussion over the final allocation of these artworks was not settled. It continued until 2005 when Slovenia issued a formal request for restitution to Italy, asking for legal assistance from the International Council of Museums (ICOM).³² In 2007, a formal request by the Slovenian ecclesiastical authorities (the Bishop of the Diocese of Koper) was also issued.³³

2.3.2. *Istrian Church Bells*

During the Second World War the Italian Fascist government needed to obtain metal from sacred bronzes and ordered the requisition of the Istrian bells,³⁴ but

²⁹ MARZO MAGNO, *Missione grande bellezza. Gli eroi e le eroine che salvarono i capolavori italiani saccheggianti da Napoleone e da Hitler*, Milano, 2017, p. 147.

³⁰ *Interventi a tutela del patrimonio storico e culturale delle comunità degli esuli italiani dall'Istria, da Fiume e dalla Dalmazia*, GU 28 March 2001, No. 73.

³¹ JAKUBOWSKI, “National Museums in the Context of State Succession: The Negotiation of Difficult Pasts in the Post-Cold War Reality”, in POULOT, LANZAROTE et al. (eds.), *National Museums and the Negotiation of Difficult Pasts*, Linköping, 2012, p. 19 ff., pp. 30-31.

³² ICOM Legal Affairs and Properties Committee, Approach from ICOM Slovenia about dispute between Slovenia and Italy on collections removed from the territory of what is now Slovenia to “mainland” Italy in World War II, Minutes of meeting of 22nd October 2005, Paris, 2005/LEG.05, pp. 4-5.

³³ JAKUBOWSKI, *cit. supra* note 26, p. 234-235.

³⁴ Royal Decree No. 505 of 23 April 1942, GU 26 May 1942-XX, No. 124.

at the same time established that those of art-historical importance had to be preserved. For this reason, the Minister of National Education (Department of Arts) ordered that bells' fusion could take place only after examination by, and the approval of, officers of the Directorate of Monuments Preservation. In this way, beginning in 1942 a detailed division of the bells deemed fit for melting and those deserving preservation began under the supervision of Carlo Someda De Marco, an Art Professor from Udine, who was the Director of the Evacuation of Arts and Protection of Artistic Patrimony for Friuli from 1940 to 1945.³⁵ During the German occupation of Friuli from 1943 to 1945, these bells were hidden by whatever means the situation allowed; some of them directly by the master founders of Udine that had previously collected them; some others hidden even by local priests from the region.³⁶ Only after the end of the war did the *Sovrintendenza*³⁷ of Udine (under the direction of Carlo Someda De Marco) transport them to the municipal Museum of Udine, where they were studied. Someda De Marco published his catalogue in order to provide a full documentation of the art-historical relevant church bells of the above mentioned dioceses.³⁸

In contrast to what happened with the Istrian Venetian paintings, in 1962 the Yugoslav government asked for restitution of the bells.³⁹ It obtained the restitution of forty-four bells, which were stored in the Museum of Pola, and received liquidated damages in the amount calculated as necessary to reconstruct those that had been destroyed (120 million Lire). However, this sum ended up in Belgrade coffers. Among the remaining bells, those belonging to actual Slovenian territories were placed in the Museum of Ljubljana, from where, in 1964, twelve of them were taken away. Only four were restored to their places of origin – the others simply disappeared. Other returned bronzes were delivered to the Museum of Pisino (present day Croatia) and registered there as cultural objects, where they

³⁵ With the collaboration of the architect Fausto Franco, Someda De Marco prohibited the fusion of a certain number of bells – coming from the dioceses of Trieste, Koper, Rijeka, Parenzo, Pola, Gorizia – that had already been collected by the master founders of Udine. A total of 1095 bells were examined, and the fusion was stopped for 67 pieces. See SOMEDA DE MARCO, *Campane antiche della Venezia Giulia*, Udine, 1961, pp. 5-6.

³⁶ The priest of S. Pietro d'Isonzo (Sempeter, today Slovenia) searched for years his lost bell after the war through villages in Friuli, and finally recognized it by its sound and was helped by the local population to have it returned to its original church: CERNAZ, "E si salvarono 44 campane", *Il Piccolo di Trieste*, 31 August 1995.

³⁷ A peripheral organ of the Italian cultural heritage State administration.

³⁸ SOMEDA DE MARCO, *cit. supra* note 35. For more on the life and figure of Carlo Someda De Marco, who in his function as Director of the Evacuation of Arts and Protection of Artistic Patrimony for Friuli from 1940 to 1945 succeeded in saving all works entrusted to him from German requisition, also helping in the protection of artistic pieces belonging to the Jewish community such as the Library Morpurgo in Trieste, see BUCCO, ALFARE' and FABIANI, *Carlo Someda De Marco. Dall'arte alla tutela delle opere*, Udine, 2006.

³⁹ CERNAZ, *cit. supra* note 36.

remain on display today.⁴⁰ Only the bell of Saint Lorenzo (Sv. Lovrec), the hamlet of Pinguento (Buzet), was restored to its original church in 1995, with lively local celebrations.⁴¹

In the period 1990-1991, under the direction of Soprintendente Valentino in Trieste, fifteen of the bells described in Someda De Marco's book, dating from between the sixteenth and eighteenth centuries and mostly coming from actual Croatian and Slovenian territories, were moved from the Museum of Udine to the Miramare Castle (thus referred to hereinafter as the "Miramare bells") in Trieste.⁴²

After 1991, Croatia and Slovenia succeeded Yugoslavia in the formal rights to reclaim the respective bells from Italy.⁴³ However, since that time there have been no official negotiations or formal requests for restitution by these States against Italy, in part because most of the formal owners were ecclesiastical orders, hence their possible legitimation comes into question, as will be explained below. Indeed, up to now there have been only sporadic informal inquiries about some of the Miramare bells, these coming from the parish priests of local communities in Slovenia and Croatia. In 2014, the *Sovrintendenza* of Trieste received a formal request of restitution from Don Lapajne, the parish priest of Hrenovice, Slovenia, who asked for the bell which once belonged to the church of Santa Geltrude (Santa Jedrt) in the village of Slavinje.⁴⁴

It is worth noting that the highest ecclesiastical authorities in Slovenia or Croatia have never taken any initiatives or responded to the solicitations of the par-

⁴⁰ Rjesenje Konzervatorskog odjela Rijeka (Conservation Department of Rijeka), broj 01-144/1-62 od 28.V.1962 godine.

⁴¹ CERNAZ, *cit. supra* note 36.

⁴² Information collected from Luca Caburlotto, Director of Polo Museale del Friuli Venezia Giulia, Ministero dei beni e delle attività culturali e del turismo (Italy) and Rossella Fabiani, Director of Museo Storico of Miramare Castle, Trieste, in an interview with Francesca Fiorentini on 23 February 2016.

