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from Italy to Slovenia:
The State of International Law and Practice

Fakulteta za poslovne vede, Katoliški inštitut
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Restitution of Istria's Treasures from Italy to Slovenia: The State of International Law and Practice[1]

Abstract: The aim of this paper is to address international law aspects of the issue of restitution of around 100 cultural treasures from Italy to Slovenia, taking into account contemporary international law and recent developments of state practice. The artworks were evacuated by Italy from Koper (Capodistria), Izola (Isola) and Piran (Pirano) in 1940 to be protected before the war, however, after the Second World War Italy refused to returned them to the places of their origin. Many of these artifacts were taken from Catholic Church parishes, monasteries or belonged to the Diocese of Koper. The purpose of this study is to identify applicable standards and procedures which could serve to encourage all actors involved, mainly Slovenian and Italian authorities, but also private owners, to move this outstanding issue from the standstill. A main conclu-

1 The expressed positions in this article are author's personal positions and do not necessarily reflect the positions of the institutions where she is employed.

sion of this study is that both States should search for a compromise, mutually acceptable solution by applying international treaties, including the principle of territorial provenance, but also several practical techniques and various contemporary state practice. One possible solution would be to reach an agreement that UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation would facilitate negotiations or mediate the case. Another option might be that other actors, i.e. Diocese of Koper, Franciscans or Minorites, would undertake negotiations regarding the restitution of particular, most important artworks.

Key words: international law, cultural property, restitution, state succession, dispute resolution, Slovenia, Italy, Free Territory of Triest, Paris Peace Treaty with Italy, Osimo Treaty, Osimo Agreement

Vračanje istrskih dragocenosti iz Italije v Slovenijo: stanje mednarodnega prava in prakse

Izvleček: Namen članka je obravnavati mednarodnopravne vidike vprašanja vračanja okrog sto umetnin iz Italije v Slovenijo, upoštevajoč sodobno mednarodno pravo in nedavni razvoj prakse v posameznih državah. Italija je leta 1940 iz Kopra, Izole in Pirana evakuirala nekatera umetniška dela, da bi jih zavarovala pred vojno, vendar je po drugi svetovni vojni njihovo vrnitev v kraje izvora zavrnila. Številne od teh umetnin so bile odvzete katoliškim župnijam in samostanom ali pa so pripadale koprski škofiji. Namen te študije je opredeliti veljavne standarde in

postopke, ki bi lahko spodbudili vse vpletene, predvsem slovenske in italijanske oblasti, pa tudi zasebne lastnike, da se to odprto vprašanje premakne iz mrtve točke. Glavna ugotovitev študije je, naj obe državi poiščeta kompromisno in obojestransko sprejemljivo rešitev, in sicer z uporabo mednarodnih pogodb, vključno z načelom teritorialnega porekla, pa tudi več praktičnih tehnik ter različnih praks sodobnih držav. Ena od možnih rešitev bi lahko bila, da Medvladni odbor za spodbujanje vračanja kulturnih dobrin v državo izvora ali njihovo vračanje v primeru nezakonite pridobitve UNESCO posreduje pri pogajanjih ali v tej zadevi vodi mediacijo. Druga možnost je, da tudi drugi akterji, to je koprska škofija, frančiškani ali minoriti, samostojno vstopijo v pogajanja o vračanju posameznih oziroma najpomembnejših umetniških del.

Ključne besede: kulturna dediščina, vračanje, mednarodno pravo, nasledstvo držav, reševanje sporov, Slovenija, Italija, Svobodno tržaško ozemlje, Pariška mirovna pogodba z Italijo, Osimska pogodba, Osimski sporazum

Uvod

The issue of the ownership and restitution of around 100 works of art, so-called Istria's jewels, which Italian authorities decided to remove or evacuate from the costal Istrian municipalities of Koper (Capodistria), Izola (Isola) and Piran (Pirano) in 1940 to the inland Italy is among the outstanding issues of mutual relations between the Republic of Slovenia and the Italian Republic (Urad 2015), as well as between the Republic of Slovenia and the Koper Diocese. (STA 2015) The reason is that since the end of the Second

World War, Italy has been refusing to restitute or return the artworks to the places of their origin, i.e. to a territory which became after the post-Second World War decisions first a part of the Free Territory of Triest (FTT), then a part of Socialist Federal Republic of Yugoslavia (SFRY) and after its dissolution in 1991 a part of the Republic of Slovenia. Before and after its independence Slovenian authorities have repeatedly asked for the restitution or return of evacuated artifacts (objects) to the places from which they had been taken and where they had been commissioned, however, so far unsuccessfully. Simultaneously, Italy transferred also extensive book material and archives, including Statutes of the mentioned littoral municipalities and registers of Stud farm in Lipica, which Italy also refused to return to the owners and the places of their origin where they are of major importance to the cultural heritage. Due to length limitations the present paper does not address the connected and also, to a certain extend, particular issues of the restitution of archives. After giving a short factual and legal historical introduction of the case and negotiations, the paper examines the international law aspects of the case, including different legal positions of Slovenia and Italy on the issue and applicable means of dispute resolution. The last chapter concludes the discussion with main findings and conclusions.

