4 Hungary's Place and Role in the International Legal Protection of Cultural Heritage

*'Les longs souvenirs font les grands peuples'**

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The legal protection of cultural heritage is a relatively new field of law; however, it roots far back in history. It was not before the last decades of the 19th century that comprehensive national laws concerning the protection and safeguarding of movable and immovable cultural heritage were adopted in several countries, while after World War II – again not without antecedents – the universal international conventions concerning the protection of cultural heritage come into force.

4.1 Short History of Law

Historical facts show that for the protection of cultural heritage measures were created already in the most ancient times. From the Roman era until the end of the 18th century most of the regulations were related to 'treasure troves' that served for the enrichment of the rulers' treasure troves, as treasures – entirely or partially – belonged to the Treasury. Originally objects made of precious metals or precious stones were considered to be treasures, but gradually the right of the ruler was extended to archaeological findings not made of gold or silver, but of historical, artistic or scientific value. The ruler had the possibility of acquiring them – in exchange of financial settlement – for the benefit of his collections. For instance the Swedish law of 1867 says that the finder of the treasure made of copper is entitled to receive a 'scientific estimated price' beyond the mere value of the material.[1]

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1 Baron Gyula Forster, *A műemlékek védelme a magyar és külföldi törvényhozásban (Protection of heritage in Hungarian and foreign legislation)*, 2nd ed., Hornyánszky v. cs. és kir. udvari könyvnyomdája, Budapest 1906, p. 365.

After numerous antecedents in history (e.g. codes of chivalry in medieval Europe, ancient Hindu law of armed conflicts), in the 19th century comprehensive national laws were adopted that covered the protection of movable and immovable cultural heritage. All states of Europe started to show care of recording, protecting and safeguarding their cultural heritage by legislative and administrative instruments. It was this period of time when national public collections were founded, mainly by handing over the sovereign's collections to the benefit of the people.

In the Romantic era, with the development of art history, it soon became evident that the value embodied in a work of art is of universal importance and the protection of cultural property serves the interest of the society rather than the ruler.

In France, after the Revolution and following the 'careless' period of the Restoration, excellent French authors took the lead of the movement launched to protect the memories of national past. An outstanding figure of this fight was the writer Victor Hugo.

The very first French law on the safeguarding of monuments and works of art of historical and artistic value entered into force on 30 March 1887.[2] Its scope covered both movable and immovable cultural property, however, it did not provide for movable works of art in private property.

The law contains provisions concerning the important monuments and movable artworks in public ownership that shall be registered. Concerning the transfer of ownership, maintenance, export of 'classified' or 'listed' artworks, the Act set up a range of obligations, however, the State could subsidize the safeguarding of such property. Interestingly, monuments registered by force of the former French decrees, remained classified, but if the State did not provide any financial aid for their maintenance, upon the request of the owner, the classified status was cancelled.

The merits of the Act include that the owner of protected movable or immovable cultural property shall not destroy, restore without the prior approval of the minister, neither transform the property. What is more, if the given chattel is not in private property but forms part of the property of a county, community, church or public institution, it shall not be alienated without permission. There was a strong need for this law because church clerks and civil servants were often tempted by offers of merchants and – contrary to the interests of the church or community – sold chattels belonging to monuments as well as paintings forming part of public property.

In 1875 for instance, carved reliefs from the Valence cathedral were sold by the cashier-clerk. Another similar case was the sawing off of the Narbonne cathedral's gate.[3]

2 Loi du 30 mars 1887 sur la conservation des monuments historiques et des objects d'art ayant un intèrêt historique et artistique, Journal Officiel de la République Française No. 89, Jeudi 31 Mars 1887, pp. 1521-1522.

3 Baron Gyula Forster, 1906, p. 439.

Forster[4] points out that the greatest failure of the Act is that the legislation was not backed up with criminal sanctions whereas the State's right of compensation was insufficient. Another weakness of the implementation of the law was that the list of classified objects required by Paragraph 1 was prepared far too slowly.

> Italy is home to the rebirth of sciences and arts, a reservoir of the most beautiful treasures reborn from the traditions and studies of antique art, the exploitation of which – on admissible and inadmissible ways – started early. As well as the mostly ineffectual defence against it.[5]

The republics and principalities of Italy set up strict and extremely detailed provisions already in the 17th and 18th centuries for the protection of works of art. In Tuscany, for instance, Cosimo II de' Medici (1590-1621) names each artwork (works by eighteen famous Italian painters, such as Leonardo, Raphael etc.) that shall not be exported at all, while other artworks not included in the list were allowed to be exported only with the permit of the Academy of Fine Arts, Florence.

Bourbon Maria Louisa (1782-1824) introduced in Lucca a general export ban for all artworks in general (including those in private property) from the Principality in 1819.

The most influential protectors of monuments and works of art were the Roman popes, who took measures for the protection of cultural heritage already in 15th century. The last one in the range of the extremely strict papal edicts – the scope of which originally covered the Vatican City and Rome – was the one of Cardinal Bartolomeo Pacca in 1820 that remained in force after the unification of Italy in the whole country until 1902.

After long discussions, the concise law in Italy on the protection of monuments, antiquities and artistic objects entered into force in 1902.[6] "There were two opposing interests to clash, science and art on one side, the sanctity of property on the other".[7] Minister Nunzio Nasi, who drafted the proposal, admitted that the main concern was the limitation on private property rights, while he emphasized that the guiding principle of the Act was that in the field of art there is no private property as such, as "an artistic object is by nature the property of 'universalità'."[8]

The central provision of the Act was the right of pre-emption of the State. The State had to decide in a period of three months whether it exercised its right of pre-emption,

4 Baron Gyula Forster (21 December 1846-18 July 1932) was a lawyer and a member of the Hungarian Academy of Sciences (1899-1904), President of the Commission for National Historical Monuments (Műemlékek Országos Bizottsága).

5 Baron Gyula Forster, 1906, p. 250.

6 Act CLXXXV of 1902, Gazzetta Ufficiale del Regno d'Italia, Anno 1902 Roma, Venerdi 27 Giugno, No. 149, pp. 2909-2913.

7 Baron Gyula Forster, 1906, p. 322.

8 Baron Gyula Forster, 1906, p. 324.

and if not, the artworks were allowed to be sold abroad without limitation. To illustrate the inadequacy of this provision one can mention the case of the Palazzo Giustiniani in Rome, when the new owner sold the antiquities decorating the palace's courtyard, entrance hall and staircase to the art dealer Sangiorgo, while the government was unable to purchase them.[9] As a result of this incident, Act 242 of 1903 entered into force according to which the export of artefacts was prohibited for two years after the Act's publication.[10]

Similar events happened in other States of Europe. In Sweden, the Act concerning 'the protection and safeguarding of the monuments of old times' was adopted on 29 November 1867.[11] The Ancient Monument Act of 1867 was to improve the protection of monuments, but also of ancient churches, since many of these were demolished during the course of the 19th century. However, the far more difficult issue of protection for privately owned historic buildings remained unsolved for decades.[12] The Ancient Monument Act of 1867 also proclaimed that the State had the prior option of purchase of not only ancient artefacts made of gold, silver and copper (which was stated already in a law of 1684 and later in the Ancient Monument Act of 1828), but also of bronze. Since the gathering of ancient artefacts was a popular activity at the time, private collectors became furious and in 1873 they managed to have the bronzes exempt from the law.[13]

The Swedish Act's paragraph on creating a balance between public and private interest is exemplary even today, limiting the rights of the Academy of Archaeology throughout its procedures concerning the protection of archaeological heritage by saying "it is not permitted however, that the owner or the possessor of the site suffers from delay or inconveniences in vain."[14]

The related law of Great Britain (Ancient Monuments Protection Act 1882) aims at classifying sixty-eight monuments, the list of which can only be amended by an Order of Council. Upon the request of their owners, these sixty-eight monuments (e.g. ancient castles, stones of Stonehenge etc.) will be protected by the members of the 'Commissioners of Works'.