⁴³ The problem of State succession with regard to Yugoslavia, Croatia and Slovenia and their obligations deriving from the 1947 Treaty of Peace with Italy and the 1975 Treaty of Osimo has been the object of intense debate and contrasting opinions, especially with reference to the restitution to Italian citizens of the properties confiscated by Yugoslavia. In Italy, several commissions of study have dealt with the problem of whether the principle *pacta sunt servanda* or the clause *rebus sic stantibus* should prevail. The former approach would allow one to consider the international obligations of Italy, perpetuated vis-à-vis Yugoslavia, as against Slovenia and Croatia. See CONETTI, "La successione della Slovenia nei trattati tra Italia e Jugoslavia", RDI, 1992, pp. 1027-1032; DE VERGOTTINI, "La rinegoziazione del Trattato di Osimo", *Rivista di storia della politica internazionale*, 1993, pp. 77-87; and DEL VECCHIO (ed.), *La successione degli Stati nel diritto internazionale*, Milano, 1999. With regard to State succession in matters relating to cultural heritage it seems accepted that Slovenia and Croatia succeeded Yugoslavia in its rights, JAKUBOWSKI, *State Succession in Cultural Property*, Oxford, 2015, p. 326.

⁴⁴ This church bell is dated and signed: Opus Ioanis Lucanensi, 1572. It is described in Someda's book on pages 36-38, and registered in the catalogue of Miramare under the number 6. Information collected from Luca Caburlotto, Director of Polo Museale del Friuli Venezia Giulia, Ministero dei beni e delle attività culturali e del turismo (Italy), 23 February 2016.

ish priests. The same can be said about the governments of Croatia and Slovenia. It seems that when it comes to the issue of restitution of the bells, whenever the local priests of the interested communities ask for support from their bishops, they face more or less hidden resistance.

3. COMPETING INTERNATIONAL LAW REGIMES: ARMED CONFLICT AND STATE SUCCESSION

The controversies surrounding the cultural materials removed by the Italian administration from the territory of Istria are usually seen as belonging either to the legal regime governing war and occupation, or to that of State succession. Thus this article undertakes a separate analysis of the Istrian cases according to each of these two regimes of international law. It will highlight that any attempt to qualify these cases for the purposes of inter-State legal relations carries with it a number of difficulties and uncertainties.

3.1. *International Law of Armed Conflict and Restitution*

The destruction and pillage of property and buildings dedicated to religion, education, art, and science have been prohibited under the binding international instruments on the conduct of war from the Hague Peace Conferences of 1899 and 1907.⁴⁵ The post-war treaty practice after the First World War fully confirmed the obligation of belligerent parties to abstain from attacks against such properties. Moreover, it also consolidated a “secondary” obligation flowing from such a “primary” international obligation, i.e. a duty to restore property unlawfully removed from its original location during a military conflict. Acts of destruction of important works of art were committed by all sides and on all fronts during the First World War. Indeed, the Paris Peace Conference was heavily marked by the tense atmosphere that dominated the meetings of the Reparation Committee, in which all the claims were addressed.⁴⁶ Accordingly, several post-First World War treaties provided for the restitution of cultural treasures and reparations for cultural loss in response to war damages in Europe.⁴⁷

⁴⁵ Article 56 of the Regulations Annexed to the II Hague Convention (1899) with Respect to the Laws and Customs of War on Land, 29 July 1899, entered into force 4 September 1900; and Article 56 of the Annex to the IV Hague Convention (1907) Respecting the Laws and Customs of War on Land, 18 October 1907, entered into force 26 January 1910.

⁴⁶ See BURNETT, *Reparations at the Paris Peace Conference from Standpoint of the American Delegation*, Vol. 1, New York, 1940, p. 876.

⁴⁷ VRDOLJAK, “Enforcement of Restitution of Cultural Heritage through Peace Agreements”, in FRANCONI and GORDLEY (eds.), *Enforcing International Cultural Heritage Law*, Oxford, 2013, p. 22 ff., pp. 24-27.

Under the basis of such precedents, the post-Second War allocation of the works of art between the former belligerent nations shall be analyzed. In this context, one may ask, firstly, whether the removal of the Istrian paintings and church bells by the Italian authorities from the Istrian territory during the Second World War constituted a violation of the rules on war conduct in force at that time. Secondly, one should ask whether Italy's retention of such assets in the present situation is (still) legitimate.

With reference to the first question, there seems to be no doubt that Italy's removal procedure concerning the Istrian artworks was legitimate according to the laws of war enacted in Italy immediately after the beginning of the war, which were valid within the Italian territory. There had been no looting on the part of a foreign State's occupying military force. From a purely legal point of view, their removal took place within a procedure regarding Italian artworks and bells located within Italian territories during war time. The principal legal basis for the removal and protection of works of art from their places in order to shelter them from war destruction was the abovementioned Law No. 1041/1940, which was also the legal basis for the order issued to Someda De Marco regarding the selection of bells having a unique value for art history, in order to protect them from fusion.⁴⁸

This outcome may be confirmed if considered also in the light international law of armed conflict. On the one hand, it is true that, since there had been no looting from an occupying military force, the requirements for the application of the hard-law rules of the Hague conventions of 1899 and 1907 qualifying the removal of the Istrian artworks as illegitimate are here missing. On the other hand, the practice of evacuating artworks which were important for the integrity of the national patrimony in order to prevent their destruction in case of war was widespread among European States in the period between the two World Wars.⁴⁹ Particularly, it must be recalled that after, the First World War, governments, international organizations and also private associations were trying to set up initiatives, such as reports or draft conventions, aiming at establishing shared preventive procedures in order to safeguard important cultural heritage sites and objects from the damages of the wars. These procedures provided for the safekeeping of movable objects in refuges

⁴⁸ On the basis of the same law many works of art throughout Italy were removed and placed in refuge storage spaces, where they were to lie for decades. This was thanks to the work of the officers of the *Sovrintendenze* of Italy, like Emilio Lavagnino, Carlo Alberto Dell'Acqua, Pietro Zampetti and Pasquale Rotondi, who hid many art pieces in secret storage places during the war. Rotondi's list is the famous list of 10,000 works of art saved by Rotondi from German looting during the Second World War. He put them in storage places in the cities of Montefeltro and Carpegna, where they remained for over 40 years, until 1984. See LOMBARDO, *Pasquale Rotondi: quando il lavoro è un'arte. Storia di un Soprintendente solo e senza soldi custode dei tesori italiani durante la seconda guerra mondiale*, Caserta, 2008.

⁴⁹ See, e.g., JAKUBOWSKI, *cit. supra* note 43, pp. 63, 65-67. For the famous case concerning the evacuation of the Polish art treasures in Canada see WILLIAMS, "The Polish Art Treasures in Canada, 1940-1960", CYIL, 1977, pp. 146-172.

which has to be previously localized and made known to the international community. Only the deflagration of the Second World War impeded the entry into force of a binding international instrument on the matter – which eventually came under the form of Article 8 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), establishing that special protection may be granted to cultural movables stored in refuge places in order to shelter them in the event of armed conflicts.⁵⁰ These principles and practices, considered altogether, surely support the legitimacy of the Italian legislation aimed at the hiding of the Istrian church bells and paintings in Udine and Rome during the conflict.

