Cross-border restitution claims of looted works of art and cultural goods

European Added Value Assessment

Accompanying the European Parliament's legislative initiative report
(Rapporteur: Pavel Svoboda)
Study

The European added value of EU legislative action on cross-border restitution claims of looted works of art and cultural goods

In accordance with Article 225 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament has a right to ask the European Commission to take legislative action in a particular area. Such requests are based on a legislative initiative report by the parliamentary committee responsible. On 16 February 2016, the Conference of Presidents of the European Parliament authorised its Committee on Legal Affairs (JURI) to draft a legislative initiative report on cross-border restitution claims of looted works of art and cultural goods.

All legislative initiative reports must automatically be accompanied by a detailed European Added Value Assessment (EAVA). Accordingly, the JURI Committee asked the Directorate-General for Parliamentary Research Services (EPRS) to prepare an EAVA to support the legislative initiative report on the cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars, rapporteur: Pavel Svoboda (EPP, Czech Republic), Chairman of the JURI Committee.

The purpose of a European Added Value Assessment is to support a legislative initiative of the European Parliament by providing scientifically-based evaluation and assessment of the potential added value of taking legislative action at EU level. In accordance with Article 10 of the Interinstitutional Agreement on Better Law-Making of 13 April 2016, the European Commission should respond to a Parliament request for proposals for Union acts by adopting a specific communication. If the Commission decides not to submit a proposal, it should inform the Parliament of the detailed reasons therefore, including a response to the analysis on the potential European added value of the requested measure.

Abstract

Works of art and cultural goods looted in armed conflicts or wars usually travel across several borders when they are sold. The cross-border character of looted art creates legal challenges for restitution claims as they often concern various national jurisdictions, with differing rules, as well as fragmented and insufficiently defined legal requirements in international and European legal instruments. Against this background, this European Added Value Assessment identifies weaknesses in the existing EU legal system for restitution claims of works of art and cultural goods looted in armed conflicts and wars. Moreover, it outlines potential legislative measures that could be taken at the EU level and that could generate European added value through simplification and harmonisation of the legal system in this area.
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Executive summary

Restitution claims concerning looted works of art and cultural goods usually include a cross-border element. Looted in armed conflicts and wars, works of art and cultural goods are often exported out of the country where the looting took place.

Due to cross-border distribution channels, it is not easy to stop illegal trade in works of art and cultural goods. Furthermore, it is difficult to estimate precisely the size of the market of looted artefacts. Nonetheless, studies have attempted to quantify it and, despite some divergences, they all seem to agree that it is a prosperous market and that it represents the third biggest illegal market following those for drugs and weapons.

At the international and European levels, several instruments exist to deal with cross-border restitution claims for looted works of art and cultural goods, namely: the first (1954) and second (1999) protocol of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the Convention on Stolen or Illegally Exported Cultural Objects; EU Directive 2014/60 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, and EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in particular Article 7(4) thereof.

Despite these instruments, there is no effective default regime to tackle the legal difficulties arising from the cross-border nature of restitution claims concerning looted works of art and cultural goods. The absence of an effective (international and European) private law framework to strengthen such restitution claims is a general weakness. In addition, there are a number of specific areas of weakness within the EU legal system, which lead to an uncertain legal situation, including the special case of Nazi looted art:

(i) no single or harmonised definition of the term 'cultural property/object', and regulatory fragmentation;

(ii) fragmentation of anti-seizure legislation and unclear relation between national anti-seizure statutes and EU Directive 2014/60;

(iii) differing substantive law and choice of law rules across the EU Member States;

(iv) insufficient measures for trade in Nazi looted art (future transactions) and contradictory restitution recommendations in cases of restitution claims of Nazi looted art (past transactions).