In Hungary, the first regulations concerning the protection of monuments and works of art appeared during the reform movements; however, these initiatives brought more remarkable results only after the Conciliation.

As for treasure-troves, the regulations of Austria were applicable to Hungary, and according to these one-third of the treasure belong to the 'fiscus', later to the emperor's

9 Baron Gyula Forster, 1906, p. 340.
10 Baron Gyula Forster, 1906, p. 341.
11 Swensk Författnings, Samling No. 71, 1867.
12 For examples of the Act's implementation, see Stefan Östergren, Care of cultural monuments in Sweden: the historical background, The Cultural Heritage in Sweden, ICOMOS Bulletin 6, 1981, pp. 24-29.
13 Based on the courtesy information from Ola Wolfhechel Jensen, docent, Swedish National Heritage Board, via e-mail dated on 19 October 2016.
14 Baron Gyula Forster, 1906, p. 363.

collections. By the first third of the 19th century Hungary achieved that archaeological findings emerged from Hungarian soil – after the Imperial Coin Cabinet has chosen the pleasing pieces for themselves – were finally acquired by the Hungarian National Museum.

As we have seen, national movements played a great role in the preparation of these Acts in other European countries as well, and these reflections were embodied in the first national laws everywhere at the end of the 19th century. Hungary was not at all late as compared to other European countries. On the contrary, our 1881 Act was in fact presented by senator Bardoux on 15 March 1886 before the discussion of the French draft in the 'Sénat'.[15]

The milestones of the development of the legal and institutional background in our country are the following:

> While most of the European museums are founded by the emperor, in Hungary it was the national society that formed the first great public collection, the Hungarian National Museum. It was Count Ferenc Széchényi who laid down the basis of the Hungarian National Museum by offering his library, his medal collection and paintings to the nation. By the adoption of Act VIII of 1808, the Hungarian Parliament founded the National Museum. With their development, the collections of the museum were separated, and by 1870 they were formed into seven different institutions. In these museums not as much the national aspect, but rather the general scientific and artistic aspects dominated.

In 1872 the Provisional Commission for Monuments was formed, contributing to the coming into force of Act XXXIX of 1881 on the maintenance of monuments that placed "immovable monuments" under the protection of law and the supervision and custody of the Minister of Religious Affairs and Public Education. Unusually however, the scope of this Act did not cover regulations concerning movable goods of historical, artistic or scientific value as the protection of cultural chattels being in private property proved to be too complicated to settle at that stage.

Scholar priest Arnold Ipolyi[16] took the stand against this deficiency of the draft in the session of the upper house on 30 April 1881 saying "it is known that legislation abroad bans the export of movable cultural property". "We are aware of the fact however that lacking legislation in this matter enriches the museums of Berlin and Vienna that acquire

15 Baron Gyula Forster, 1906, p. 412.

16 Arnold Ipolyi (20 October 1823-2 December 1886) was a Hungarian bishop and historian.

interesting Hungarian artefacts."[17] The proposal of Ipolyi was rejected, but Ágoston Trefort[18] committed himself to have a draft elaborated on movable cultural property in the near future.

With this basic situation – compared to other European countries – the rather unusual tradition of separating movable and immovable cultural heritage evolved and lasted for decades in Hungary. However, the question of an Act on the protection of movable cultural heritage remained an issue. A draft was prepared by 1911 but it could enter into force only after World War I, in 1929.

Act XIX of 1922 on the autonomous governance and personnel of our great national public collections covers Hungarian national public collections and establishes the National Hungarian University of Collections.[19] Based on the 1898 proposal of Gyula Wlassics, Minister of Public Education, after World War I the draft Act of count Kunó Klebelsberg, Minister of Public Education encompassed the great public collections again in the organisation of a 'unified' Hungarian National Museum and reintroduced the principle of autonomous governance. While the personnel were civil servants employed by the State, the ownership right of the collections belonged to the autonomous museum organisation.

Act XI of 1929 on the settlement of various questions concerning museums, libraries and archives settled the situation of non-national museums by placing them under the supervision of the Council of the National Hungarian University of Collections. This Act – filling the gaps of Act XXXIX of 1881 on monuments – deals with the protection of movable cultural goods.

Act VIII of 1934 on the Hungarian National Museum changed the former name of University of Collections (a name, being strange and rather ambiguous) into Hungarian National Museum, while the Council received the name of the Council of Hungarian National Museum with unchanged tasks. The only change was in the domain of institutions belonging to the University of Collections.

The Acts of 1881, 1922, 1929 and 1934, each building on the other, formed a whole over half a century.

This wreath of Acts that came into effect between 1881 and 1934 was repealed by this Legislative Decree 13/1949 on museums and monuments that put an end to the autonomy of the Hungarian National Museum. The Museum's assets were transferred to the State, while the national public collections that previously formed part of the National Museum, got separated. This Legislative Decree – only for a short time – realised a uniform regulation concerning movable and immovable cultural heritage in our country.

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17 Baron Gyula Forster, 1906, p. 205.

18 Ágoston Trefort (7 February 1817-22 August 1888) was a Hungarian politician, who served as Minister of Religion and Education from 1872 until his death. He was the President of the Hungarian Academy of Sciences from 1885.

19 Országos Magyar Gyűjteményegyetem.

Legislative Decree 9/1963 on the protection of museums and movable heritage of museological interest established the county museum structure, although its scope did not cover monuments. Interestingly, in the socialist era when no new museum buildings were built (except for the Picture Gallery of Szombathely), for long decades the multi-channel financing, the competition among the counties brought great development as a result of which the 60's and 70's became the "golden age of Hungarian museums".

Due to the legislation of the 1960s, movable and immovable cultural heritage were managed separately, hence they were regulated not only in different Acts but were placed under the supervision and financing of different Ministries.[20]

After the social and economic changes that took place in Hungary after 1989, the revision of legislation dealing with the protection of cultural heritage also proved to be necessary.

Act CXL of 1997 on museum institutions, public library services and civil cultural activities (hereinafter the 'Museum Act'), that have been modified various times since then, placed the county museum organisations under the management of local governments that obtained the ownership of the collections as well. It listed national museums (all but one maintained by the Hungarian State) and established the Directorate for the Protection of Cultural Heritage[21] as an authority.

The greatest achievement of the Act LXIV of 2001 on the Protection of Cultural Heritage was that it managed to reunite the elements of cultural heritage – archaeological heritage, historical monuments and the protection of movable cultural heritage – in one single act. The scope of this Act covers the elements of cultural heritage as well as all related activities, persons and organisations.

In 2012, the modification of the Act[22] divided the tasks and competences regarding the elements of cultural heritage within the same single legislative text. As a result, it is the minister for culture that remains responsible for the movable cultural goods, while it is the minister of Prime Minister's Office whose added spheres of responsibility are archaeological heritage and historical monuments.

As for movable cultural goods, the Act basically provides for provisions concerning the export of cultural goods, as well as the declaration of protected status and the owner's obligation related to this status. These tasks belong to the Forster Gyula National Centre for Cultural Heritage Management (hereinafter 'Forster Centre'). The decisions the Forster Centre issues are based on the opinions by experts given by Hungary's various national museums.

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20 Mária Mihály, *Műemlék- és műtárgyvédelem a törvények tükrében (Protection of movable and immovable monuments in the light of law)*, Magyar Műemlékvédelem, Budapest, 1997, pp. 271-278.

21 The former Directorate for the Protection of Cultural Heritage was reorganized several times. Since September 2012 it has been called Forster Gyula National Centre for Cultural Heritage Management.

22 Act CXCI of 2012 on the modification of various acts related to the protection of cultural heritage.

According to the explanatory notes to the Act, the reason of the latest modification of the Act in 2016 is the Government's decision on the closing down or transformation of the central background institutions. This decision basically affects the Forster Centre, the institution that had been the major background institution of the protection of cultural heritage. To this end the various competences of the Forster Centre will be split up between the minister for culture and a newly established cultural heritage organisation responsible for the major investments related to archaeological tasks.