A short factual and legal background and state of negotiations

In July 1940 the Italian authorities, based on the Italian legislation, transferred the cultural artifacts (objects) into inland Italy. Italian authorities took the works of

art, created by the most prominent painters and sculptors of the Venetian school of 14th to 18th centuries, from churches, monasteries and museums in Koper, Izola and Piran. (Hoyer 2005a) However, the preparations of Italian authorities to preserve artworks of great national and artistic value from a possible war destruction (bombing) began already in 1931. On 22 January 1931 the first Circular was published by the Italian Ministry of National Education which raised the issue of the protection of artworks in the event of war. On this basis, a list of artworks, which existence should be protected, was established. All relevant organisational activities concerning the removal of cultural objects was organised by the Superintendence in Triest. The collecting and transportation of artworks was preformed within two weeks in June 1940 (Hoyer 2005a) in conformity with domestic Italian legislation. (Jakubowski 2015, 283) The removal was also approved by local and Church administration. (283) In deed of 29 February 1940 the letter was sent by the Diocese of Triest-Koper to the parish office in Piran regarding the preparation of the works of art for the protection and transport. (Hoyer 2005b, 122) Several Church documents can, however, be used as the evidence of the missing evacuated works. Already on 1 June 1954 the list of missing works of art from St. Anne's Church and Monastery in Koper was prepared by the Minorits. (117; 125) On 27 September 1955 the provincial minister of the Franciscan province of Padua, in a letter to the provincial minister of the Franciscan Monastery in Ljubljana, confirmed the list of 105 sacral objects for »the Church of St. Anne in Koper to whom they belonged«. (147) On 17 October 1977, few weeks after the entry into force of the Osimo Treaty, the Holy See formalised also the ecclesiastical border between Yugoslavia and Italy.

The Pope, following the formally established Yugoslav-Italian state border, issued a papal bull which undertook the formal division of the Diocese of Triest-Koper into the Diocese of Triest and the Diocese of Koper. (Paulus VI 1977)

Already a brief legal overview of the history of the region shows a multicultural and historically diverse character of the Slovenian Istria. This is why it is not surprising that the »Istrian jewels« are claimed to be of major significance to the cultural heritage of the Slovenian Istria. Its territory was over the centuries under the rule of several authorities, consequently, a multiethnic population is characteristic for the region even today. Istria was for four centuries a part of the Republic of Venice, after its fall in 1797 the sovereignty over Istrian peninsula and the city of Triest varied several times between Napoleonic states and Austria, while eventually the Congress of Vienna in 1815 granted the entire territory of the Venice Republic, including a multiethnic Istria, to Austria. After the First World War and after the dissolution of the Austro-Hungarian Empire Istria was ceded to the Kingdom of Italy. Consequently, around half a million of Slavic population, mostly Slovenes, were subject to forced Italianization until the fall of the Fascist regime in Italy. (Kacin Wohinz and Troha 2001, 103–138)

After the defeat of Italy in 1943 and the end of the Second World War in 1945, a large part of the Istrian peninsula, following the Peace Treaty with Italy from 1947, was ceded to the new socialist Yugoslavia, while the north-western coast of the peninsula, including the municipalities of Koper, Izola and Piran, as well as the city of Triest with its surrounding areas, formed the FTT – a new independent authority. (139–149) In 1954, with the London Memoran-

dum of Understanding, and formally in 1977, with the entry into force of the Osimo Treaty from 1975, the border between SFRY and Italy was decided also regarding the territory which was since 1947 under the authority of the FTT. (150–161) With the independence of the Republic of Slovenia, proclaimed on 25 June 1991, Slovenian Littoral, including the three relevant municipalities, became part of Slovenia.

The current factual situation of the Istrian treasures is that at least 97 works of art were taken by Italian authorities from the Slovenian Littoral for preservation reasons, but have not been returned to the places of their origin after the end of the war. (Hoyer 2005a) After their location was unknown for decades, in 1990 the objects were for the first time identified and in 2002, after being found in bad condition, renovated by Italy. (Hoyer 2005a, 17; Jakubowski 2015, 283–284) In 2005 an exhibition of some of the artworks took place at the Revoltella Museum in Triest. At this and some other occasions, Italian representatives have stressed that Italy has no intention to return the cultural objects to the places of their origin and their owners in Koper, Izola and Piran, but has an interest to maintain and restore the entire collection of transferred artworks in Italy. Slovenian Minister of Culture, however, expressed her regret in 2015 that the cultural treasures of Slovenian Littoral are now stored in depots, while in Slovenia the altars, cloisters and some municipal buildings are »empty«. (Primorske novice 2015)

The efforts to resolve the issue of the return of evacuated works of art from Italy to Slovenian Littoral, including Koper, Izola and Piran, started immediately after the

Second World War. (Žitko 2005, 76) The issue of the restitution of cultural objects was included in 1947 Peace Treaty with Italy and also in the 1975 Osimo Treaty. Following the exchange of letters of Yugoslav and Italian foreign ministers in 1975, a mixed Yugoslav-Italian delegation was established to settle the issue. The mixed delegation met for four times (in 1978, 1979, 1981, and 1987). Since then, despite several invitations by the Head of the Yugoslav delegation Borut Bohte, no further meeting took place. (78–79) In addition, in 1988 a study on the legal problems of the restitution of cultural valubles in the framework of the Osimo Agreement was prepared. According to Salvator Žitko, the claims for restitution of cultural valuables from the former territory of Zone B of the FTT (works of art, archive material, cadastral and land registers) and also from the ceded territories were of utmost importance and firmly grounded in international legal documentation: in the 1947 Peace Treaty with Italy, its Annex XIV, and in 1975 Minić-Rumor letters. (80) Following the dissolution of Yugoslavia, according to publicly available data, Slovenia was the only SFRY successor state which brought a claim against Italy for the restitution or return of cultural objects. In 1992 the first exchange of notes took place and both states agreed to search for a solution in respect of the implementation of the 1975 Osimo Treaty, including the issue of cultural property. (Žitko 2005, 81; Jakubowski 2015, 286) Since 1993, Slovenia has been raising this issue regularly during the diplomatic consultations and bilateral visits, as well as in writing in several verbal notes, however, the issue has never been discussed in substance. So far Italy showed no readiness to tackle the issue in a more

concrete manner. (Žitko 2005, 80–81) In 2005 Slovenia also issued a formal request to Italy and presented an official motion to the International Council of Museums Legal Affairs and Properties Committee, asking for assistance in the settlement of the dispute. (ICOM Minutes 2005) Again, no substantial follow-up was made to this initiative. This outstanding issue of the artworks from Koper, Izola and Piran was exposed also at bilateral meetings between Slovenia and the Holy See. As of 2017, the issue remains unsolved and no concrete bilateral or other framework is established to address the issue and find a solution in spirit of the growing international awareness of the importance of the cultural heritage.