Turning to the second question concerning the (il)legitimacy of Italy's present retention of the Istrian artworks, one may consider that the legitimacy of their removal from Italian territories could support the argument that these objects, being Italian property at the time, could still be legitimately retained by Italy. Yet, the strength of this argument based on time symmetry or chronological continuity can be challenged. In this perspective reference can be made, to the already mentioned "secondary" obligation to restore the property unlawfully removed from its original location during a military conflict arising from the binding rules of the conventions of 1899 and 1907, establishing the principle of protection of cultural property during war and the illegitimacy of its destruction or confiscation. The wide international practice, arisen after the First World War, establishing the principles of restitution of cultural movable property removed from occupied and/or ceded territories supports the argument that among the ratios of the obligation to return the idea of restoring national patrimonies is central and could be used as an argument also with reference to the post-Second World War restitutions.⁵¹ Furthermore, a reference can also be made to the 1954 Hague Convention and in particular to the rules contained in its First Protocol.⁵² In particular, Article I(3) establishes the obligation to return cultural property removed from the territory of another State during an armed conflict and prohibits the retention of cultural property as war reparations, thus supplementing the already existing treaty obligations under the conventions of 1899 and 1907.⁵³ Both Italy and Yugoslavia were among its original

⁵⁰ To be recalled are at least the Report by the Netherlands Archeological Society of 1918, RGDIP, 1919, p. 329; the The Hague Rules on War Warfare of 1922-1923, RDI, 1923, p. 40 ff.; and especially the draft international convention "for the protection of Monuments and Works of Art in Time of War" by the Committee of Expert of the International Museums Office of 1937, in *Museion*, 1939, Vol. 47-48, p. 167 ff., which constitute the basis for the contents of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, signed on 14 May 1955, entered into force 7 August 1956.

⁵¹ On this see JAKUBOWSKI, *cit. supra* note 43, pp. 63-65; pp. 65-67.

⁵² Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed on 14 May 1954, entered into force 7 August 1956.

⁵³ Signed on 14 May 1955, entered into force 7 August 1956. This Protocol sets out rules on the general obligation to return cultural property removed from the territory of another state(s)

Contracting Parties. However, the 1954 Hague Convention is not directly applicable to the case of the Istrian artworks, for at least two reasons: (i) the Convention is not retroactive (Article 33), therefore it cannot be applied to the restitution of cultural objects looted, confiscated or removed during the Second World War;⁵⁴ and (ii) the Convention requires, for its application, the removal of cultural property by an occupying State, a circumstance that was absent in the cases of both the Istrian paintings and the church bells.

In sum, two fundamental principles emerge from the above analysis: first, the principle that States have a duty to take appropriate preventive measures to protect cultural property from destruction in the event of armed conflict; and second the principle according to which cultural property unlawfully displaced from its original territories shall be returned once the conflict is over due to the significance of such objects to the cultural identity of nations, local communities and individuals inhabiting such territories. The normative weight of these principles has recently been confirmed by the UN SC Resolution No. 2347 of 24 March 2017. While focusing on the destruction of cultural heritage sites and objects, and on the consequent illicit trafficking of cultural movables, particularly when conducted by terrorist groups, Resolution No. 2347 establishes that States have the primary responsibility to protect their cultural heritage in the context of armed conflicts (paragraph 5), and that the above principles lie in the core of current efforts by the international community in protecting cultural heritage in armed conflicts.⁵⁵

3.2. *State Succession: Rules and Practices*

The rules on State succession with respect to movable State property are essentially rooted in international customary law, codified to a certain extent by the 1983 Vienna Convention.⁵⁶ Accordingly, the regime on State succession in relation

during an armed conflict and prohibits the retention of cultural property as war reparations (Article I para. 3), thus supplementing the already existing treaty obligations under the Conventions of 1899 and 1907.

⁵⁴ PROT, “UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects”, *Revue de Droit Uniforme*, 1996, p. 59 ff., p. 68.

⁵⁵ UN Doc. S/RES/2347 (2017). Specially see, with reference to the preventive measures, para. 16 of the Resolution which “encourages Member States to take preventive measures to safeguard their nationally owned cultural property and their other cultural property of national importance in the context of armed conflicts, including as appropriate through documentation and consolidation of their cultural property in a network of ‘safe havens’ in their own territories to protect their property, while taking into account the cultural, geographic, and historic specificities of the cultural heritage in need of protection, and notes the draft UNESCO Action Plan, which contains several suggestions to facilitate these activities”. With reference to the obligation of return of the cultural property, see paras. 8 and 17(j).

⁵⁶ Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 7 April 1983, UN Doc.A./CONF.117/14, not yet in force.

to movable property is driven by the consideration that such a category of property shall not be distributed solely on the basis of its fortuitous location on the date of State succession. Next, the underlying criterion for the distribution of movable property within a State refers to the connection of such property with the activity of the predecessor State in the territory of the successor of State, supplemented by the principle of division of movable property in “equitable proportions”.⁵⁷

However, these general principles do not entirely answer the complexity of problems relating to movable cultural property. Indeed, such objects are capable of conveying a cultural message that may be directed to individuals, States and communities at one and the same time. Therefore, they cannot be regarded as subject (only) to a regime of classic absolute and exclusive ownership.⁵⁸ On the contrary, their cultural, collective dimension gives even tangible objects some inherent attributes of an immaterial, intangible character, which supports classifying them as a *sui generis* category of property, entailing separate regulation.

The works of the UN International Law Commission (ILC) in relation to the 1983 Vienna Convention perfectly demonstrate these complexities in defining cultural property for the purpose of the law on State succession. It was noted that such a definition would present “almost insurmountable problems” because some objects “have a universal value, either because of the message they transmit or the personality of their authors”.⁵⁹ For these reasons the ILC commented that the transfer of works of art in cases of State succession be “covered either by the provisions relating to State property or [be] dealt with as the question of their return or restitution, rather than as a problem of State succession”.⁶⁰ In other words, their status might also be determined according to other considerations, including those underlying the works of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP), established in 1978 to facilitate the return of cultural objects of fundamental significance to national cultural heritage, in cases where international treaty law cannot be applied.⁶¹

The analysis of international practice demonstrates that States usually exclude the issues of cultural property from those referring to State succession to movable State property.⁶² In general there are two reasons for applying such exceptions in relation to cultural moveable assets. The first refers to the correlation of the ter-

⁵⁷ Art. 17, paras. 1(c) and 3; Art. 18, paras. 1(b), 1(d) and 2; Art. 28, para. 2., Art. 31, para. 2, of the 1983 Vienna Convention. See CZAPLIŃSKI, “Equity and Equitable Principles in the Law of State Succession”, in MRAK (ed.), *Succession of States*, Leiden/Boston, 1999, p. 61 ff.

⁵⁸ GAMBARO, “Community, State, Individuals and the Ownership of Cultural Objects”, in SANCHEZ CORDERO (ed.), *The 1970 UNESCO Convention. New Challenges*, Mexico City, 2013, p. 135 ff., p. 149.