4.2 International Conventions

From the second half of the 20th century we have witnessed an increasing attention and responsibility to our common cultural heritage. This awareness has been taking shape in the foundation of the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as: UNESCO).

In 1945, UNESCO was created in order to respond to the firm belief of nations, forged by two world wars in less than a generation, that political and economic agreements are not enough to build a lasting peace. Peace must be established on the basis of humanity's moral and intellectual solidarity.[23]

UNESCO has been striving for more than seven decades to build a coherent system of international conventions, recommendations and declarations to build peace and sustainable development.

The Constitution on the enactment of the United Nations' Educational, Scientific and Cultural Organization was promulgated by Act XL of 1948 in Hungary. Based on political grounds, Legislative Decree 2/1953 repealed the Act on the enactment of the Constitution. Subsequently, similarly to the other countries belonging to the Soviet Bloc, the membership of our country was suspended until 2 June 1954, when the Hungarian People's Republic reinserted the Constitution in its legal system by Legislative Decree 15/1954.[24] In spite of the fact that Act VIII of 2003 repealed this Legislative Decree, the membership of Hungary remained continuous in UNESCO.[25]

The Constitution of UNESCO became part of the Hungarian legal system by Act XXXII of 2009. It is the Minister of Culture – in collaboration with the other ministers concerned – that is in charge for its implementation.

23 http://en.unesco.org/about-us/introducing-unesco.

24 This step was made due to the fact that the Soviet Union re-joined UNESCO in 1954.

25 Explanatory notes to Act XXXII of 2009 on the promulgation of the United Nations' Educational, Scientific and Cultural Organization' Constitution.

Hungary is in fact one of the few countries that acceded to all major UNESCO Conventions[26] that from the legal point of view form a comprehensive system for the protection of cultural heritage.

In the present article the authors seek to present an overview of the main international agreements related to the protection of tangible cultural property, as well as of Hungary's place and role in the international cooperation devoted to safeguarding the world's cultural heritage.

4.2.1 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two Protocols

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
> Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;
> (Preamble, The 1954 Hague Convention)

While from antiquity the right to plundering and looting was generally accepted, measures have also been taken in the earliest times for the protection of cultural heritage. The origins of our right to asylum lie in the great Pan-Hellenic sanctuaries such as Olympus or Delphi that were recognized as sacred and inviolate. The modern laws and customs of war were developed during long centuries.

The text of the Convention II regarding the laws and customs of war on land was agreed on the International Peace Conference held in The Hague in 1899, and considered as the first formal international treaty providing protection for cultural property. It prohibited pillage and seizure by invading forces (Arts. 23, 28 and 47) and required armies to take all necessary steps to spare edifices devoted to religion, art science, and charitable purposes, provided these buildings were not used at the time for military purposes (Art. 27). The 1899 Conference was followed by the 1907 Hague Conference which drew up a number

26 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 with its two Protocols by Legislative Decree 14/1957 and by Act XXIX of 2006; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property by Legislative Decree 2/1979; the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage by Legislative Decree 21/1985; the 2001 Underwater Heritage Convention by Act IX of 2014; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage by Act XXVIII of 2006; the 2005 Diversity of Cultural Expressions Convention by Act VI of 2008; 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects by Act XXVIII of 2001.

of Conventions. Convention No. IV annexed a set of Regulations containing several provisions relating specifically to the protection of cultural property.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted at The Hague in 1954 (hereinafter the '1954 Hague Convention'), as a consequence to the massive destruction of the cultural heritage in World War II. It was the first international treaty of a world-wide vocation dedicated exclusively to the protection of cultural heritage in the event of armed conflict. The Convention – which is not in fact a UNESCO Convention, but a treaty between the various States Parties[27] – was adopted together with a Protocol in order to prevent the export of cultural property from occupied territory, requiring the return of such property to the territory of the State from which it was removed. The destruction of cultural property in the course of the conflicts that took place at the end of the 1980s and the beginning of the 1990s, highlighted the necessity for a number of improvements to be addressed in the implementation of the 1954 Hague Convention.[28] The Second Protocol is much more explicit in relation to the range of peacetime safeguarding measures that States should undertake. A review of the Convention was initiated in 1991, resulting in the adoption of a Second Protocol to the 1954 Hague Convention in March 1999 that Hungary also promulgated in 2006.

Although Hungary acceded to the 1954 Hague Convention and its first Protocol on 17 May 1956 as fifth, up till now its implementation has only been partially successful. From the time the 1954 Hague Convention and its Protocols were signed, there have been some peaks in the field of implementation where remarkable results were achieved. However, this performance is not equally distributed over time. Due to the regular and profound reorganization of central authorities, the decree of attention the Hague Convention receives is rather uneven. We can state that the military field is comparably better organized than the civil domain concerning the implementation of the said Convention. Act XXIX of 2006 on the promulgation of the Second Protocol expressly authorizes the Minister of Defence, in cooperation with the Minister of Culture, to care about the regulations necessary to the implementation of the legal instruments of the Convention and its Protocols. In practice, therefore, the Minister of Human Resources is responsible for culture and, in agreement with competent ministers, particularly the Minister of Defence, is entrusted with addressing pertinent issues in respect to these legal instruments.

With special regard to the preparation of inventories as a peacetime safeguarding measure,[29] the nature and extent of the register of identified cultural property varies from

27 At the same time, the Director-General of UNESCO is the depositary of The Hague Convention and its two Protocols, and the Secretariat of UNESCO provides technical assistance under Art. 23 of the Convention.

28 According to UNESCO's 1993 'Boylan Report', there was nothing fundamentally wrong with the 1954 Convention and the First Protocol, but there were serious problems in terms of its interpretation and practical application.

29 Art. 3 of The 1954 Hague Convention: Safeguarding of cultural property.

one States Party to another. Some do not identify or designate any, while numbers within the range of 500 to 5000 localities and buildings seem fairly typical for a medium-size "developed" country.[30]

According to Act XXIX of 2006 in Hungary the Ministry of Culture is in charge of making an inventory of cultural property under special protection. Related to this obligation Ministerial Decree 29/2007 was issued by the Minister of Education and Culture to publish the Inter-national Register of Cultural Property under Special Protection.[31]

In Hungary, parallel lists of cultural property exist: the two itemized lists in Annex 2 of Act XLIV of 2001 on the protection of cultural heritage containing national memorials, and that of accentuated national memorials, being the new category of memorials of great national significance introduced in the Act in 2012. Furthermore, the Forster Centre is responsible for listing a number of protected historic sites, buildings, conservation areas, historic gardens and archaeological sites all over Hungary, as well as movable cultural heritage items and collections in private ownership. We also have to mention that Hungary is represented in the World Heritage *List* with eight properties[32] forming part of the cultural and natural heritage.[33]

For the incitement of UNESCO, the Museum of Fine Arts prepared a comprehensive recommendation to the Cultural State Secretariat relating placement under enhanced protection of cultural properties in Hungary. Based on that documentation, the Cultural Expert Committee to the Hungarian National Commission for UNESCO is considering this question and its possible proposals concerning a tentative list to the Ministry of Human Resources and the State Secretariat responsible for culture.

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate. Art. 5 of the Second Protocol to The Hague Convention: Safeguarding of cultural property. Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Art. 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

30 Patrick J Boylan, *Implementing the 1954 Hague Convention and its Protocols: legal and practical implications*, https://culturalpolicy.uchicago.edu/implementing-1954-hague-convention-its-protocols-legal-and-practical-implications, Chicago, 2006, p. 1.

31 According to Art. 8 of the Convention, the most precious cultural goods can be granted a *special protection* and the Parties to a conflict shall ensure the immunity of this cultural property by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.

32 http://whc.unesco.org/en/statesparties/hu.

33 Henrietta Galambos, Boglárka Borbély, *The Protection of Cultural Property in Hungary with special regard to the 1954 Hague Convention*, Bundesamt für Bevölkerungsschutz, Fachbereich Kulturgüterschutz, Bern, 2014.