Application of international law and the analysis of different legal positions of Slovenia and Italy

The legal arguments of Slovenia and Italy differ on several issues, and can be identified through several public statements or reactions of both sides. The basis of the legal argumentation of the claims of Slovenia and Italy might be found already before 1991 and continue ever since. (Žitko 2005, 79) The differences can be identified regarding the existence of treaty and international law obligation, as well as the application of the procedural principle of co-operation. It needs to be noted that, despite some recent developments regarding the cultural heritage dispute resolution, under the (traditional) international law the issue of restitution or return of cultural property is firstly and far most an inter-state matter.

Bilateral framework: the application of the 1947 Peace Treaty with Italy and 1975 Treaty of Osimo

Article 12 of the Treaty of Peace with Italy, which was signed on 10 February 1947 and entered into force on 15 September 1947, states, *inter alia*, that

> »Italy shall restore to Yugoslavia all objects of artistic, historical, scientific, educational or religious character (including all deeds, manuscripts, documents and bibliographical material) as well as administrative archives (files, registers, plans and documents of any kind) which, as the result of the Italian occupation, were removed between November 4, 1918, and March 2, 1924, from the territories ceded to Yugoslavia under the treaties signed in Rapallo on November 12, 1920, and in Rome on January 27, 1924.«

Further, by Article 75: »Italy accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations.« In addition to the above provisions, Annex XIV of the Peace Treaty with Italy provides also that »the Successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it under the present Treaty, as well as all relevant archives and documents of an administrative character or historical value concerning the territory in question, or relating to property transferred under this paragraph.« And also: »The Italian Government shall transfer to the Successor State [Yugoslavia] 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 therefrom without payment and are held by the Italian Government or by Italian public institutions.«

The above provisions are clear regarding the ceded territory, however, they are not directly applicable to the territories of the Slovene municipalities of Koper, Izola and Piran, which became part of the FTT, established under Article 21 of the Peace Treaty with Italy. In this respect, Annex X (Economic and Financial Provisions Relating to the Free Territory of Triest) to the Peace Treaty provided the following Italian obligation: »Italy shall hand over to the Free Territory all relevant archives and documents of an administrative character or historical value concerning the Free Territory or relating to property transferred under paragraph 1 of this Annex.« Paragraph 1 of Annex X provided that the FTT receives, without payment, Italian State and para-statal property – movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations – within the Free Territory.

Aiming to implement the Peace Treaty with Italy regarding the cultural treasures, Yugoslavia and Italy concluded the Agreement on Regulation of Restitution of Cultural Valuables to Yugoslavia in 1961. The agreement represented a total and definitive regulation of all questions, connected to Italy's liabilities regarding the 1947 Peace Treaty – as far as they referred to the restitution of cultural valuables mentioned in the quoted articles and originated either in the territory which was a constitutive

part of Yugoslavia until 1941 or from the territory ceded on the basis of the 1947 Peace Treaty and were certainly present on these territories before May 1945. (Žitko 2005, 77) Slovenia did not succeed this agreement. Clearly, the FTT was not considered as ceded territory within the meaning of Article 19 and Annex XIV of the Peace Treaty. However, Italian sovereignty over the area constituting the Free Territory of Triest terminated upon the coming into force of the Peace Treaty. Accordingly, Articles 12 and Annex XIV of the Peace Treaty are not applicable to the issue of the restitution or return of those works of art which place of origin was Koper, Izola or Piran (i.e. part of the territory which became part of Zone B (i.e. Yugoslav administration) of the FTT). Owning to the fact that it has proved impossible to put into effect the provisions of the Peace Treaty with Italy relating to the Free Territory of Triest, the London Memorandum of Understanding was concluded on 5 October 1954, providing for practical arrangements regarding the boundaries between Yugoslavia and Italy, the rights of minorities, etc. However, it contained no provisions on the restitution or return of cultural objects from Italy to Yugoslavia.

Also, the Treaty on the Delimitation of the Frontier for the Part not Indicated as such in the Peace Treaty of 10 February 1947 (hereinafter the 1975 Osimo Treaty) and the Agreement on the development of economic co-operation (hereinafter the 1975 Osimo Agreement), both signed at Osimo, Ancona on 10 November 1975, provided no substantial agreement regarding the allocation of artworks from Zone B by Italy, although certain attempts to address the question were made during the treaty negotiations. At the time of signing the Treaty and the

Agreement, the representatives of both states, foreign minister of SFRY Miloš Minić and foreign minister of Italy Mariano Rumor, also exchanged several letters. In one of them they agreed as follows:

> »Within six months from the date of the entry into force of the said Treaty, delegations appointed respectively by the Italian Government and the Yugoslav Government shall meet in a place to be determined in order to consider issues relating to cultural property, works of art, archives, and land registers pertaining to the territory referred to in article 21 of the Treaty of Peace with Italy of 10 February 1947. The remaining issues relating to archives and land registers pertaining to the territory ceded by Italy to the Socialist Federal Republic of Yugoslavia under the Treaty of Peace with Italy of 10 February 1947 shall likewise be considered during the same meeting.« (Osimo agreement 1975, 143–144)