Against this background, this European Added Value Assessment (EAVA), outlines potential legal action that could be taken at the European level in order to contribute to resolving the legal uncertainties linked with restitution claims concerning looted works of art and cultural goods. The proposed legislative measures include, *inter alia*, establishing a general *in rem* jurisdiction (based on the location of the property and the principle that
enforcement follows property rather than person) for movable property (not only limited to cultural objects); harmonising anti-seizure statutes across EU Member States; introducing a general prohibition of sale and acquisition for stolen and illegally exported/imported works of art and cultural goods, and complementary measures such as setting-up an EU department or self-standing agency on the protection of looted works of art or cultural goods, and supporting provenance research at the European level.

The EAVA argues that the adoption of such measures would create a more certain EU legal system for restitution claims of works of art and cultural goods looted in armed conflicts and wars. Legal certainty, accompanied by complementary measures, such as support for provenance research at the European level, would constitute an added value in itself. It would also help to reduce costs, such as those incurred in ensuring robust results of provenance research or additional legal fees due to the cross-border context.
Introduction

The issue of works of art and cultural goods looted in armed conflicts and wars clearly features a cross-border character – looted items are often exported out of the country where the looting took place and illegally traded and transported through others before reaching their final destination. In 1941, for example, the Nazis looted, from a private collection in the Netherlands, landscape paintings by the 18th century Bohemian painter Norbert Grund, and brought them to Germany. Having been sent by a consignor in Germany, the paintings reappeared at the beginning of 2001 at a sale of the state-owned auction house Dorotheum, based in the Austrian capital, Vienna.

There are estimates that the global illegal market for works of art and cultural goods has a value of between US$6 and US$8 billion per year.1 It would thus be the third biggest illegal market following those for drugs and weapons. Importantly, there is evidence that terrorist groups such as ISIS use the illegal art market to help finance themselves. Works of art and cultural goods looted by ISIS in Iraq and Syria2 are put on sale by auction houses in Europe despite existing EU legislation prohibiting trade in cultural goods with these countries, under certain circumstances.3 One of the most prominent cases concerns cultural relics looted from the ancient Syrian city of Palmyra and smuggled to Europe.4 Due to cross-border distribution channels, however, it is not easy to stop this illegal trade.

The cross-border character of looted works of art and cultural goods creates problems for restitution claims. They involve several national jurisdictions with differing rules regarding, for example, the law that should be applied in cross-border looted art disputes and the standards of proof that should be applied for determining whether a work of art has been looted. In addition, the various international and European legal instruments currently applicable in cases of cross-border restitution claims of looted works of art and cultural goods are fragmented and incomplete. At the international level, three instruments deserve particular attention:


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1 See, for example, Frank Wehinger, Illegale Märkte. Stand der sozialwissenschaftlichen Forschung, MPIfG Working Paper, 11/6, October 2011, p. 50.
2 For examples of looted cultural property from Iraq and Syria and possible protection measures see, for example, United States Government Accountability Office, GAO Report to Congressional Requestors, Cultural Property. Protection of Iraqi and Syrian Antiquities, August 2016.
4 See, for example, Harriet Agerholm, Stolen artifacts from Palmyra and Yemen seized in Geneva, in: The Independent, 4 December 2016.
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- The 1995 Convention on Stolen or Illegally Exported Cultural Objects adopted by the International Institute for Private Law (UNIDROIT Convention).

At the European level, legislation applicable to restitution claims of looted works of art and cultural goods include:

- EU Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State and,
- EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and in particular Article 7(4) thereof.

Crucially, looking at these international and European legal instruments as a whole, private law for restitution claims of looted works of art and cultural goods plays a minor role. The focus has so far been on public international law. Small exceptions in the areas of private law build partly the UNIDROIT Convention and EU Regulation 1215/2012, with its Article 7(4) referring to civil claims for the recovery of a cultural object. For an effective default regime in cases of cross-border restitution claims of looted works of art and cultural goods, however, a stronger private international law dimension to supplement the public international law dimension would be required. In other words, the insufficiently developed (international and European) private law dimension contributes to legal uncertainty in cases of cross-border restitution cases of looted works of art and cultural goods.