Hungary has made efforts to disseminate the provisions of the Convention within armed forces, as well as among target groups and the general public through university education, conferences, publications and information pamphlets concerning international humanitarian law regulations distributed by the Red Cross.

From 2005, the Museum of Fine Arts has participated in the Hungarian delegation of the UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict, and sends its reports to the Ministry of Human Resources and the other stakeholders, such as the Hungarian National Commission for UNESCO. The latter regularly publishes these reports on its website.

> The Hague Convention contains provisions for the marking of identified cultural property with the Convention's special emblem of a blue and a white quartered shield. However a State is not obliged to mark important cultural property in this way and some have decided as policy not to do so since they argue that this would make such cultural property more vulnerable to attack by an enemy determined to destroy symbols of national identity in defiance of the Convention, as with some highly publicised attacks on marked cultural property in the Yugoslav civil wars of the 1990s.[34]

Ministerial Directive 7001/1998 on the distinctive emblems related to the Hague Convention was issued by the Minister of Public Education. In times of peace, the emblem can be used upon the decision of the head of the institution, however, in state of emergency; the decision on marking the cultural property is taken by the Minister of Culture in consultation with the Council of Defence.

With reference to Resolution II of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, the Decree 2/1958 issued by the Ministry for Education and Culture, created a Hungarian Advisory Committee to advise the government concerning the measures required for the implementation of the Convention. This Decree was repealed in 2006. Currently there are seven subcommissions working under the auspices of the Hungarian National Commission for UNESCO, two of which are dedicated to the protection of cultural heritage, namely the Sub-Commission for World Heritage and the Sub-Commission for Intangible Cultural Heritage.

Government Decree 1200/2015 established a National Inter-Ministerial Committee on the Dissemination and Implementation of International Humanitarian Law that aims at assisting governmental institutions in the better implementation of our obligations undertaken by international humanitarian law conventions, with special regard to the

34 Partick J Boylan, 2006, p. 1.

1949 Geneva Conventions and their 1977 Protocols. The Committee was active even prior to 2015: the Hungarian Red Cross initiated its establishment and the Government set up the National Inter-Ministerial Committee on the Dissemination and Implementation of International Humanitarian Law by Government Resolution 2095/2000.

The purpose of this Committee is that government institutions exercising tasks related to humanitarian law (Ministries of Interior, Justice, Human Capacities, and Defence) as well as the representatives of the National Directorate General for Disaster Management and the Hungarian Red Cross discuss the actual questions of humanitarian law and promote that Hungary fulfils its obligations undertaken in international humanitarian conventions. The Committee meets four times a year and is presided by the Head of International Law Department of the Ministry of Foreign Affairs and Trade.

> The most substantial innovation of the Second Protocol are no doubt the provisions in Chapter 4 which give teeth to, and internationalise, the rather vague obligations on States in Article 28 of the original Convention, with the defining of five explicit offences of serious violations of the Protocol are defined in Article 15.[35]

Implementing the Chapter 4 provisions of the II Protocol requires primary legislation almost certainly in all countries.

In this context in Hungary too, by force of Act XXIX of 2006, Act IV of 1978 on the Penal Code was modified. Article 153 of Act C of 2012 on the new Hungarian Penal Code[36] regulates now the question of the protection of cultural goods by means of criminal law in conformity with the provisions of The Hague Convention and its Protocols. As the Museum Act provides for the definition of cultural goods differently – among others the

35 Patrick J Boylan, 2006, p. 4.

36 Section 153 Assault on Protected Property.
(1) Any person who in time of war launches an attack on or assaults an establishment that is not recognized as a military objective and is therefore not protected by the military, that results in losses in such unprotected establishment, or is likely to result in extensive, prolonged and severe damage to the natural environment which would be deemed manifestly excessive in relation to the concrete and direct military advantage anticipated is guilty of a felony punishable by imprisonment between two to eight years.
(2) The penalty shall be imprisonment between five to ten years if the assault is directed against:
a) hospitals or any similar establishments for the treatment or placement of patients and casualties, or
b) cultural goods protected under international treaty.
(3) Any person who uses or utilizes cultural goods protected under international treaty, or the immediate surroundings thereof in support of military action, or makes such goods the object of theft, pillage, destruction or vandalism shall be punishable in accordance with Subsection (2).
(4) The penalty shall be imprisonment between five to fifteen years if the criminal offense referred to in para. b) of Subsection (2) or in Subsection (3) is committed in connection with cultural goods placed under special or enhanced protection by international treaty, or the immediate surroundings thereof.

definition excludes immovable cultural property – the Penal Code provides for the definition of cultural goods as it is in the Convention and the Second Protocol.

In practice, most of the provisions of the Convention other than the identification and possible marking of important cultural property are typically dealt with and respected by all relevant Military Regulations and training programmes in Hungary. The Hungarian Defense Service Regulation as the appendix of the Decree 24/2005. (VI.30) issued by Ministry of Defense contains obligations of the principles of international humanitarian law concerning military personnel. It regulates both the general protection of cultural objects and the perfidious usage of the international convention's distinctive emblem.

In addition to this, confidential "rules of engagement" (ROE) are prepared for the military personnel when posting for specific missions, in which the Convention and its Protocols are likewise contained.

According to Act CXIII of 2011 on the national defense and the Hungarian Defense Forces, specific measures may be implemented in case of special legislation (NDA). The Act does not regulate concretely the protection of cultural objects in armed conflicts. However, its Article 11 indirectly expresses that institutions created for civil protection attend to humanitarian tasks.

Based on Act CXXVIII of 2011 on disaster management, and its executive Government Decree 234/2011, each public collection shall create disaster plans and guidelines concerning the protection of its cultural property. This includes fire compartments, safety procedures and evacuation plans for both people and museum collections.

Finally, consideration should be given to the question whether the protection of cultural property fall under the heading of international humanitarian law.

> In considering the law applicable to armed conflict a distinction needs to be made between the legality to resort to armed conflict (*jus ad bellum*) and the law governing the conduct of hostilities themselves (*jus in bello*). The latter establishes a set of rules that seek for humanitarian reasons to limit the effects of armed conflict and to restrict the means and methods of warfare. It is these rules that constitute what is termed 'international humanitarian law' or the 'laws and customs of war'.[37]

The wording and spirit of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter the '1954 Hague Convention') and of its two Protocols evidently reveal that they are fundamental instruments of international humanitarian law. When a cultural object is destroyed, it is always people who are the real target, their memory and identity.

37 Kevin Chamberlain, *War and Cultural Heritage*, Institute of Art and Law, Great Britain, 2004, pp. 3-4.

> It is understandable that the view is sometimes expressed that "things" are not as important as human beings…and that consideration of the fate objects should always be secondary to that of the alleviation of human suffering. Yet we at UNESCO are constantly confronted by the pleas of people who are physically suffering to help them save their cultural heritage, for their suffering is greatly increased by the destruction of what is dear to them. Their cultural heritage represents their history, their community, and their own identity. Preservation is sought, not for the sake of the objects, but for the sake of the people for whom they have a meaningful life.[38]

Moreover, the outstanding correlations between the 1954 Hague Convention and the 1949 Geneva Conventions (that form the core of international humanitarian law regulating the conduct of armed conflict and seeking to limit its effects) can also prove the above statement.[39]

The essential provisions of the 1954 Convention are reiterated in Article 53 of the 1977 Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (hereinafter 'Additional Protocol I') and Article 16 of the 1977 Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter 'Additional Protocol II').

Article 53 of the Additional Protocol I provides:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
> a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> b) to use such objects in support of the military effort;
> c) to make such objects the object of reprisals.

Article 16 of Additional Protocol II is in similar terms.

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38 Lyndel V. Prott, Professor of cultural heritage law, former Director of UNESCO's Division of Cultural Heritage. The quote is from Lyndel V. Prott, The spoils of war: World War II and its aftermath: the loss, reappearance, and recovery of cultural property, *in* Elizabeth Simpson, Harry N. Abrams, Incorporated, New York, 1997, p. 16.