The legal status of the exchanged letters could best be described with the latine phrase *pactum de contrahendo* – being fully aware that the exact meaning of this phase is uncertain. (Aust 2007, 31) Yugoslavia ratified both letters (Ib and IIb) as part of the 1975 Osimo Treaty, while Italy registered both letters with the Secretary General of the United Nations in accordance with Article 102 of the United Nations Charter on 9 July 1987 as part of the 1975 Osimo Agreement. In any case, both sides have agreed that the letters are part of the overall formal Osimo compromise. Be it that way or another, from the introductory sentence of the agreement concluded through the exchange of letters, it follows that both sides agreed about the substance of the letters »during the negotiations which resulted in

the signing of the Treaty between our two countries on today's date«. It was agreed that the »issues relating to cultural property, works of art, archives« pertaining to the FTT needed to be considered and that this outstanding issue is considered after the entry into force of the 1975 Osimo Treaty. The Osimo Treaty and the Osimo Agreement entered into force on 11 October 1977. The Parties adopted also a Final Act of Osimo negotiations which shows how complex the bilateral negotiations were. The Final Act indicates that at the close of negotiations both sides agreed that: »The two agreements shall be ratified as soon as possible in accordance with the constitutional procedures in force in the two countries. The instruments of ratification of the two agreements shall be exchanged on the same date and the two agreements shall enter into force simultaneously on the day of the exchange of the instruments of ratification.« The wording shows how sensitive the overall compromise was. At the close of negotiations both Parties agreed that they should make a commitment to ratify both agreements simultaneously, together with all annexes and, in practice, also with all exchanged letters.

As mentioned above, in the following years, Yugoslavia and Italy did not manage to solve the issue of the restitution of cultural property to Koper, Izola and Piran, despite the general agreement reached with the exchange of letters during Osimo negotiations to properly address the issue. Even if the exchange of letters would be considered merely as *pactum de negotiando* (and not as *pactum de contrahendo*), the negotiations need to be carried out *bona fide*, with the aim to reach a final settlement of a dispute. Or in other words: treaties have to be

implemented in good faith. (Aust 2007, 353) Also one of the most prominent scholars on the state succession and cultural property Andrzej Jakubowski (2015, 285) observes that such negotiations never produced any effect and that the evacuated objects remained carefully hidden for more than 60 years in wooden crates. He concludes that nowadays Slovenia can invoke both treaties (1947 Peace Treaty and 1975 Osimo Treaty), as well as an exchange of letters between SFRY and Italy.

Interestingly, in the 1975 exchange of letters the same wording is used: »To consider issues relating to cultural property, works of art, archives, and land registers pertaining to the territory referred to in article 21 of the Treaty of Peace with Italy of 10 February 1947.« And likewise: »The remaining issues relating to archives and land registers pertaining to the territory ceded by Italy to the Socialist Federal Republic of Yugoslavia under the Treaty of Peace with Italy of 10 February 1947.« The 1947 Peace Treaty with Italy obliged Italy to restore to Yugoslavia an extensive array of cultural material relating to the ceded lands, based on the rudimentary principle of territorial provenance – the Treaty provided for the unconditional return of such properties originating from the ceded territory. The return of the transferred cultural objects to the places of their origin relating to the entire territory ceded to Yugoslavia (first part in 1947 and second part in 1977) would also be a logical interpretation of the objectives of both treaties. Also the 1961 Agreement on the regulation of restitution of cultural property, which aimed to implement the 1947 Peace Treaty regarding the return of the cultural property, was based on the principle of territorial origin of the cultural object. (Jakubowski 2015, 285) Yet,

the Italian position, as reconstructed from few public opinions made by the Italian representatives in 2005 and 2007, has been to the opposite, i.e. that Italy is under no obligation to return the artworks from Koper, Izola and Piran (i.e. from the territory which was after the Second World War not ceded to Yugoslavia, but became part of Zone B of the FTT) to Slovenia, since artworks had been transported within the territory of Italy and the evacuation was done in accordance with Italian legislation prior to war. Italy has also claimed it had a right and duty to evacuate and displace its cultural treasures endangered by war. (287–288)

Such a position seems somehow contrary to the fact that the Republic of Slovenia succeeded to the Osimo Treaty and Agreement in 1992 (Akt o notifikaciji) and that Italy agreed to the succession. However, not only the 1947 Peace Treaty with Italy contained a very complex set of provisions on the reparation of cultural property to Yugoslavia, based on purely territorial considerations, but in post-Second World War theory and practice regarding the allocation of cultural assets in cases of territorial transfers developed considerably. Thus, the territorial factor conditioned the inclusion of cultural aspects of state succession in the broader discourse on restitution. (Jakubowski 2015, 6) Also, legal literature generally put forward the principle of territorial provenance to govern the situations of cultural property removed in armed conflicts and territorial transfer alike. (Vásárhelyi 1964; Kowalski 2001) Accordingly, with the words of Jakubowski (2015, 6): »A successor state may have a claim based on customary international law to recover all movable cultural heritage

(not only state property) removed from the territory to which succession related.«