Within the context of EU legislative action on restitution claims for looted works of art and cultural goods, art looted by the Nazis between 1933 and 1945 represents a special case. According to expert research carried out by Prof. Dr Matthias Weller (Annex I), a distinction should be made between already completed transactions in Nazi looted art and future ones. EU legislative action, including the private international law dimension, would be appropriate for future transactions only. With regard to fully completed transactions, and/or legal relations fully established in the past, however, EU legislative action to change the law retroactively would not comply with guarantees under the European Convention on Human Rights, the EU Charter of Fundamental Rights and national constitutional guarantees in the Member States. Restitution claims for past transactions in Nazi looted art shall be considered based on moral guidelines. Such guidelines are particularly provided for by the 1998 Washington Declaration. This was the first instrument focusing on Nazi looted art and its eleven principles were tailored to find

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5 For further information on these and other instruments aimed at protecting works of art and cultural goods in armed conflicts and wars, see, for example, Magdalena Pasikowska-Schnass, Protection of cultural heritage in armed conflicts, EPRS, March 2016.

6 Article 7(4) of Regulation 1215/2012 reads: ‘as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seized;’

7 For further details as to why retroactive legislation is not advisable, see the external expert study by Matthias Weller (Annex I of this paper), pp. 78ff.
'just and fair' solutions. It is estimated that the Nazis looted more than 600,000 works of art and cultural goods especially from Jewish families, gallery owners and collectors. Only a small number of these pieces of art were returned to the former owners or their heirs and many are still missing.

Against this background, this European Added Value Assessment (EAVA) follows a five-fold strategy. Firstly, it will shortly describe the character of the illegal art market, and legal challenges for claimants, and provide indicators on the amount of requests to recover looted works of art and cultural goods. Secondly, it will sketch the EU policy context. Thirdly, it will point out the weaknesses in the existing EU legal system. Fourthly, it will suggest possible EU legislative action to strengthen the legal system for cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars. Fifthly, it will outline the added value of EU legislative action.

For the purpose of this EAVA, the terms 'cultural property' and 'cultural object' will be used in addition to the terms 'works of art' and 'cultural goods'. The use of the terms (looted) 'cultural property' and 'cultural object' to mean looted works of art and cultural goods is explained by their frequent appearance in the relevant legal texts and in academic legal discourses.

The illegal art market, legal challenges and indicators on the amount of restitution claims

As mentioned above, estimates of the global illegal market for works of art and cultural goods range between US$6 and US$8 billion per year. Yet, these figures should be considered as rough estimates at best, as reliable data on illegal trade in works of art and cultural goods is practically non-existent. Data on the value of the legal global art market, for which estimates vary between US$45 billion and US$57 billion for the year 2016, is more reliable. On the basis of the higher range, the value of the legal European art market has been estimated to amount to about US$19 billion. Taking again the higher ranges of the estimates of the legal and illegal global art markets, the illegal global art market has a value of about one seventh of the legal global art market. The main destinations for illegal trade in works of art and cultural goods are the markets in North America and Europe.

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8 The central principle, no. 8, of the Washington Declaration states: ‘If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently resituated, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, reorganizing this may vary according to the facts and circumstance surrounding a specific case.’
In fact, Europe is the largest continent for sales of works of art and cultural goods, with over half of the world’s dealers.14

Crucially, as Frank Wehinger has pointed out in a study on illegal markets including the art market, the illegal market for works of art and cultural property is closely interlocked with the legal one.15 In fact, the interlock of both is simple. It is difficult to identify looted works of art and cultural property because they are often introduced directly into the legal art market via galleries and auction houses. Furthermore, pieces of art with a dubious provenance can obtain a (natural) safe provenance and increased prominence thanks to repeated sales by galleries or auction houses. Therefore, the correct provenance is hard to verify and suspicious facts about the trade of looted works of art and cultural goods often come to light as a result of the context or by accident. The latter case is true, for example, for the so-called Schwabing Art Trove (also known as the Gurlitt Case). Over 1 400 artworks by masters were found in an apartment in Munich in March 2012 after Cornelius Gurlitt was investigated for tax evasion. Gurlitt’s father, Hildebrand, was involved as an important art dealer in art looting by the Nazis and contributed to confiscating and removing ‘degenerate’ art from museums. The issue of ownership for many of the 1 400 artworks is still ongoing.16