39 The International Committee of the Red Cross persuaded governments to adopt the Geneva Conventions. The 1949 Convention was initiated by the ICRC as a result of the state's agreement on the revision of the three existing three Geneva Conventions. See: https://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm.

The fact that they are expressed to be 'without prejudice' to those instruments means that the provisions of those instruments prevail over Article 53 and Article 16 where there is a conflict, or those instruments provide more extensive rules that Article 53 or Article 16. However, the obligations of Article 53 are in other respect stricter than those of the 1954 Convention as there is no derogation, as in Article 4 (2) of the 1954 Convention for 'imperative military necessity'.[40]

The Rome Statute of the International Criminal Court, adopted in Rome in July 1998, which is a landmark treaty on the individual criminal responsibility for international crimes, contains important provisions concerning offences related to cultural property. Article 8 "…Intentionally directing attacks against buildings dedicated to religion, education, art science or charitable purposes, historic monuments, […] provided they are not military objectives." is considered a war crime.

The recent headline-making case of Al Faqi Al Mahdi's[41] trial at the International Criminal Court is the first devoted solely to cultural destruction to be held in an international forum. In 2012, Al Mahdi destroyed a mosque and nine of Timbuktu's world heritage site-listed mud-built shrines. Under the Court's governing Rome Statute he was charged with the war crime of directing attacks against historic monuments and buildings dedicated to religion.[42]

4.2.2 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

In the 1930s, the International Museums Office (predecessor of the International Council of Museums) drafted an international convention for the purposes of the League of Nations concerning the return of lost, stolen or illegally transferred or exported objects of artistic, historical or scientific value, which was never accepted. In 1939 another draft convention was formulated for the protection of monuments and works of art in the event of war. These efforts led to the adoption of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter the '1970 UNESCO Convention') and the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects (hereinafter the '1995 UNIDROIT Convention') after World War II.[43]

40 Kevin Chamberlain, 2004, p. 15.

41 https://www.icc-cpi.int/mali/al-mahdi.

42 The Art Newspaper No. 283, October 2016, p. 59.

43 Mária Mihály, *Háborúban hallgatnak a törvények (Silent leges inter arma), a New York-i restitúciós konferencia kötetéről (Laws are silent amidst arms, on the Publication related to the Restitution Conference in New York)*, Magyar Múzeumok, 1997/4, p. 58.

> In 1960 the United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA 1514 (XV)). During the following decades the newly independent States were anxious to recover important items from their cultural heritage, many of which were to be found in the museums of the former colonizing states. They were also very concerned at the continuing loss of cultural heritage due to the exploitation by looters at a time when they had relatively few resources to control it. Much of the early debate associated these two issues, but the major market and collecting States were reluctant to return cultural objects received in the past and now in their museums and private collections. They were, however, prepared to do something to stop the contemporary losses complained of by mainly developing States.[44]

This UNESCO Convention was adopted at the 16th General Conference of UNESCO in November 1970. Every year it witnesses further ratifications and acceptances with the result that there are now well over 100 States Parties[45] and the Convention is acquiring greater significance than at any other point in its history. Hungary promulgated the Convention by Legislative Decree 2/1979.

The 1970 UNESCO Convention was the very first international treaty of universal effect that intended to protect cultural heritage in peacetime. Loss of cultural property damages the international community as a whole: 'The looting an illicit trafficking of cultural property erode the cement that holds communities and societies together.' Establishing actions to safeguard these items is only possible with an international cooperation.

One of the greatest achievements of this Convention was that it basically changed the practice of museums in the field of acquisition, which consciously apply the 1970 year[46] as a watershed in terms of requiring proofs of provenance when acquiring an object. Conditions surrounding the acquisition of objects are routinely stated in official museum policies since then. In particular, museums all over the world deny themselves the collection of anything associated with unlawful export. Much of this emphasis is due to the Arti-

44 L.V. Prott, *Strenghts and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption*, Second Meeting of States Parties to the 1970 Convention, UNESCO Headquaters, Paris, 2012.

45 See the list of 122 States Parties to the Convention at: www.unesco.org/eri/la/convention.asp?KO=13039&language=E.

46 Concerning the 1970 threshold, the British Museum published its statement in 1998, the Museums Association in 2002, the UK Department for Culture, Media and Sport in 2005.

cle 7 (a)[47] of the 1970 Convention that "changed forever the ethical landscape of the museum world".[48]

The side effects of the 1970 UNESCO Convention are not to underestimate either, notably the evident impact it had on the development of other international treaties such as the 1999 Second Protocol of the 1954 Hague Convention, the 2001 Underwater Cultural Heritage or the 1995 UNIDROIT Convention, on national legislations and various Codes of Ethics such as the one published by International Council of Museums in 1978.

Despite the inevitable merits of the 1970 UNESCO Convention, the weaknesses that appeared more characteristically during the implementation were:

- the issue of time limitation to claims (a concentrated effort was made to insert such a limitation, but it was defeated), and
- the problem of "good faith" acquisition and mandatory compensation – a provision (Art. 7 (b)(ii)) which has been widely criticised as inadequate.

These problems remained unsolved by the 1970 Convention. Based on the experiences of the following two decades, UNESCO turned to the International Institute for the Unification of Private Law (UNIDROIT) when the time came to prepare private law rules for the implementation of its 1970 Convention.

As for the question of time limitation, some States rich in cultural heritage found unacceptable to exclude claims after a certain lapse of time, while others were convinced about the necessity of time limitation of claims because of the security of transactions, which can otherwise be called into question at any time and the difficulty to come up with proves many years after the original transaction, when documents have been lost and witnesses have died.

47 Art. 7: The States Parties to this Convention undertake
(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States.

48 Brodie, N; Doole, J. & Watson, P., *Stealing History: The Illicit Trade in Cultural Material*, Cambridge, 2000, p. 9.

While the 1970 UNESCO Convention includes no rule as to time limitation for claims, the 1995 UNIDROIT Convention remedied this heavily criticized point by elaborating a complex system as for stolen[49] as well as for the illicitly exported[50] cultural objects.

Article 7b(II) of the 1970 UNESCO Convention provides for the restitution to the original owner of a stolen or illegally exported object by the possessor, even the good faith possessor, and the latter's right to compensation. The chief problems in a case of theft are transfer of title and the conflict of interests between the person (usually the owner) who has been dispossessed of an object and the purchaser in good faith of that object. Legal systems approach the problem of acquisition roughly in two different ways: some systems e.g. that of Great Britain or Germany follow the *nemo plus iuris* rule (a purchaser cannot acquire valid title unless the transferor has valid title), whereas other legal systems e.g. in France accord greater protection, albeit to varying degrees, to the acquirer in good faith of stolen property ("en fait de meubles, possession vaut titre").

> Yet this loophole, created by differences between legal systems, could easily be exploited by traffickers to their advantage, and to the detriment not only of owners of cultural property, but also to scholarship and systematic protection of the heritage. Because this question of private law could not be resolved by UNESCO, which does not have a mandate in matters of international law, UNESCO could observe that, over many years, the 1970 Convention, even if every State were to adhere to it, would not resolve the problem.[51]

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49 Chapter II – Restitution of stolen cultural objects, Art. 3.
(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.
(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.
(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.
(6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.

50 Chapter III – Return of illegally exported cultural objects, Art. 5.
(5) any request for return shall be brought within a period of three years from the time when the requesting state knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in para. 2 of this article.

51 Lyndel V. Prott, UNESCO and UNIDROIT: a Partnership against Trafficking in Cultural Objects, www.unidroit.org/english/conventions/1995culturalproperty/articles/s70-prott-1996-e.pdf, p. 60.