⁵⁹ See UN Doc. A/CN.4/322, para. 49.

⁶⁰ UN Doc. A/CONF.117/4, p. 51.

⁶¹ UNESCO Doc. 20C/Resolution 4//7.6/5.

⁶² JAKUBOWSKI, *cit. supra* note 43, p. 322.

itorial provenance of such items and their significance to the cultural heritage of a successor State. The second reason arises from the principle of self-determination of peoples in its “external” meaning – referring to situations in which a people breaks free from an existing State and forms its own State by means of secession. In such a case, the new State may have a claim to recover and/or reconstruct its cultural identity by the repatriation of cultural objects lost and/or removed in the past. Moreover, cultural materials do not per se belong to the category assets deemed indispensable for the administration of a territory by a successor State or its economy. However, they are crucial in defining a State’s identity and to the stability of ethno-national relations, and thus their status is nearly always specifically addressed and negotiated at the time of territorial transfers. Older peace treaties and succession agreements, when referring to the allocation of State cultural property, usually contained special provisions referring to the categories of objects subject to repatriation.⁶³ This was the case, for example, in a series of treaties and agreements concluded between the Kingdom of Italy and Austria between 1866-1920, by virtue of which Italy succeeded in recovering a number of artworks from the Habsburg collections.⁶⁴ Furthermore, more recent agreements have opted for general cooperative solutions, in which difficult problems would be negotiated on a case-by-case basis, avoiding explicit references to specific assets.⁶⁵ All the above-mentioned agreements have provided for consensual measures of dispute settlement in the form of bilateral and multilateral commissions.⁶⁶

In fact after the Second World War the allocation of cultural materials based on the principle of territoriality in cases of State succession was often challenged. While some of the peace treaties signed immediately after the war provided for an unconditional restoration of properties originating from the ceded territory, particularly the 1947 Paris Peace Treaty with Italy, the international practice permitted some exemptions. The profound changes in the territorial boundaries in Europe, followed by the displacements of entire national and/or ethnic groups, led to certain *de facto* and/or *ex gratia* solutions. These were greatly influenced by Cold War political considerations, and tacitly recognized the priority of the collective cultural rights of a group over the general principle of territoriality. Accordingly, cultural property sometimes followed the destiny of displaced communities, though such a principle for allocation was not explicitly formulated by the inter-State contractual arrangements.⁶⁷

⁶³ *Ibid.*, pp. 65-83. See also HUGUENIN-BERGENAT, *Kulturgüter bei Staatensukzession. Die internationalen Verträge Österreichs nach dem Zerfall der österreichisch-ungarischen Monarchie im Spiegel des aktuellen Völkerrechts*, Berlin-New York, 2010.

⁶⁴ JAKUBOWSKI, *cit. supra* note 43, pp. 49-52, 69-70, and 75-76.

⁶⁵ See, e.g., Treaty between Federal Republic of Germany and Poland on Good Neighbourly Relations and Friendly Cooperation, 17 June 1991, entered into force 16 January 1992.

⁶⁶ See, e.g., Art. 4 of the Agreement on Succession Issues of the Former SFRY, 29 June 2001, in force 2 June 2004.

⁶⁷ JAKUBOWSKI, *cit. supra* note 43, pp. 107-115, 135.

In addition, the experience of decolonization greatly undermined the role of the principle of territorial provenance in cultural matters. Former colonial powers objected to dismembering and sharing the cultural resources with the newly independent States that formerly were their colonies and from which such resources were removed. As a result, the rules on State succession in cultural property have never been codified.⁶⁸ In practice, many solutions have been achieved through various *ex gratia* arrangements, performed within the framework of good neighbourliness and cultural cooperation policies.

Nonetheless, in contrast to this international practice the international law scholarship at the doctrinal level has tended to support the significance of traditional principles in distributing and allocating cultural property in State succession, based on the principle of territorial provenance and its significance to the cultural heritage of States and their populations. In this regard, the Institute of International Law (IIL) adopted the Recommendation on State Succession in Matters of Property and Debts.⁶⁹ This document reaffirmed the principle of territoriality applicable to the allocation of State property, based on the criteria of close connection and equitable apportionment. Then it introduced a special regime for the property (and archives) of major importance to the cultural heritage of a successor State. Accordingly, “property that is of major importance to the cultural heritage of a successor State from whose territory it originates shall pass to that State”. It also recommended that “such goods shall be identified by that State within a reasonable period of time following the succession” (Article 16(5) and (6)).

The other problem with State succession in cultural property relates to those situations in which cultural materials were removed prior to the date of succession, in violation of international law. This thus refers to State succession to responsibility for an internationally wrongful act. For a long time the obligations arising from the commission of such an act were claimed as being non-transmissible and non-enforceable (the so-called “negative succession rule”). However, the developments in the post-Cold War international practice⁷⁰ and the new doctrinal approaches postulated in international law scholarship have led to widespread criticism of the negative succession rule. These developments clearly favour a more equitable approach to State succession and international responsibility, based on analysing the factual and legal contexts of a given case in light of the principles of international justice as well as the stability and security of international legal relations.⁷¹

⁶⁸ VRDOLJAK, *International Law, Museums and the Return of Cultural Objects*, Cambridge, 2006, pp. 200-202; and JAKUBOWSKI, *cit. supra* note 43, pp. 163-172.

⁶⁹ 26 August 2001, *Annuaire de l'Institut de Droit International*, 2000-2001, p. 712 ff.

⁷⁰ In particular, see *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement of 25 September 1997, ICJ Reports, 1997, p. 3 ff.

⁷¹ See “Resolution on Succession of States in Matters of International Responsibility”, 28 August 2015, *Annuaire de l'Institut de Droit International*, 2015, pp. 703-719 ; CRAWFORD, *State Responsibility: The General Part*, Cambridge, 2013, pp. 435-455; and DUMBERRY, *State Succession to International Responsibility*, Leiden/Boston, 2007.

Undoubtedly, such a new conceptualization of State succession with respect to international responsibility also refers to the status of obligations stemming from wrongful acts against cultural heritage. For instance, Serbia has recently assumed responsibility for violations of the rules governing war conduct in relation to cultural heritage, under the First Protocol to the 1954 Hague Convention,⁷² committed by its predecessor, the Federal Republic of Yugoslavia during the war with Croatia. In fact, on 23 March 2012 Serbia and Croatia signed a protocol on the restitution of Croatian cultural assets from Serbia to Croatia. According to its provisions more than 1,000 works of art taken during the 1990s would be returned from Serbia to Croatia,⁷³ and some restitution has already taken place.⁷⁴

The significance of the human link with cultural heritage is particularly relevant in the light of very recent doctrinal developments by the IIL in relation to State succession to international responsibility. The 2015 IIL Resolution on Succession of States in Matters of International Responsibility⁷⁵ is founded on the argument that “situations involving succession of States should not constitute a reason not to implement the consequences stemming from international wrongful acts”.⁷⁶ Moreover, one of the most important elements of that document consists in its equitable approach to the territorial factor in resolving issues of State succession to international responsibility. Accordingly, the principle of an “intrinsically direct link of the consequences of the wrongful act with the territory or the population concerned” is consistently applied in the provisions concerning specific categories of successor States (except those regarding the merger of States or the incorporation of one State into another existing State). This principle is corrective in nature, since along with territorial considerations it invokes a human link that may exist between the wrongful act and the population concerned. In fact “this is particularly relevant in cases of violations of human or minority rights”, i.e. when the wrongful act “has a specific population as a direct victim”.⁷⁷ In other words, the continuity of obligations and rights arising from a serious breach of international law is to be maintained, irrespective of any non-succession or discontinuity claims of the States concerned.⁷⁸

⁷² *Cit. supra* note 52.