In general, missing information about the provenance and ownership of artworks is only one of various legal challenges that victims of looted works of art and cultural goods face when making a restitution claim. Due to the cross-border character of many such cases, claimants face a number of legal problems. These include varying access to data from nation to nation, differing legal standards across EU Member States as to which law should be applied, and differing national rules on legal issues such as, for example, limitation periods for submitting a restitution claim and good faith acquisition. Thus, the cross-border character of restitution claims of looted works of art and cultural goods creates additional costs for claimants. These include, inter alia, additional translation costs, costs for elaborate provenance research and increased costs for legal advice and expert evidence on foreign rules when foreign jurisdictions are involved.

There is no data available on issues directly associated with restitution claims of looted works of art and cultural goods, such as, for example, precise costs for elaborate provenance research. Moreover, there is no data on the number of restitution claims all over Europe. However, there are various indicators implying that requests to recover looted works of art and cultural goods might be high. For example, the Art Loss Register,17 the world’s largest database of stolen art, holds 500 000 items. Furthermore, the INTERPOOL Stolen Works of Art Database counts 49 000 items.18 In the special case of Nazi looted art, the German Lost Art Database19 reported 150 000 objects in 2014 and the Object Database of the Central Registry of Information on Looted Cultural Property 1933-

15 Wehinger, Illegale Märkte, Stand der sozialwissenschaftlichen Forschung, pp. 49-53.
16 See, for example, Nazi trove in Munich contains unknown works of masters, BBC News online, 5 November 2013.
17 www.artloss.com
18 www.interpol.int/Crime-areas/Works-of-art/Database
19 www.lostart.de/Webs/EN/LostArt/Index.html
contains details of over 25,000 looted and missing objects from more than fifteen countries.

Nevertheless, it seems that the number of restitution claims in EU Member States is rather small. Looking at the specific case of Nazi looted art, the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the Dutch Restitution Committee), which advises on claims concerning looted art, reported in 2015 that:

‘Between January 2002, when the Restitutions Committee took up its duties, and the end of 2015, the Minister of OCW requested advice about 161 cases. Of these, 143 related to items of cultural value from the Dutch National Art Collection; 136 were requests for advice ‘in the first instance’ and seven concerned requests for revised advice. The other 18 cases were about artworks with current owners other than the Dutch State, such as provincial and local authorities, foundations or private individuals.’

(While, the number of cases involving a cross-border element is not totally clear, it might be around 50% according to a representative of the Dutch Restitution Committee).

However, more and more claims are likely to be forthcoming. In fact, new evidence, new resources and the digitalisation of records – not only on Nazi looted art but far beyond – are constantly becoming increasingly available and will help to ease provenance research on looted works of art and cultural goods.

**EU Policy Context**

The development of the EU internal market, as agreed by the Treaty on European Union, required the adoption of legislative measures on the protection of cultural property. The abolition of border controls has somewhat facilitated the illegal movement of cultural objects. Thus, the EU enacted in December 1992 Regulation 3911/92 on the export of cultural goods and in March 1993 Directive 93/7 on the return of cultural objects illegally exported from the territory of a Member State. As rightly indicated by Marc-André Renold in a study commissioned for the JURI committee, however, the two instruments were not aimed at harmonising laws, but rather at fostering EU Member States’ reciprocal recognition of domestic provisions for fighting the illegal trade in works of art and cultural goods.