However, much had changed since 1970, the time the drafters of the UNIDROIT Convention began work. It was recognised that the protection of the bona fide purchaser after a very short period (3 years in France), or immediately (in Italy), together with the presumption in favour of bona fides in many other legal systems, facilitated the passing of illegally acquired cultural objects into the licit trade. This was even so because there was a general practice of not revealing the provenance of objects and of purchasers not making related inquiries. For the specific case of cultural objects, therefore, most States which had traditionally protected the bona fide purchaser were prepared to change their law.

Nevertheless, some States considered that change in such a rule might involve constitutional problems, since it was a fundamental concept. They also claimed that it would be politically very difficult to change unless provision was made for compensation. For this reason, Article 4 (1) of the UNIDROIT Convention does provide for a possibility of compensation, but strictly limited to those acquirers who made careful efforts to avoid acquiring stolen cultural property (Art. 4(4)).[52]

When it is about the transfer of ownership, Act 5 of 2013 on the new Civil Code is based on the principle of 'nemo plus iuris' which means that one cannot transfer more rights than he or she disposes of.[53] Keeping the rule unchanged of being able to acquire the ownership of the thing *in the course of trade even if the transferor was not the owner*, from 2013 this rule has been complemented by the criteria that were developed through judicial practice and are now codified.[54]

In the Museum of Fine Arts, Budapest, to all acquisitions an acquisition policy applies based primarily on the relevant international conventions (1970 UNESCO Convention and the 1995 UNIDROIT Convention), the Hungarian Civil Code and the International Council for Museum's Code of Ethics. According to this policy, a proposal for acquiring a particular work of art arises from the Collection Department, which is evaluated by the Acquisition Committee, and the final decision is taken by the General Director of the institution. The Legal Department is member to the Acquisition Committee to ensure that due diligence is exercised throughout the whole process by obtaining all relevant information from the vendor concerning the provenance of the artwork, the chain of transfers of

52 Lyndel V. Prott, UNESCO and UNIDROIT: a Partnership against Trafficking in Cultural Objects, www.unidroit.org/english/conventions/1995culturalproperty/articles/s70-prott-1996-e.pdf, p. 68.

53 The text of the new Civil Code of Hungary in English, translated by Tamás Dezső Ziegler https://tdziegler.files.wordpress.com/2014/06/civil_code.pdf. Section 5:39 [Acquisition of ownership from a person other than the owner].
(1) Ownership by transfer may be acquired only from the owner of the thing.

54 Section 5:39 [Acquisition of ownership from a person other than the owner].
(2) Where ownership is acquired *in good faith*, in the course of trade for consideration, the transferee shall acquire ownership by way of transfer even if the transferor was not the owner.
(3) Acquisition in the course of trade for consideration shall also include when the buyer makes a purchase from a seller who enters into a sales contract *in his own name*, within the framework of *legitimate business activities*.

property, as well as existing export documents, also a certificate – in most cases – from the Art Loss Register[55] to see whether the object is in the database of stolen objects.

Contacting experts from the country of origin is an important element of exercising due diligence that can eventually result in refusing the acquisition of an artwork. This was the case recently when – by providing specific information about the export license as well as the provenance of the artwork – the Spanish Secretariat for Classification, Valuation and Export of Cultural Heritage[56] discouraged the Museum to purchase an object.

When acquiring ownership from a person other than the owner by primary form of acquisition, the former ownership right gets extinguished. This rule can be illustrated by an interesting example emerged in the Museum of Fine Arts, Budapest, when an object – disappeared in course of World War II from the collections of the Museum – was acquired at an auction by a private person and has come into view of the Museum again just recently. According to the applicable Hungarian legislation, the Museum of Fine Arts and the Hungarian State respectively could not successfully enforce the ownership claim.

4.2.3 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

It was at UNESCO's request in 1984 that UNIDROIT took up the matter of elaborating the rules of private law applicable to illicit traffic in cultural movables in order to complement the 1970 UNESCO Convention.

The Convention generated an extraordinary degree of incomprehension and resistance. Prof. Lyndel Prott, who participated as an observer representing UNESCO at the preceding negotiations, describes the general mood as follows:

> Certain representatives of countries which were net losers of cultural objects suggested that UNESCO should not be encouraging UNIDROIT in this work, since it was inspired by a desire to weaken the protections of the 1970 UNESCO Convention – UNIDROIT was then seen by these countries as basically a European-oriented institution. On the other hand, the suggestion was made by a representative from one of the countries which was a net acquirer of cultural objects that the UNIDROIT process was a manoeuvre by developing countries to achieve, by means of a new convention, provisions that they had been unable to achieve in the 1970 Convention![57]

55 Centred in London, the Art Loss Register is the world's largest private database of lost and stolen artworks, antiquities and collectables.

56 Secretario de la Junta de Calificación, Valoración y Exportación de bienes del Patrimonio Histórico Español, Secretaría de Estado de Cultura.

57 Lyndel V. Prott, *The UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects – Ten Years On*, Unif. L. Rev., 2009, p. 216.

Because of the strict regulations of the 1995 UNIDROIT Convention that go far beyond the 1970 UNESCO Convention, there are only 37 Contracting States to the 1995 UNIDROIT Convention, among them Hungary that ratified the Convention in 1998 and promulgated it by the Act XXVIII of 2001.

One of the tasks UNIDROIT received was the standardisation of the rules concerning the acquisition of cultural objects.

Article 3(1) of the 1995 UNIDROIT Convention states that the possessor of a cultural object which has been stolen shall return it. This was already a change executed in the law of a number of States, notably where the presumption of good faith protected the acquirer to obtain ownership over the artwork. In addition, even in cases where the rightful owner could manage to retrieve the object, in many cases he would be required to pay compensation. Article 4 (4) of the 1995 UNIDROIT Convention provides for a possibility of compensation, but strictly limited to those acquirers who made efforts to avoid acquiring stolen cultural property as follows:

> In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.[58]

The other task that UNIDROIT received was to attempt to formalise in the Convention the treatment of antiquities which had been illegally excavated whereby State ownership by definition cannot be proved. Article 3 (2) resolves the problem as follows:

> A cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.[59]

When the fourteen-piece silver collection deriving from the Sevso Hoard appeared in 1990 at an auction organized by the New York-based auction house Sotheby's, where its sale was attempted, all States including Hungary situated in the territory of the former Roman Empire were officially asked the single question whether those pieces have been documented as appertaining to the inventory of any museum. An important achievement of the 1995

58 Art. 4(4) of the 1995 UNIDROIT Convention.
59 Art. 3(2) of the 1995 UNIDROIT Convention.

UNIDROIT Convention as compared to the 1970 UNESCO Convention was that the former required neither designation nor registration in point of the claimed cultural object, while the scope the 1970 UNESCO Convention still required cultural objects to have been documented by the State requesting the return.

Finally, we have to mention that Hungary made the following Declaration to the 1995 UNIDROIT Convention: in accordance with Article 3, Paragraph 5, a claim for the restitution of a cultural object – with respect to the provisions provided in the Hungarian law – shall not be subject to time limitation.[60]

According to the general explanatory notes to the Act LXXX of 2001 on the return of the illegally exported cultural good (related to Council Directive 93/7/ECC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State) based on the provisions of Art. 13(1) of the UNIDROIT Convention[61] the Hungary declares that in case of differences between the Convention ant the Directive, Hungary will proceed according to the provisions of the Directive concerning the other Member States of the European Union.

4.2.4 Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation

The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (hereinafter the 'ICPRCP') was founded in 1978 in order to open a forum for the States that would enable them to settle their disputes related to the illicit appropriation of works of art even when the international conventions (especially the 1970 UNESCO Convention) cannot be applied. This intergovernmental committee acts as a forum where States can basically settle their pending restitution cases – such as the on-going discussions on the case of the Parthenon Marbles – through political and diplomatic channels, however it is important to emphasise that the recommendations of the ICPRCP are not binding to the Parties participating in the dispute.

Hungary was member to the ICPRCP between 1999 and 2003 for the first time, and between 2006 and 2010 for the second time, but our country regularly sends a delegation to the meetings.