⁷³ “Protocol on Restitution of Cultural Assets from Serbia to Croatia Signed”, 23 March 2012, available at: <<http://www.culturenet.hr/default.aspx?id=44206>>.

⁷⁴ See at: <<http://www.min-kulture.hr/default.aspx?id=9899>>. See also the case of the Venus of Cyrene and the decision of the Italian Council of State: *Associazione Nazionale Italia Nostra Onlus v. Ministero per i Beni le Attività Culturali et al., Consiglio di Stato*, No. 3154, 23 June 2008. On this case see CHECHI, “The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene”, *IYIL*, 2008, pp. 159-181.

⁷⁵ *Cit. supra* note 71.

⁷⁶ *Ibid.*, preamble, third recital.

⁷⁷ KOHEN, “State Succession in Matters of State Responsibility”, *Annuaire de l’Institut de Droit International*, 2015, p. 513 ff., p. 536, para. 62.

⁷⁸ See JAKUBOWSKI, “State Responsibility and the International Protection of Cultural Heritage”, *Santander Art and Culture Law Review*, 2015, p. 147 ff., pp. 165-169.

3.3. *State Succession and the Istrian Cultural Property*

In the light of the aforementioned principles and practices on State succession and cultural property, the case of the Istrian cultural objects raises several questions. First of all, as mentioned above the paintings, bells and other artworks were not taken under military duress, nor in violation of any international law. Their removal for safekeeping and preservation purposes was executed in conformity with the law applicable at that time (the criterion of *tempus regit actum*). Thus, their removal cannot be treated as a wrongful act giving rise to international responsibility on the part of Italy. Moreover, such materials arguably do not fall within the categories of property whose restitution was ordered under Article 75 of the 1947 Peace Treaty. This recognized the 1943 Allied Declaration⁷⁹ and established Italy's obligation to return any property removed by force or duress by any of the Axis powers from the territory of any member State of the UN (which included Yugoslavia among its original founders). Since no force or duress was involved, restitution claims by Yugoslavia's successor States based on the allegedly wrongful acts by Italy against their predecessor State would not be applicable to the case of Istria's cultural property.

The second question relates to the execution of the binding contractual provisions of the 1947 Paris Peace Treaty with Italy in relation to the restitution of cultural property removed from the ceded territories. This 1947 Peace Treaty provided for the restoration of the cultural integrity of the territories ceded to Yugoslavia. Under Article 4 of Annex XIV to the Treaty, the successor States would receive "all objects of artistic, historical or archaeological value belonging to the cultural heritage of the ceded territory, which, while that territory was under Italian control were removed from there, without payment, and are held by the Italian Government or by Italian public institutions". Moreover, under Article 12 of the Treaty, Italy was bound to restore to Yugoslavia all cultural materials removed from the ceded territories before the Second World War, including those recovered from Austria and Hungary by virtue of the peace arrangements concluded after the First World War, based on the rudimentary principle of territoriality.⁸⁰ In other words, the items which had been returned to Italy at the time of the collapse of Austria-Hungary would be repatriated once again on the basis of the territorial connection following the subsequent State succession process. However, these obligations referred to the territories ceded by Italy in 1947, and thus they did not apply to the cultural property of the Free Territory of Trieste. Accordingly, they do not refer to the artworks removed from the Slovenian Littoral, but they may relate to the church bells

⁷⁹ The Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, 5 January 1943, available at: <<http://www.lootedartcommission.com/inter-allied-declaration>>.

⁸⁰ See KOWALSKI, "Repatriation of Cultural Property Following a Cession of Territory or Dissolution of Multinational States", *Art, Antiquity and Law*, 2001, p. 139, pp. 155-158.

evacuated from the territories that passed to Yugoslavia in 1947 and subsequently succeeded to Slovenia and Croatia. As already mentioned, in 1962 the Yugoslav government requested the restitution of bells and it obtained the restitution of 44 bells, which were subsequently stored in the Museum of Pola, and damages in the amount needed to reconstruct those that had been destroyed. Thus, when considering the existence of an obligation on the part of Italy to return the bells to their original owners, it would be necessary to first assess the role played by the liquidated damages paid to Yugoslavia. The question which arises is whether this compensation forecloses any further right on the part of Yugoslavia's successor States to claim the return of the bells.⁸¹

The third issue relates to more general principles of State succession in cultural property, referring to territorial provenance and the cultural integrity of the territories of the Slovenian Littoral (Zone B of the Free Territory of Trieste). The lack of treaty provisions in this regard does not, in and of itself, preclude the legitimacy of Slovenia's claims to cultural property from these territories. Moreover, Yugoslavia and Italy, during the bilateral negotiations at Osimo in 1975, agreed that the "issues relating to cultural property, works of art, archives" pertaining to the Free Territory of Trieste would be considered after the entry into force of the 1975 Treaty of Osimo.⁸² In other words, they bound themselves to find a solution to the issue, though the text of the treaty remains silent with respect to the type of solution. In fact, diplomatic talks continued until 1988.⁸³

In the context of Istria's cultural materials, the application of territorial provenance is highly problematic, due to the national, cultural and human considerations that are at stake. Arguably, an unconditional application of the principles of territorial provenance of such items and their significance to the cultural heritage of a successor State, as enshrined in the 2001 IIL Recommendation on State Succession in Matters of Property and Debts, would not lead to equitable and just solutions. However, according to the commitments undertaken at Osimo, the States involved in the controversy over the fate of Istria's cultural material are under an international obligation to cooperate in order to find an equitable solution. This is the crux of the issue next examined.

⁸¹ It was not possible for the authors to find the original documents regarding these transactions. Therefore, a more detailed legal analysis of this issue is not possible at this point.

⁸² Exchange of Letters between Milos Minic, Vice-President of the Federal Executive Council and Federal Secretary for Foreign Affairs of the Socialist Federal Republic of Yugoslavia, and Mariano Rumor, Minister for Foreign Affairs of the Italian Republic, 10 November 1975, Osimo, Ancona, 1466 UNTS 142, letters Ib and IIb.

⁸³ See ŽITKO, "Efforts of the Authorities to Retrieve Cultural Heritage Still in Italy", in HOYER et al. (eds.), *Art Works from Koper, Izola, Piran Retained in Italy*, Piran/Ljubljana, 2005, pp. 76-81.