More specifically, the restitution of cultural property looted by the Nazis and in the course of colonialism remained a largely untouched issue for several decades, despite international instruments in the form of the 1954 Hague Convention and the 1970 UNESCO Convention. As Bianca Gaudenzi and Astrid Swenson have recently pointed out, ‘it was

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20 [www.lootedart.com](http://www.lootedart.com/)
only in the 1990s, with the end of the cold war, that repeated efforts to draw attention to the unfinished business of World War II eventually resulted in the large scale restitution campaigns and the establishment of international agreements such as the 1998 Washington Declaration. In December 2003, the European Parliament adopted a resolution on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested. With a special regard to cultural property looted during World War II, Parliament emphasised that although the problem of looted cultural property is a matter of public knowledge, it has often been remarkably difficult for private claimants to recover their property and clarify their provenance. In other words, Parliament criticised the fact that Directive 93/7 did not establish a level playing field for individual claimants who rely very much on extremely varied national legal requirements. The explanatory statement of the report underlying the resolution called for a legal framework that would be fairer to claimants, current holders and state-owned and not-for-profit entities. In fact, Directive 93/7 was revised and replaced in May 2014 by the above-mentioned Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State. The revised directive established a system of cooperation between judicial authorities of EU Member States to be followed in case of an application by a requesting Member State on the return of unlawfully removed cultural goods. Equally, Regulation 3911/92 was replaced by Regulation 116/2009 on the export of cultural goods. It is tailored to prevent the export of cultural goods unlawfully removed from an EU Member State by introducing, inter alia, an export licence to be issued by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitely located. It is only recently, in July 2017, that the European Commission proposed new rules to stop imports into the Union of cultural goods illegally exported from their country of origin. Among other things, the proposal aims to stop the illegal trafficking of cultural goods for the purposes of financing terrorism. Despite EU-wide bans on imports of cultural goods from third countries, for example from Iraq and Syria, there is no general EU legal framework for the import of cultural goods from non-EU countries. The Commission thus proposes the same rules for the import of cultural goods in all Member States and a uniform definition for works of art and cultural goods. However, these changes to European legal instruments in the area of looted works of art and cultural goods neglect the establishment of an EU legal system that is fairer to claimants, current holders and state-owned and not-for-profit entities of cultural properties as demanded by the European Parliament in its 2003 resolution. It is still difficult, especially for private claimants, to recover cultural property and clarify its provenance.

Weaknesses in the existing EU legal system

Drawing on the external expert study by Matthias Weller (Annex I), this EAVA identifies four specific areas of weakness in the existing EU legal system leading to an uncertain legal situation in cases of restitution claims of looted works of art and cultural goods:

(i) no single or harmonised definition of the term cultural property/object (this failing was also addressed by the recent Commission proposal) and regulatory fragmentation;

(ii) fragmentation of anti-seizure legislation and unclear relation between national anti-seizure statutes and EU Directive 2014/60;

(iii) differing substantive law and choice of law rules across the EU Member States;

(iv) insufficient measures concerning trade in Nazi looted art (future transactions) and contradictory restitution recommendations in cases of restitution claims regarding Nazi looted art (past transactions).

The first area of weakness – no single definition of the term cultural property/object and regulatory fragmentation – results from the fact that there are various instruments with unclear relations to one other. For example, for the definition of what constitutes a cultural object, Article 7(4) of Regulation 1215/2012 concerning civil claims for the recovery, based on ownership, of a cultural object, refers back to Article 1 of Directive 93/7. Crucially, Directive 93/7 was replaced by Directive 2014/60 and the definition of the term 'cultural object' is different in each. Directive 93/7 has a restrictive definition, indicating specific categories of cultural objects (in the annex to the directive). In contrast, Directive 2014/60 ranks as a cultural object any cultural object classified or defined by an EU Member State under legislation or administrative procedures as a national treasure possessing artistic, historic or archaeological value within the meaning of Article 36 TFEU. Although it is likely that Article 7(4) of Regulation 1215/2012 now refers to Directive 2014/60 (since Directive 93/7 was repealed), this is not entirely clear.