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60 www.unidroit.org/status-cp/281-instruments/cultural-property/cultural-property-convention-1995/status/1480-1995-article-3-5.

61 Art. 13(1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument.

4.2.5 Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950

The Agreement on the Importation of Educational, Scientific and Cultural Materials (hereinafter the Florence Agreement) having an outstanding importance for cultural institutions is a 1950 UNESCO treaty whereby states agree to not impose customs duties on certain educational, scientific, and cultural materials that are imported. It was opened for signature on 22 November 1950 at Lake Success, New York and promulgated by Legislative Decree 12/1979 in Hungary.

4.3 Major Issues Governed by Law for the Protection of Cultural Heritage: Export Control and 'Protected' Goods

4.3.1 Export Control in the European Union

The word 'culture' has not turned up in the 'founding' or 'principle' Treaties of the European Union until 1992. The Maastricht Treaty already contains a Title (Title IX) on culture, among the provisions amending the Treaty establishing the European Economic Community and according to Article 167(1)-(4):

> The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in areas such as the conservation and safeguarding of cultural heritage of European significance. Furthermore the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.[62]

Consequently, the European Union has only a complementary competence in cultural matters in relation to the Member States.

With the creation of the Single European Market (hereinafter the 'SEM') on 1 January 1993, customs controls were abolished in order to establish the free movement of goods without import and export restrictions between Member States. However, Article 36

62 Art. 167(1)-(4) of the Treaty on the Functioning of the European Union (hereinafter the 'TFEU') (ex-Art. 151 TEC).

TFEU[63] allows Member States to keep their national legislation concerning the export of cultural goods and determine what goods can be exported from their own territory, but this shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

In order to compensate the abolition of national customs controls within the SEM, the European Union adopted in 1992 Regulation 3911/92 on the export of cultural goods that was subsequently codified by Regulation 116/2009 without major modifications,[64] (hereinafter the 'Regulation') and a Directive on the return of cultural objects unlawfully removed from the territory of a Member State in 1993[65] (hereinafter the Directive) to complement the Regulation. The export of cultural goods is the only field of culture where binding legal acts are adopted by the European Union.

The main objective of the Regulation – being directly applicable in all Member States – is to ensure the uniformity of the provisions concerning the export controls for cultural goods at the Community's external frontiers. According to the Regulation, the export of cultural goods belonging to one of the 15 categories included in Annex I to the Regulation, and reaching or exceeding the age and value indicated in the Annex (for instance, for paintings over 50 years, more than EUR 150 000), is subject to the presentation of an EU export license when exporting outside the EU's customs territory.

In addition to the EU export license most Member States have – in line with Article 36 of TFEU – provisions that also require a national export license for transfer to another Member State within the SEM. These national export restrictions vary to a great extent, some are very similar to the provisions to the Regulation, some go beyond the Regulation by establishing lower financial thresholds, resulting in much stricter export controls.

In Hungary, Annex No. 1 of Act LXIV of 2001 on the protection of cultural heritage takes over the same categories, but assigns lower values to them. In 1992, during the negotiations of the original regulation among the Member States, huge discussions were held on the determination of values. The discussions were finally closed as a result of a political compromise. Throughout the accession negotiations the Hungarian delegation emphasised that from the point of view of Hungarian cultural heritage, there will always be goods of lower value, but of irreplaceable importance for the Hungarian culture, and argued in favour of the reduction of the values related to the categories.

To fulfil the requirements of the Regulation, Hungary established the former Directorate of Cultural Heritage in Hungary in 1998 that abolished the very old decentralised system

63 Art. 36 (ex Art. 30 TEC). The provisions of Arts. 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

64 Promulgated by Ministerial Decree on the export of cultural goods 14/2010 (XI. 25.) NEFMI (Ministry of Human Capacities).

65 93/7/EEC of 15 March 1993.

in which all public collections had the right to issue export licenses. The Forster Center is now the sole authority empowered with such a right.

According to the former regulations in Hungary, an export license was required in case of the export of cultural goods of at least 50 years old. From 2014 on, this circle of cultural goods became narrower, as an export license (permanent or temporary) is required – either to another Member State, or to a third country – concerning all *protected* cultural goods or those belonging to one of the fifteen categories in Annex No. 1 of Act LXIV of 2001 on the protection of cultural heritage exceeding a certain age limit and the particular market value at the same time. The issuance of an export license depends on the preliminary expert opinion of the public collection enacted by law.

In case an artwork – declared as *national treasure* by a Member State – is exported illegally from one Member State to another, by breaching the regulations of Council Regulation (EC) No. 116/2009, the regulations of Council Directive 2014/60/EU[66] (former 93/7/EEC)[67] must be applied and it shall be returned.

Due to the extremely different national regulations, none of the EU legal provisions give the definition of *national treasures possessing artistic, historic or archaeological value* but confers this into the competence of the Member States. According to a report made by the European Union, when defining national treasures Member States can very roughly apply two categories: those that give a larger and those that give a more restricted definition. The former comprises countries with rich cultural heritage (mainly the exporting countries), the latter might have a not very rich heritage, but a significant art market. In Hungary, the definition of national treasure appeared in Act LXXX of 2001 on the return of cultural objects unlawfully removed on the occasion of the 2014 recast of Council Directive 93/7/EEC. According to the mentioned law, national treasures possessing artistic, historic or archaeological value shall mean protected cultural goods, as well as archaeological artefacts and the constituent parts, accessories and fixtures of historic monuments possessing historic value.

It should not be forgotten that the 1993 Directive was in fact based on an early draft of the 1995 UNIDROIT Convention. The European Parliament and the Council adopted the 2014 recast of the Directive in order to overcome several of its shortcomings such as the scope of the directive which is now extended to national treasures (designated by Member States) by having the Annex (with the categories) revoked.

The most important change is Article 10 of the Directive that establishes a new level of diligence:

66 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012 (Recast).

67 Transposed by Act LXXX of 2001 on the return of cultural objects unlawfully removed.

> Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object.
> In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.
> The requesting Member State shall pay that compensation upon return of the object.[68]

With this fundamental change, interestingly Article 10 corresponds verbatim with the provisions on due diligence in Article 4, Paragraph 4 and Article 6, Paragraph 2 of the UNIDROIT Convention. This is remarkable, since only half of the EU Member States have ratified the 1995 UNIDROIT Convention.[69]

4.3.2 Protected Cultural Goods

The notion of 'cultural goods' is defined by the Hungarian Museum Act as follows:

> outstanding and typical objects, images, sound recordings and written memories and other proof of the origin and development of lifeless and live nature, mankind, the Hungarian nation and the history of Hungary, as well as pieces of arts.[70]

The outstanding and irreplaceable cultural goods require a special protection in order to save them for future generations. In Hungary the category of protected[71] artworks was introduced in 1929, and at the beginning all related rights and obligations were exercised by the Council of the National Hungarian University of Collections. From the 1963 to 1997 it was not a central authority or a ministerial institution, but national museums that

68 Art. 10 of Directive 2014/60/EU.
69 Robert Peters, 2015, p. 145.
70 Section sz), Definitions, Annex I of the Museum Act.
71 The applied expression in Hungary is 'protected' while in other countries 'objets classés' (France), 'listed buildings' (UK), 'beni vincolati' (Italy) etc.

– lacking such central coordination – independently from each other declared and registered cultural objects that belonged to the scope of their collection as protected. As a result of their activity, the number of protected artworks in Hungary reached several thousands of objects, which was obviously too great a contingent to be protected suitably. Supposedly, in this period many protected works of art left the country without an export license. As a result of this situation, and also due to the requirements set up by the Regulation and the Directive, the Directorate for the Protection of Cultural Heritage was established by the Museum Act. From that time on the authority started to review the contingent of protected artworks and has performed all related functions.