It is another Italian argument that many private owners of artworks from Koper, Izola and Piran fled to Italy; therefore, they were no longer domiciled in the ceded territory and also the property of Italian Catholic Church parishes was transferred together with the local communities. (287) The fact is that a legal status of the evacuated cultural property from Istria was indeed not the same, since it comprised artworks of state and private, mainly Catholic Church, owners. Clearly, Article 75 of the 1947 Peace Treaty and point 4 of its Annex XIV do not classify the property as public or private, but simply refer to »property«, or »all objects of artistic, historical or archaeological value belonging to the cultural heritage of the ceded territory«. Besides, the 1961 Yugoslav-Italian Agreement included the artworks owned by private owners, including the Catholic Church. Suggested public-private property division was unknown also to Yugoslav-Italian negotiations in 1970s and 1980s. During these negotiations, Yugoslav delegation acted also upon authorisation of the Catholic Church as a predominate owner of the objects in private property. The cultural objects in private ownership are thus not excluded from the treaties. However, in public international law the obligations, duties and rights exist primarily between states. This means that with the restitution or return of cultural objects the predecessor State would fulfil its obligations, while it is then up to the successor State to fulfil its obligations towards the private owners. At the same time, such approach does not prevent private owners to undertake a private legal action in

accordance with the private international law against the possessors of their property before the competent courts.

Based on the above brief legal analysis of the bilateral framework, the following conclusions can be made:

1. As also concluded by Andzrej Jakubowski (2015, 289), even if one accepts the argument that the obligation to return the cultural objects under Article 12 of the 1947 Peace Treaty does not apply to the artworks removed by Italy from Zone B of the FTT, it does not, however, exclude the right of Slovenia to the cultural heritage (property) of that territory. Slovenia can also invoke the 1975 exchange of letters, when both sides agreed that the matter of artworks pertaining to the FTT needed to be considered. In such cases, successor state would be entitled to claim for the reintegration of its cultural treasures, based on the rudimentary principle of territoriality. The treaties also do not establish any time limitation to make a claim.
2. The disputed cultural objects, removed from public institutions, museums and churches, are territorially linked to the Istrian municipalities under the sovereignty of Slovenia.
3. Despite a clear obligation to address the issue of the restitution of all cultural objects to Slovenian Littoral, including to the municipalities of Koper, Izola and Piran, in order to reach a final solution on the matter, no substantial or expert negotiations took place already since 1987 despite several initiatives made by Slovenian side. There have been some general agreements to address the issue, however, there was no follow-up.

Therefore, a relevant question for our further consideration is what other grounds or forums could be evoked by the Parties to reach a solution of this outstanding bilateral issue.

Multilateral framework: the application of multilateral treaties relevant in war and peace time

The restitution of cultural property in armed conflict was codified in the 1907 and 1908 Hague Conventions concerning the laws and customs of war in similar terms, as later in the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1954 and 1999 Protocols, prohibiting all acts of destruction, theft, or pillaging of cultural property. Most important is the 1954 UNESCO Protocol which in Article I establishes that cultural property shall never be retained as war reparations. In addition to the above treaty regime, after lengthy negotiations, UNESCO presented also a final text of the Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War in 2007. The proposed text provided for an obligation to return cultural property to the territories from which it was taken, applied no time limit in dealing with such cases and did not provide for a possibility of restitution-in-kind. However, due to the sensitivity of the topic, as well as the lack of any definition of the Second World War, it was rejected (Jakubowski 2015, 197–198) by three votes against and two abstentions. In March 2009, the Intergovernmental meeting of experts on the preparation of a draft declaration of principles relating to cultural objects displaced in connection with the Second World War took place again at the UNESCO headquarters

in order to make further efforts to prepare an acceptable text for adoption. A consensus was, however, not reached. (UNESCO General Conference)

Regarding the discussed Istrian cultural treasures evacuated from Koper, Izola and Piran, the Italian view was that the issue at stake could not be examined in light of the international regime on the protection of cultural property in the event of war, in particular of the above mentioned UNESCO Draft Declaration of Principles. (Jakubowski 2015, 288) Jakubowski supports the position that the art treasures from Istria can by no means be treated as property looted or unlawfully displaced during the war, therefore, the Italian position that the majority of objects were evacuated by the Italian administration in 1940 from the territories under Italian sovereignty for preservation reasons and, in conformity with the law applicable at the time of removal, needs to be fully supported. (289) However, even Italian representatives cannot avoid connecting these events to the war situations. For example, in the formal statement by the Italian government in response to 2005 Slovenian request to continue negotiations, Italy argued that there was no obligation to return the artworks to Slovenia, since Italy had the obligation and duty to evacuate and displace its cultural treasures endangered by war operations. (287) This implies that the cultural treasures were removed from Istria in connection to the Second World War. Indeed, in June 1940 Italian authorities transferred the cultural objects from Koper, Izola and Piran into inland Italy based on the Italian laws of 1 June 1939 and 6 July 1940 regulating the removal from frontier areas for protection of the objects of artistic, historic, bibliographic and cultural interest from war destruction. (Hoyer 2005a,

59) While the restitution of cultural objects to the ceded territories, which were removed under the same Italian legislation which was tackled in the 1947 Peace Treaty with Italy, there seems no convincing argument that the evacuation of the Istrian treasures from the Slovene Littoral (at the time Kingdom of Italy and then FTT) would be considered not to be in connection with the Second World War.