4. ENFORCING CULTURAL RIGHTS THROUGH INTERNATIONAL COOPERATION AND COMMUNITY PARTICIPATION

4.1. *Balancing Competing Cultural Interests*

The case of Istria's cultural property now in Italy demonstrates the great difficulties in resolving problems related to the fate of cultural heritage stemming from the post-Second World War territorial changes and population transfers. The above considerations have underlined the weaknesses of possible formal claims by either Slovenia or Croatia for the return of the church bells. Moreover, they have also shown the problems surrounding the status of artworks from Koper, Izola and Piran, as it also appears that Slovenia's claim for the return of these artworks has rather weak formal foundations on the grounds of humanitarian law and State succession law. It is clear that the matter is more complex than the mere question of establishing legal titles and a legal basis for restitution actions, and cannot be approached only from this perspective. In addition to the legal considerations, the different cultural policies of the States involved constitute additional complicating elements, as well as the circumstance that, in addition to national interests, the cases involve the strong interests of local communities and their associations, which may not coincide with the approaches of their State governments.⁸⁴

With regard to States' interests, there are the interests of Slovenia and Croatia, which are both going through their first phase in the building of a national identity following the dissolution of Yugoslavia, i.e. one different and separate from the identity of the other neighbouring countries, including Italy. Their interest in recovering cultural objects is to use them as symbols of a reconstructed national identity. In this context, they aim to exhibit the cultural objects in central State museums, like the one in Ljubljana, and not to reinstall them in their original locations. The approach of the State authorities seems to be supported by the respective highest ecclesiastical authorities.⁸⁵ At the same time, the Italian governmental interests are directed at reaffirming the Italian component of these pieces of art, that is, the Venetian provenance of the objects in question, and in so doing to also confirm the Italian ownership of these pieces, although no formal position on this issue has

⁸⁴ ŠKRLJ, "Trst bo storil samomor, če bo živel v izolaciji" Primorske novice", 2 September 2011, pp. 16-17: interview with Luca Caburlotto, Director of the Polo Museale del Friuli Venezia Giulia, *Ministero dei beni e delle attività culturali e del turismo* (Italy), concerning the need for a new approach involving all stakeholders from all the interested states and communities.

⁸⁵ Similar argumentations emerged in the cultural debate surrounding the exhibition Histria in 2005, concerning Venetian paintings from Istria: TOÈ, "Histoire: ces tableaux de maîtres que l'Italie ne veut pas rendre à la Slovénie", *Le Currier des Balkans*, 27 November 2015; available at: <<https://www.courrierdesbalkans.fr/seconde-guerre-mondiale-ces-portraits-que-l-italie-ne-veut-pas-restituer-a-la-slovenie>>.

ever been expressed by the Italian government.⁸⁶ Moreover, the Italian government does not seem very eager to proceed with finding definitive solutions to the dispute, as the topic is very sensitive for the Region of Friuli Venezia Giulia, where many inhabitants have Istrian origins and belong to all the ethnicities (Italian, Slovenian and Croatian) formerly inhabiting Istria.⁸⁷ Thus, the linkage between the displaced cultural objects and exiled communities is implicitly strengthened vis-à-vis the original location of the bells.

The other dimension, hardly taken into account in cases of State succession, is that of the cultural rights of the human communities affected by the territorial and political transfers. In fact, what appears crucial is the relationship between cultural heritage and the groups and individuals who have created, maintained and enjoyed such a heritage. These actors, therefore, have a definite interest in staking their claim based on their inherent link with their cultural heritage, and not seeing it disappear by virtue of the territorial vicissitudes and political changes involved in State succession. The case of Istria and its multi-ethnic and multinational population, scattered and traumatized by the Second World War, the crimes experienced and population reconfigurations, thus requires a more profound analysis of the cultural collective entitlements that may be at stake. Undoubtedly, the control and possession of cultural property removed from the territories ceded to Yugoslavia is an important part of the collective identity and memory of Italian communities exiled or expelled from their homeland.

Such collective interests are recognised to some extent in international practice. For instance, Polish communities transferred from the territories ceded to the Soviet Union after the Second World War were entitled to some limited number of works of art, antiquities and church furnishings, provided that they constituted private property or property of the Catholic Church.⁸⁸ This practice might be in-

⁸⁶ It should be noted however that Vittorio Sgarbi, an art historian very active in Italian cultural and political life, in 2002 was the Secretary of State for Cultural Heritage and was the promoter of the recovery and exhibition of the Istrian paintings in 2005. His well-known opinion – expressed when he was in the above-mentioned official post – was in favour of the Italian ownership of the Istrian works of art and of the position that these objects are part of Italian cultural heritage. See, e.g., TOÈ, *ibid.*

⁸⁷ With regard to the similar issue of the restitution of the Istrian paintings to Slovenia and Croatia, the Association Istrian Union (Unione Istriana) expressed its interest in having their role acknowledged in the management of the works of art. It suggested acknowledging a formal Italian ownership, but preserving them in a museum under its management in Koper (Slovenia). See TOÈ, *cit. supra* note 85. The intermingling of different opposing interests on the matter and the high political sensitivity of the topic in Trieste and the surrounding area, together with the scarce attention that the Italian government has so far devoted to the question, was confirmed by Luca Caburlotto, Director of Polo Museale del Friuli Venezia Giulia, Ministero dei beni e delle attività culturali e del turismo (Italy), in an interview with Francesca Fiorentini, on 23 February 2016.

⁸⁸ A Draft Agreement between the Provisional Government of National Unity of the Polish Republic and the Government of the Ukrainian Soviet Socialist Republic on the repatriation

terpreted in favour of the *esuli* claim to the heritage of their lost homeland. On the other hand, the access and enjoyment of this heritage is also important for the present-day communities living in Istria, including an Italian minority, who may wish to recover the splendour of their monuments and temples, today deprived and emptied of crucial artworks which were created for their sites. This claim would be founded on the grounds of the cultural integrity of historic monuments and right to enjoy and access cultural heritage.

Perhaps an even stronger local communities-oriented argument refers to status of Istria's church bells. Local communities perceive the bells as symbols of their religion and determinants of their local social life, hence the local communities are very sensitive to the issue of restitution and, where possible, the returning of the bells to their places of origin, or at least conserving and exhibiting them in local museums. The interests of the local ecclesiastical authorities are similar, and reflected in the request for the bells' return by the priest of Hrenovice in Slovenia. At the same time the bells, though not on display and unused, may also have a symbolic value for Istria's Italian communities now living in Italy, as part of a common heritage that they feel they somehow own, and wish to continue feeling as their own.⁸⁹

4.2. Cultural Cooperation

International cooperation in cultural and cultural heritage matters constitutes a paramount principle of inter-State relations, including cultural diplomacy.⁹⁰ Enshrined in Article 1(3) of the UN Charter,⁹¹ one of the core purposes of the UN is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character". It is also one of the found-

of Polish cultural goods from the territory of the Ukrainian Soviet Social Republic and of the Ukrainian goods from the territory of Poland (1945). Citation and translation from Polish. See KOWALSKI, *Art Treasures & War: A Study on the Restitution of Looted Cultural Property, Pursuant to Public International Law*, Leicester, 1998, p. 70.