According to Act LXIV of 2001 on the protection of cultural heritage the now existing categories of protected artworks are the following:

a. By virtue of the Act, cultural goods registered in the inventories of museums, archives, visual and audio archives operating as public collections and with libraries.
b. Irreplaceable goods and collections of outstanding importance of the cultural heritage shall be granted protected status by the Forster Centre in order to ensure their preservation.
c. Public collection of national interest.
d. Cultural value of public interest.

The fact that a work of art is registered as protected by the Forster Centre creates various obligations that the owner has to comply with. These are mainly related to the transfer of ownership and the safeguarding of the object. Beside the numerous obligations however, in Hungary the owner of a protected artwork can hardly benefit from the fact that the cultural good in his ownership has become protected. It is no doubt an advantage that due to the protection the authenticity and the cultural value of the object becomes attested, and special financial support funds become available (from the National Cultural Fund for instance). However, there are no tax reductions, subsidies or any other advantages the owners in many other European countries can benefit from.[72]

As a result of the activity of the Forster Centre, in the last couple of years the number of protected objects has been significantly reduced. The legal title of dispensing an item from the protected status – obviously apart from the destruction of the object – can only happen on professional grounds, which means that either the conditions of gaining a protected status are absent or the definitive export of the artwork is justified by a national cultural interest and wide public access is granted to it.

This was the case for instance in 2015, when the Musée d'Orsay, Paris intended to purchase the *Marching French Soldiers*, a work painted in the first year of World War I by

72 Despite of the fact that Art. 53 of the Act LXIV of 2001 states that a separate Act will regulate the question of subsidies in favor of the owners of protected artworks, no such regulations have come into effect yet.

József Rippl-Rónai (1861-1927) in France.[73] The artwork is profoundly connected to France and more than three million visitors gain access to it every year.

4.4 Immunity from Seizure Concerning Cultural Objects on Loan

In the past two decades, when realising 'blockbuster' exhibitions with international loans, the phenomenon that caused the most legal headaches was the problem of providing the works on loan with immunity from seizure.

The Action Plan for the EU Promotion of Museum Collection Mobility and Loan Standards[74] gave the following definition to immunity from seizure: the legal guarantee that cultural objects on temporary loan from another state will be protected against any form of seizure[75] during the loan period.

In practice, there are two main situations in which someone may wish to seize a cultural object that is temporarily on loan abroad. Firstly, if there is a dispute of ownership over a cultural object on loan (allegedly stolen or wrongfully appropriated). A claimant may attempt to file a claim in the borrowing state and to try to seize the object, supposing that his or her chances in the country where the cultural object is temporarily on loan are better, than in the country where the object is normally located.[76]

Secondly, if an individual or company is of the opinion that the owner of the cultural object on loan owes a debt (not necessarily related to the object) to the claimant and this claimant tries to seek to satisfy his claims from the debtor's property.[77]

Theoretically, there can be other cases as well, when – for instance – in the context of a criminal investigation, law enforcement officers may wish to seize certain cultural objects in order to preserve evidence.

Cases when priceless works of art were seized on the occasion of an exhibition every time caused shock and outrage in the museum community. This was the case for example in 2005, when the Swiss company Noga tried to seize 54 French masterpieces belonging to the Pushkin State Museum, Moscow, in the Fondation Pierre Gianadda, Martigny in

73 www.musee-orsay.fr/fr/collections/acquisitions/acquisitions-2015.html?zoom=1&tx_damzoom_pi1[path]=fileadmin%2Fmediatheque%2Fintegration_MO%2F1Kpix_RipplRonai_SoldatsFrancais.jpg&cHash=b88be3a2d9.

74 Action Plan for the EU Promotion of Museum Collection Mobility and Loan Standards, Helsinki University Press, Helsinki, 2006.

75 Every process of attachment, execution, sequestration, forfeiture, requisition, foreclosure, replevin, detinue etc. should be considered as included in this term.

76 Excellent examples of this could be the so-called *Schukin* case in Nout van Woudenberg, *State Immunity and Cultural Objects on Loan*, p. 282, published in 2012, or the *Romanov v. Florida International Museum* case in Nout van Woudenberg, Immunity from seizure: A Legal Exploration, p. 201, in *Encouraging Collections Mobility – A Way Forward for Museums in Europe*, 2010.

77 The *Noga* case in Nout van Woudenberg, *State Immunity and Cultural Objects on Loan*, p. 310, published in 2012.

return for the Russian Federation's debts to this company. The Director of the State Hermitage Museum in St Petersburg said that 'now works of art are being used as hostages in trade disputes'.[78] Although the seizure order was quickly cancelled by Switzerland's Federal Council, the Hermitage warned that no Russian museum would be able to send objects on loan to any venues unless it receives concrete legal guarantees that its artworks would not be seized during the loan period.

In most of the cases however, with in-depth provenance research, borrowing museums could be able to trace the history of the cultural object, and could possibly anticipate ownership claims. In addition, the ICOM Code of Ethics for Museums states in Article 2.2 that 'no object or specimen should be acquired by… loan… unless the acquiring museum is satisfied that a valid title is held.' And Article 2.3 goes on by stating that

> every effort must be made before acquisition to ensure that any object or specimen offered for… loan… has not been illegally obtained in or exported from its country of origin or any intermediate country in which it might have been owned legally. Due diligence in this regard should establish the full history of the item from discovery or production.

Therefore, to a certain extent, it could be calculated as to whether ownership claims may be expected, although this may not always be watertight.[79]

Immunity from seizure is essentially different from immunity from jurisdiction. Depending on the legislation of the borrowing state, the fact that cultural objects are immune from seizure does not automatically imply that it would be impossible to initiate legal proceedings in which the objects play a leading role. From this point of view, legislation of the various countries having immunity from seizure can be very different.

As the issue of immunity from seizure for travelling cultural objects has only relatively recently become a real concern for states and museums the relevant legislation in various states is comparatively new. In 1965, the United States was the first country ever to enact immunity from seizure legislation. France was the first state within the European Union in 1994, followed by Germany, Austria, Belgium and the United Kingdom and Finland, just to mention but a few.

After several years of lobbying by the Hungarian museums, the Hungarian Parliament adopted Act XCV of 2012 on the special protection of cultural objects on loan. Hungarian immunity from seizure has been regularly required by Hungarian public institutions

78 www.hermitagemuseum.org/wps/portal/hermitage/news/news item/news/1999_2013/hm11_2_221/?lng=hu.

79 Nout van Woudenberg, Immunity from seizure: A Legal Exploration, p. 202, in *Encouraging Collections Mobility – A Way Forward for Museums in Europe*, 2010.

organising international exhibitions and guaranteed – strictly for a limited period of time, which is 12 months – by the Forster Centre, the competent authority.

According to the practice of the Museum of Fine Arts, immunity from seizure is required by foreign lenders almost in the case of each international exhibition. Some lenders require such guarantee in consideration of the provenance of the object on loan, while others demand this legal guarantee automatically, as a general condition to any of the loans granted by the particular institution. This latter practice should be however discouraged.

4.5 In Conclusion

The protection of cultural heritage was included in the founding mission statement of the International Council of Museums (ICOM),[80] an organisation founded to bring together museums and museum professionals in the post-World War II world. Seven decades later, the protection of heritage in emergency situations, and the fight against illicit traffic of cultural goods is central to the activity of ICOM. Nowadays, museums – as for the protection of cultural heritage – also need to face global challenges like wars, illicit trafficking, terrorism, financial crisis, as well as increasingly devastating natural disasters.

To reinforce the museums' place and role in society, UNESCO adopted a Recommendation on the Protection and Promotion of Museums and Collections, their Diversity and their Role in Society on 17 November 2015.[81] This instrument for international intergovernmental policy development aims to emphasize that museums dedicate themselves to the development of knowledge and care of our shared heritage that shall be passed down to future generations.

80 Established in 1946, ICOM is a non-profit and non-governmental organisation maintaining formal relations with the UNESCO and having a consultative status with the United Nations Economic and Social Council (ECOSOC).

81 http://unesdoc.unesco.org/images/0024/002451/245176M.pdf.