Regarding the restitution of cultural valuables in peace time, the UNESCO Convention from 1970, which entered into force on 24 April 1972, contains also a restitution provision. According to Article 7(b)(ii) of the Convention, States Parties undertake, at the request of the State Party »of origin«, »appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property«. More indirectly and subject to domestic legislation, Article 13 of the Convention also provides provisions on restitution and cooperation. The UNESCO Convention also introduces the idea of strengthening cooperation among and between States Parties, which is present throughout the Convention. The 1970 UNESCO Convention is ratified by Italy and succeeded by Slovenia. However, it is not applicable to the situations before its entry into force. Yet, its Article 15 provides that: »Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory

of origin, before the entry into force of this Convention for the States concerned.«

In 1995 on request of the UNESCO, the International Institute for the Unification of Private Law (UNIDROIT) prepared the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which was adopted in Rome on 24 June 1995 and entered into force on 1 July 1998. The UNIDROIT Convention is ratified both by Italy and Slovenia. However, the provisions of Chapter II (Restitution of stolen cultural objects) and Chapter III (Return of illegally exported cultural objects) of this Convention shall apply only in respect of a cultural object that is stolen or illegally exported after this Convention enters into force in respect of the State where the claim is brought. (Article 10) The 1995 UNIDROIT Convention complements the 1970 UNESCO Convention from the private international law point of view. While the 1970 UNESCO Convention obliges states to take necessary measures (Article 7), the 1995 UNIDROIT Convention enables both states and individual owners who wish to recover a stolen object to file a complaint before a foreign court. (Article 6–7) Article 3 of the 1995 UNIDROIT Convention establishes a very simple and clear rule: »The possessor of a cultural object which has been stolen shall return it.« Of particular importance to the present case study is Paragraph 2 of Article 5 which establishes: »A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.«

This very principle applied *mutatis mutandis*, might explain the current status of the so-called Istrian jewels. Even if one accepts Italian argument that the artworks were evacuated from Slovenian Littoral (Koper, Izola and Piran) in 1940 for preservation reasons and in accordance with the legislation in force, one should fully agree with Jernej Letnar Černič (2008, 19) that this argumentation cannot explain why Italian side rejects Slovenian requests for the restitution of artworks as unjustified – even more so, as Slovenia seems to have an interest to return artworks to their primary owners. According to Letnar Černič (19), it seems indisputable that the artworks have been stolen and also maybe even a criminal offence was committed. According to the available data, the Diocese of Koper possesses documents issued by the Italian ministry for education which contain the confirmation that the artworks, displaced from churches and monasteries in Koper, Izola and Piran, would be returned to their owners after the end of the war. Legal basis for these objects, which are property of churches and monasteries of the Diocese of Koper, is obviously on the Slovenian side. (19–20)

Some authors suggest that internal legislation, like the Return of Unlawfully Removed Cultural Heritage Objects Act (Zakon o vračanju), could be invoked in order to enforce the restitution of disposed Istrian artworks. (Belaj 2011, 59) However, the mentioned act was adopted for the implementation of the Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from a Territory of a Member State which is in force with the date of Slovenian European Union membership (i.e. of 1 May 2004), while the Directive and the Implementation Act provide for the return of a cultural object when it has left

the territory of a Member State unlawfully after 1 January 1993 and is located in the territory of another Member State. On 15 May 2014, the European Parliament and the Council adopted Directive 2014/60/EU on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, a recast of the 93/7/EEC Directive. While the European Union secondary legislation seems not to be applicable to the case study of the restitution of Istrian treasures, it is worth noticing that both directives are based on the principle of territorial provenance. Paragraph 10 of the 2014/60/UE Directive provides that »Member States should also facilitate the return of cultural objects to the Member State from whose territory those objects have been unlawfully removed regardless of the date of accession of that Member State, and should ensure that the return of such objects does not give rise to unreasonable costs«. In this regard, Italy might have difficulties to identify legal basis for its possession of the Istrian cultural valuables, which it possesses without clear title and rejects to return to the places of their origin. Undoubtedly, treaty law (1947 Peace Treaty with Italy, 1954 Hague Convention, 1954 Hague Protocol, 1970 UNESCO Convention, 2001 Agreement on State Succession of five SFRY successor states) reaffirms the rudimentary nature of the principle of territorial provenance.

However, the analysis of contemporary international practice shows that despite the above legal framework the principle of territorial provenience is not the only applicable principle in the event of restitution, return or relocation of cultural property. Already in 2001, Institute de Droid International Resolution, entitled State Succession in Matters of Property and Debts, established that the

interstate arrangements in such matters shall be carried out according to the principles of territorial provenance and of major significance to the cultural heritage of a successor state. In addition, the resolution states that such objects should be identified as soon as possible. Some scholars, such as Yves Hugguenin-Berhenat and Anderzej Jakubowski (2015, 9; 321–334), further suggest that four non-binding principles should be followed by states when negotiating the allocation of movable cultural properties: the principle of territorial provenance (origin) of cultural assets is the first rudimentary principle which is combined with the second principle of the preservation of cultural heritage. These two principles might be contradicted to the principle of the integrity of internationally ranked collections. Finally, simply the principle of equity might be evoked.

In case of Istrian artworks, if considering also other criteria, the overall history of the ethnically diverse region should be considered. At presence, Koper, Izola and Piran are the area where autochthonous Italian national community lives and is granted special rights under the 1991 Constitution of the Republic of Slovenia (URS), including a direct representation in representative bodies of local self-government and in the national Parliament, providing that in those municipalities where Italian national community resides Italian shall also be the official language (Articles 5, 11 and 65 of the Constitution of the Republic of Slovenia). Second, the Catholic Church parishes and Diocese of Koper seem to work together with the state in favour of the restitution or return of the artworks. *Res clamat ad Dominum* is a quote used by the former Koper bishop Metod Pirih for decades in respect of Slovenian claims

towards the restitution of cultural heritage, mainly regarding the artworks owned by the Diocese of Koper and the Franciscans monasteries in Piran and Koper. (Šuligoj 2016) Accordingly, the disputed cultural objects are also of major significance to the cultural heritage of the population, the territory and mentioned three municipalities in Slovenian Littoral, which means that, also invoking other emerging principles, it would basically bring the same result as applying the principle of territorial provenance.