⁸⁹ For example, an Italian intellectual and musicologist of Istrian origin is very well-known in the Istrian communities across the borders of Italy, Croatia and Slovenia. He was very active in the process of the restitution of the church bell of S. Lorenzo in Pinguente (Slovenia) in 1995. See DI GREGORIO, *Antiche campane istriane*, 2010, available at: <http://istrianet.org/istria/people/albums/di_gregorio/documents/antiche_campane_istriane.pdf>.

⁹⁰ CHECHI, "Multi-Level Cooperation to Safeguard the Human Heritage and to Secure the Return of Wrongfully Removed Cultural Objects", in BORELLI and LENZERINI (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Leiden/Boston, 2012, p. 347 ff., pp. 362-368; and CHECHI, *The Settlements of International Cultural Heritage Disputes*, Oxford, 2014, p. 296 ff.

⁹¹ Charter of the United Nations, 26 June 1945, entered into force 24 October 1945, amended in 1963, in 1965, and in 1971.

ing objectives of UNESCO,⁹² substantiated in Article IV(4) of the Declaration of Principles of International Cultural Co-operation,⁹³ which stresses the significance of enabling “everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life”. The aims of international cultural co-operation are “to develop peaceful relations and friendship among the peoples and bring about a better understanding of each other’s way of life” (Article IV paragraph 2), thus contributing “to the establishment of stable, long-term relations between peoples, relations that should be subjected as little as possible to the strains which may arise in international life” (Article IX). The principle of international cooperation is also seen as crucial for the safeguarding and protection of cultural heritage from illicit trafficking and exportation.⁹⁴ Importantly, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),⁹⁵ adopted at the peak of decolonization, was heavily influenced by the struggle of former dependent territories to recover their lost heritage in the event of State succession. The Convention recognized the importance of the link between State territory and cultural property, and established the principle of international cooperation as crucial for the effective protection of cultural heritage (Preamble, Article 2). At the same time, however, subsequent developments to address the issues not covered by the 1970 UNESCO Convention’s regime, such the establishment of the ICPRCP and the Recommendation Concerning the International Exchange of Cultural Property,⁹⁶ illustrate the rudimentary nature of international cooperation for settling and alleviating the controversies stemming from State succession.

Clearly the procedural principle of cooperation today constitutes the fundamental element of the entire international system for the protection of cultural heritage. In fact, protection and safeguarding are sometimes understood as “the structuring of such a co-operative system”.⁹⁷ In other words, the protection of cultural heritage, as a joint commitment of the international community, is founded on the principle of cooperation, which drives all the current global initiatives in these matters. In particular, the recommendations of the Expert meeting on the “Responsibility to Protect” and the protection of cultural heritage⁹⁸ employs inter-

⁹² Art. I(2)(c) of the Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, entered into force 4 November 1946.

⁹³ 4 November 1966, UNESCO Doc. 14C/Resolution 8.

⁹⁴ See Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, 19 November 1964, UNESCO Doc. 13C/Resolutions 206, 207.

⁹⁵ 14 November 1970, entered into force 24 April 1972.

⁹⁶ 26 November 1976, UNESCO Doc. 19C/Resolutions, Annex I.

⁹⁷ FORREST, *International Law and the Protection of Cultural Heritage*, New York, 2010, p. 17.

⁹⁸ 27 November 2015, UNESCO Doc. 38C/49.

national cooperation in all its forms, with “bilateral and multilateral co-operation, and with the support of relevant intergovernmental and nongovernmental organizations” as paramount for counteracting cultural heritage crimes, including those with genocidal intent.⁹⁹

In this context, it is apparent that Italy and the two successor States of Yugoslavia – Slovenia and Croatia – are under an obligation to cooperate in cultural and cultural heritage matters, which arises from a number of contractual arrangements (both bilateral and multilateral). This obligation also relates to the status of cultural property removed from Zone B of the Free Territory of Trieste during the Second World War, which, even if left outside the black-letter rules of the treaty, is certainly covered by this broad principle. The existing and operative cooperative arrangements within bilateral, European Union and regional programmes¹⁰⁰ can be appropriate institutional and technical frameworks to address these issues.¹⁰¹ International practice offers a vast number of practical solutions to post-succession problems related to contested cultural materials in cases of State succession. These range from the methods ensuring that interested State(s) or foreign nationals have access to disputed cultural heritage items,¹⁰² to joint custody and management, and to long-term loans within shared-heritage programmes.¹⁰³ Clearly, States are usually more willing to resort to such solutions if they have an important political and economic interest in maintaining good, friendly relations among themselves. Undoubtedly all the States involved in Istria’s heritage controversy are truly predestined to such cooperative solutions. Yet even in this scenario an open question remains: shall this obligation to cooperate refer only to States’ interests?

4.3. *Equity and Participation*

More than most others, the case of Istria’ contested cultural heritage demonstrates one of the major shortcomings in the existing international mechanisms for

⁹⁹ See also the role of international cooperation in the protection of cultural heritage as enhanced by the recent Draft Council of Europe Convention on Offences relating to Cultural Property, 2 March 2017, PC-IBC (2016)Conv1_Rev 4_en.

¹⁰⁰ See, e.g., TIŠMA, *Sectors of Culture and Environment in Istria: State of the Art and Future Perspective*, Fifth Report, October 2013, p. 10, available at: <<http://www.cespi.it/SEENET/5%20report/4%20Istria-5th%20Seenet%20Rep.pdf>>.

¹⁰¹ JAKUBOWSKI et al., *cit. supra* note 9, p. 305.

¹⁰² See, e.g., Arts. IV and V of the Agreement between Austria and Hungary concerning certain objects from museum and library collections, with three protocols and three annexes, 27 November 1932.

¹⁰³ See SCOTT, “Renewing the ‘Special Relationship’ and Rethinking the Return of Cultural Property: The Netherlands and Indonesia, 1949-79”, *Journal of Contemporary History*, 1 January 2016; and CORNU and RENOLD, “New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution”, *IJCP*, 2010, pp. 1 ff.

resolving cultural heritage disputes, which is their inherently State-centred nature. In fact, non-State communities, such as minorities, ethnic groups and indigenous peoples not being the subjects of international law, face serious difficulties in bringing actions and enforcing their rights at the international level. In practice, these groups are hardly ever represented in inter-State negotiating bodies. Although national legal systems gradually tend to recognize that various non-State actors can indeed have *locus standi* before domestic tribunals and administrative authorities, this is still not the case when it comes to international law. Moreover, States perceive cultural heritage disputes as falling within their exclusive competence, not to be shared with other stakeholders.