Various contemporary means of dispute resolution and the application of the procedural principle of cooperation

The above differences in Slovenian and Italian positions regarding the existence or non-existence of international legal obligations to return the relevant cultural treasures retained in Italy to the places of their origin (i.e. Koper, Izola and Piran), call for an effective dispute resolution mechanism. But in the absence of binding compromissory or arbitration clauses (or rather of any compulsory legal means) in the existing international law framework, there are several non-binding possibilities to settle the dispute, either through negotiations, mediation, conciliation or even arbitration and by applying the procedural principle of cooperation in good faith. For these reasons, the findings of Marie Cornu and Marc-André Renold (2010) that alternative methods of dispute resolution are an important and enlightening source of information on various developing practise addressing the return, restitution, and repatriation of cultural property, seem to be of crucial importance. For this reason, relevant parts of

their study will be summed-up herein, after addressing an innovative and developing role the UNESCO Intergovernmental Committee has in facilitating negotiations between states.

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

Firstly, in 1978 the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) was established within UNESCO. Its aim, according to the Paragraph 1 of Article 4 of ICPRCP, is to seek »ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin«. It is generally recognised that its scope is therefore extremely wide, covering for example thefts as well as removals during colonization. (Cornu and Renold 2010, 2; Prott 2009)

The ICPRCP assists with seeking interstate solutions in specific cases of restitution or return. According to Article 1 of its Statute, its role is of advisory nature and its services are available to Member States and Associate Members of UNESCO. This means that the ICPRCP's recommendations concerning States' disputes are not legally binding. The broad function of the ICPRCP is described in Article 4 of the Statute, *inter alia* it is responsible for:

1. Seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin. In this connection,

the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned.

2. Promoting multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin.

In 2005, the UNESCO's General Conference adopted at its 33rd session a resolution (33 C/46) that explicitly articulates the mediatory and conciliatory functions of the Intergovernmental Committee. In addition, the ICPRCP Statute was amended and The Rules of Procedure for Mediation and Conciliation in accordance with paragraph 1 of Article 4 of the Statute of ICPRS were adopted in October 2010. (UNESCO Mediation) According to Article 1, Paragraph 2, the condition to apply to the mediation and arbitration procedure is an agreement of the parties in dispute. The Rules of Procedure for Mediation and Conciliation are meant to be complementary to the work of the ICPRCP. The Rules of Procedure are conceived under the general principles of equity, impartiality and good faith, which are intended to promote harmonious and fair resolution for disputes concerning the restitution of cultural property. In proceedings States may also represent the interests of public or private institutions located in their territories, as well as those of their nationals. (UNESCO Restitution)

It is of particular importance that UNESCO Member States which are calling for their restitution or return of cultural objects of fundamental significance, in cases where international conventions cannot be applied, may call on the ICPRCP. Even if disputes *prima facie* do not strictly apply the dispositions of the UNESCO Convention, the solutions

are often adopted in accordance with the spirit and the principles contained in the 1970 UNESCO Convention. Such examples of good practice of returning of cultural objects of major significance to the country of origin are the Switzerland-Egypt return of 32 ancient cultural objects of June 2015, Germany-Italy return of a collection of grave goods dating back to the 5th Century BC of January 2015, Germany-Greece return of two objects from the Cycladic culture of June 2014, and Germany-Iraq return of ancient artifacts of September 2013. (UNESCO Other Cases)

The ICPRCP has 22 Member States with a four year-term, renewed by half every second year at the UNESCO General Conference. Italy is a member of the Intergovernmental Committee from November 2015, while Slovenia is not a member. However, the composition of the committee should not be an obstacle to submit the issue for its consideration. For such cases, equal treatment of both sides in dispute is guaranteed in Article 8 (Paragprahph 1) of the ICPRCP Statute.

Other alternative means of dispute resolution

According to Cornu and Renold (2010, 3), »the idea that there is a moral duty to make restitution of, or pay compensation for, highly valuable or significant cultural heritage items is strongly gaining ground, especially when the dispossession dates back to a period of colonial domination«. Historically, the end of war or armed conflict has often resulted in the restitution of cultural property as required by the peace treaty. While the traditional tools of interstate relations are still used for the restitution of cultural property (10), in recent years »voluntary« restitu-

tions occur in situations where there do not appear to be any available legal means of convincing or compelling a party to make restitution. For example, France made a gesture of good will and entered the negotiations with Nigeria on the subject of the Sokoto and Nok statuettes unlawfully exported from Nigeria and acquired by France in 1999. The reached agreement acknowledegs Nigeria's owneship of the objects, which remain on deposit with the Quai Branly Museum for 25 years, renewable by joint agreement. (2–3) Also in December 2000, Italy and Libya voluntarily agreed to the resitution by the former to the latter of many objects removed during the colonial period. (10) Voluntary restitution may also be made by private individuals. (5) Italy also reached the agreement with Ethiopia to hand back to Ethiopia the Aksum Obelisk and also bore all transport, reconstruction and restoration costs. (19) Restitution is either unilateral, based on state internal legislation, or bilateral, negotiated with or without mediation or referred to conciliation or arbitration. (10)

Secondly, a recent development has brought the emergence of other actors entitled to claim ownership of certain objects. Many cases of restitution of cultural property involve entities such as museums, where ICOM plays an active role. The ICOM Code of Ethics for Museums contains several recommendations that encourage the return of such property. Recent example of restitution of cultural property by museums include the restitution agreements concluded in 2006 and 2007 between Italy and some museums in the United States of America (e.g. Metropolitan Museum of Art in New York, Museum of Fine

Art in Boston, J. Paul Getty Museum in California). The American museums agreed to make restitution of objects of dubious provenance that might have been obtained from illegal excavations. But they did so in exchange of the commitment of the Italian government to allow loans of similar works, some of which are specifically listed. (12) However, in cases if objects belong to the national heritage, there is more at stake than the power of the owner over the object. In such cases, transfer of ownership may require official authorization and is sometimes prohibited. Such case was for example the rejection of the request of Zambia concerning the Broken Hill skull by the museum with the support of the British Government. In some cases there is nothing to prevent museums, including national museums, from agreeing to long-term loans. In other cases, special laws may override the prohibition of disposal, while in some cases the prohibition of disposal is absolute. (8–9)

Another type of the agreement is one that follows mediation. Mediation is a popular tool and has been expressly supported by many bodies, such as ICOM and ICPRCP of UNESCO. Some mediation agreements are confidential, while other, usually when involving states or public authorities, are made public. The ICPRCP chooses to focus its efforts on the objects forming part of a state's heritage, i.e. on the items of the highest importance, whether they are in public or private hands. Their symbolic or religious value or importance to the state of origin should, in principle, command respect. Although the ICPRCP also promotes conciliation and the UNIDROIT Convention, according to Article 8, Paragraph 2, provides that the parties

may agree to submit the dispute to arbitration, these two means of dispute resolution are rarely used and are not popular. (12–14)

In practice, a crucial question to be determined is the following: Which property is vital to and inseparable from the countries or communities that produced it and in which way it is connected with the state considered to have a greater right to posses it? The notion of the country of origin is not always a clear-cut. (15) In practice, several states classify such property as national treasure or include it in *ad hoc* record. However, states do not always identify the cultural property that they consider important, which is part of the difficulty in the application of this criterion. The notion of state of origin can in practice also be defined in terms of a link between a community and cultural object. (15) Therefore, the Institute de Droit International resolution defines a country of origin of a work of art as »the country with which the property concerned is most closely linked from the cultural point of view«.

According to Cornu and Renold (18–23), the variety of restitution solution is impressive, for example a simple (traditional) restitution, conditional restitution, restitution accompanied by cultural cooperation measures, formal recognition of the importance to cultural identity, loans (long term, temporary and others), donations, setting up special ownership regimes (joint ownership, trust and others), the production of replicas, withdrawal of the claim for restitution in exchange for financial compensation. Negotiated agreements offer sometimes complex solutions and there is also a tendency to »uncouple« ownership from possession. There seems to be a move

towards settlements that are not formally expressed in terms of victory or defeat. Reconciliation of interests is becoming the solution increasingly preferred by all concerned.

The review of modern state practice in settling issues of cultural heritage shows that the application of the procedural principle of cooperation is crucial and of utmost importance. Regarding our case study of Istrian treasures retained in Italy, Jakubowski (2015, 289) suggests that the best way to setting the claims regarding the Istria's jewels would be through close international cultural cooperation, as cultural legacy of Venice is of great importance to all Western civilization and beyond national considerations, and that an option could be an agreement on long-term loans. Obviously, in last few decades, the consensual and innovative arrangements have become increasingly popular and follow the incising sensitivity regarding the restitution of cultural property on one hand and the maintenance of factual *status quo* on the other.

Conclusion

The above analysis of the application of relevant international law and practice to the case of restitution of Istria's art treasures from Italy to Slovenia reveals a need for a wider approach of addressing this outstanding bilateral issue by both Parties. It has been shown that the restitution or return of the cultural property has always been primarily an affair of state and of disputes between states, whith each side claiming sovereignty or ownership over cultural property of major significance. However, the lack

of legal recourse is one of the obstacles in reaching final solutions, therefore, several practical techniques and methods have been developed in recent years to avoid formal legal proceedings and to reach mutually acceptable solutions. This might include reaching an agreement between a state and private owner or agreement on long-term loans.

In the present case, Slovenian authorities based its requests to reach a final solution to the restitution of cultural objects to Slovenian Littoral (mainly Koper, Izola and Pian) solely or predominantly on bilateral legal framework established by 1947 Peace Treaty with Italy and reinforced by 1975 Osimo Treaty, including the Minić-Rumor arrangement on the exchange of letters. At the same time, the Italian authorities response to the mentioned proposals has been extremely reluctant and even repellent. It looks like Italy has no interest to enter the bilateral negotiation based solely on the principle of territorial provenance, which is undoubtedly a governing principle of the existing international and European legal framework. To overcome such divergences views and objectives in a broader perspective and recent state practices might be taken into consideration. In this respect, the contemporary developments of global ethics and moral duty regarding the broader attitude towards the treatment of national cultural heritage should also be taken into account. It was shown that Italy already reached several innovative compromise solutions. Such broader approach could and should also be acknowledged to the present case.

One possible solution could be to benefit from the wide mandate of the UNESCO Intergovernmental Commit-

tee to assist or mediate bilateral talks and assist with its experience and expertise. Its focus is predominantly the restitution or return of cultural objects of fundamental significance. The innovative inter-state solutions can, however, also result in partial or temporal solutions in favour of the appropriate protection and preservation of the artworks. If states are unable to resolve the outstanding issues, then the private owners, including in this particular case the Catholic Church or Diocese of Koper, could also enter into negotiations on the legal status and location of certain artworks. Lastly, a political will and courage would need to be re-established in order to search and find a mutually acceptable solution in the European spirit. Both sides need to recognise the need for further expert level exchanges and move the current state of negotiations from the stand-still. The aim should be to reach a mutually acceptable solution which would take due account of international law, as well as ever richer international practice.

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