A gradual recognition of the collective features of culture can be observed in international practice, including in the forms of participation and consultation in managing cultural heritage matters.¹⁰⁴ In this context, the right of everyone to participate in cultural life, as enshrined in Article 27 of the Universal Declaration of Human Rights¹⁰⁵ and Article 15(1)(a) of the International Covenant of Economic, Social and Cultural Rights,¹⁰⁶ has now been re-interpreted as fundamental for the realization of all cultural rights that enable the exercise of other human rights.¹⁰⁷ According to General Comment No. 21 of the UN Committee on Economic, Social and Cultural Rights,¹⁰⁸ the right of everyone to participate in cultural life “may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such”. Thus, its nature is both individual and collective, yet subject to various societal contexts and cultural practices. It is widely recognized that this right presupposes equal and free access for all to a variety of cultural resources.¹⁰⁹ It also refers to a variety of participatory forms of cultural manifestations, including different means of accessing cultural goods and products. It also seems that it involves the right to participate in the decision-making processes which refer to the cultural life of a given community.¹¹⁰ Such an interpretation of the content of the right to participate in cultural life has been enshrined in recent international cultural heritage legal instruments,

¹⁰⁴ See VRDOLJAK, “Standing and Collective Cultural Rights”, in JAKUBOWSKI (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Leiden/Boston, 2016, pp. 272-287.

¹⁰⁵ 10 December 1948, UNGA Res. 217A(III), UN Doc.A/810, 71.

¹⁰⁶ 16 December 1966, entered into force 3 January 1976.

¹⁰⁷ STAMATOPOULOU, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Leiden-Boston, 2007.

¹⁰⁸ General Comment No. 21, Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc. E/C.12/GC/21.

¹⁰⁹ Parliamentary Assembly of the Council of Europe, Recommendation 1990 (2012), final version, The right of everyone to take part in cultural life, adopted on 24 January 2012, available at: <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18058&lang=en>>.

¹¹⁰ ROMAINVILLE, “Defining the Right to Participate in Cultural Life as A Human Right”, *Netherlands Quarterly of Human Rights*, 2015, p. 405 ff., p. 435.

in terms of consultation, governance and information sharing,¹¹¹ perhaps most explicitly in the 2005 Faro Convention¹¹² and the UN Declaration on the Rights of Indigenous Peoples.¹¹³ Moreover, the practice of the Inter-American Court of Human Rights,¹¹⁴ and more recently that of the African Commission of Human Rights,¹¹⁵ seems to provide evidence of a more profound trend toward recognizing the collective rights of non-State groups. In addition, certain universal standards are offered by the Operational Guidelines to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage,¹¹⁶ and the 1972 World Heritage Convention with respect to collective cultural rights affecting States' cultural policies and interests. Importantly, these documents stipulate that the participation of communities and groups is required for the implementation of both conventions.¹¹⁷ The paradigm of participation is inherent in the concept of procedural justice. This is often understood as a requirement that all those who are affected by a given social structure or institution should have standing as subjects in relation to it (the so-called "all-affected principle").¹¹⁸ Accordingly, the achievement of procedural justice entails a fair process, which would involve the wide participation of all subjects affected by the outcome of a decision. Thus it would seem that human communities who have an intrinsic link with a contested heritage should have a right to participate in negotiations and management of such heritage in cases of territorial and political reconfigurations. Notwithstanding the difficulties and uncertainties that such community participation may entail for the handling of the disputes examined in this article, it would effectively contribute to the achievement of fair, just and equitable solutions. In particular, it could free cultural heritage matters from the many inextricable constraints and contradictions of purely inter-State negotiations.

¹¹¹ ADELL, "Introduction", in ADELL et al. (eds.), *Between Imagined Communities and Communities of Practice Participation, Territory and Making of Heritage*, Göttingen, 2015, p. 14.

¹¹² Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, entered into force 1 June 2011.

¹¹³ 13 September 2007, UN Doc. A/RES/61/295.

¹¹⁴ For an extensive analysis, see HAUSLER, "Collective Cultural Rights in the Inter-American Human Rights System", in JAKUBOWSKI (ed.), *cit. supra* note 104, pp. 222-251.

¹¹⁵ *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, AfCHPR, Comm. No. 276/03, 4 February 2010.

¹¹⁶ 7 October 2003, entered into force 20 April 2006.

¹¹⁷ See Chapter III of the Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (2014), available at: <<http://www.unesco.org/culture/ich/en/directives>>; and the Operational Guidelines for the Implementation of the World Heritage Convention (2015); see, e.g., paras. 12, 26, 40, 64, 119, available at: <<http://whc.unesco.org/en/guidelines>>.

¹¹⁸ NÄSSTRÖM, "The Challenge of the All-Affected Principle", *Political Studies*, 2011, pp. 116-134.

Therefore, although the rules and practices international law in relation to participation of minorities or local communities in inter-State cultural and cultural heritage arrangements are still in an embryonic stage of development, an increased role of such cultural actors in terms of voice, consultancy and participation is urgently needed for an equitable resolution of cultural heritage disputes like the Istrian ones examined in this paper. Introducing this goal into the international law agenda would be particularly timely in view of the “European Year of Cultural Heritage: Celebrating the Diversity and Richness of our European heritage”, planned for the year 2018 by the European Union’s Member States.¹¹⁹

5. CONCLUDING REMARKS

There are no simple solutions to such controversies as those relating to the rights and interests attached to Istria’s cultural treasures. Indeed, cultural heritage easily becomes “hostage” to inter-State disputes. International law operates here in a grey zone, where States’ identities and interests in certain cultural materials often collide with the rights and entitlements of other cultural stakeholders, creating complex legal conflicts. On the other hand, at the procedural level States are bound to cooperate in order to achieve fair and equitable solutions, if possible with the support of relevant intergovernmental and nongovernmental organizations and institutions. In this regard, the duty to cooperate stems not only from the contractual obligations of States involved in cultural heritage disputes, but also from an increasingly recognized international obligation on the part of all members of the international community to cooperate in protecting cultural heritage, perceived as a global common. Furthermore, the realization of cultural rights is fundamental for the protection and enhancement of all human rights. However, the mere cooperation between States or their agencies will not guarantee fair and equitable outcomes if all others who have a cultural, human link with the contested heritage are omitted in decision-making procedures. Therefore, the core requirement of inter-State arrangements relating to cultural heritage in borderlands, marked by a difficult history and complex, multinational composition, such as in the case of Istria, lies in the recognition of the cultural rights of all the affected communities. In other words, fair and equitable solutions to cultural heritage disputes require both efficient international cooperation and fair and transparent community participation.

Naturally, community engagement in relation to cross-border cultural heritage controversies involves the accommodation of differences through a widespread participation in administrating and managing procedural justice. This might be par-

¹¹⁹ More information is available at: <https://ec.europa.eu/culture/european-year-cultural-heritage-2018_en>.

ticularly problematic in cases affecting groups of people who do not share similar values, or represent conflicting cultural identities. Nonetheless, it seems crucial to provide well-structured mechanisms giving voice to communities' members, thus involving their active participation in decision-making procedures when their inherent cultural heritage interests are at stake.