The regulatory fragmentation leads to an inconsistent jurisdiction, sometimes depending on where the cultural object is located – *in rem* jurisdiction – and sometimes not. For example, Article 7(4) of Regulation 1215/2012 would apply in the case where the defendant is domiciled in another EU Member State than the one where the cultural object in question is located. According to Article 7(4), the claim can be lodged with a court where the cultural object is located. However, it might be the case that the defendant is domiciled in a state that is a contracting party to the Lugano Convention25 while the cultural good in question

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25 The Lugano Convention was signed in 1988 by the then 12 Member States of the European Communities together with the then six members of the European Free Trade Area (EFTA) in order to extend the recognition to EFTA Member States who were not eligible to sign the Brussels Regime as a set of rules regulating which courts have jurisdiction in legal disputes of civil or commercial nature between individuals domiciled in an EU or EFTA Member State.
is located in an EU Member State. The effects of the 2007 Lugano Convention,\textsuperscript{26} are materially the same as what is known as the Brussels Regime for the recognition and enforcement of judgments in civil and commercial cases. However, in the Lugano Convention there is no equivalent to Article 7(4) of Regulation 1215/2012 which allows the option of lodging a claim with a court where the cultural object is located. In other words, the defendant domiciled in a state that is a contracting party to the Lugano Convention may be sued at his domicile but not at a court where the contested cultural object might be located (for example an EU Member State). In fact, the EU is missing a general jurisdiction \textit{in rem}.

The second area of weakness, fragmentation of anti-seizure legislation and unclear relation between national anti-seizure statutes and Directive 2014/60, concerns the conflict between the interests of claimants for the restitution of cultural property and the interests of European societies to have public access to art and cultural property across borders. In order to protect interests, such as cross-border cultural exchange and mutual understanding, it is important that art and cultural property on loan from foreign states is safe from legal action and seizure. However, there is no uniform legal framework allowing for a proper anti-seizure jurisdiction across the EU. Some Member States have enacted self-executing legislation or established a procedure under administrative law that results in an administrative decision that prevents any seizure of a contested cultural object once it is issued and as long the object is on loan. In fact, however, the majority of Member States do not have such legislative protection for cultural objects on loan. Finally, as there is no uniform legal framework for a proper anti-seizure jurisdiction there is also no instrument for authorities to expose anti-seizure proceeding should there be no access to justice elsewhere for claimants.

The unclear relation between national anti-seizure statutes and Directive 2014/60 leads to the question as to which legislation prevails. While Directive 2014/60 provides for grants restitution claims to recover an object located in another EU Member State, national anti-seizure legislation blocks any kind of seizure of a cultural objective on loan in that Member State. There are two possible interpretations: first, the anti-seizure legislation of Member States should be interpreted in the light of EU secondary law and thus must not impair any claim for restitution. Second, Directive 2014/60 must be seen in the light of EU primary law, and especially Article 167 (2), indent 3, TFEU, which encourages cooperation between Member States in the area of non-commercial cultural exchanges, and thus the protection of the mobility of art collections. The question which of the both interpretations prevails is yet to be solved, however.

The third area of weakness – differing substantive law and choice of law rules across the EU Member States – allows for law 'shopping', by transferring the cultural object in question to the most favourable jurisdiction, and prevents a more effective private enforcement. In fact, the substantive law rules in cases of restitution claims of looted cultural objects differ widely among the Member States. For example, some EU Member

\textsuperscript{26} Succeeding the 1988 Convention, the 2007 Lugano Convention on jurisdiction and the recognition and enforcements of judgments was signed with the objective of achieving the same level of circulation of judgments between the EU Member states and Switzerland, Norway and Iceland.
State jurisdictions generally allow good faith acquisition subject to varying conditions. In contrast, other EU Member States exclude good faith acquisition, but allow exceptions; and the jurisdictions of yet other Member States strongly favour the owner by not allowing any type of good faith acquisition, but seek to minimise disadvantages by setting time limits for the submission of claims by the innocent buyer. Crucially, the rules on limitation periods for submitting a restitution claim also differ among the EU Member States, and not only in terms of length – they also vary with regard to the beginning of the limitation period. Thus, these widely differing rules can lead to situations where people might lose their right to submit a restitution claim in a cross-border case of looted works of art and cultural goods.

Because the issue of looted works of art and cultural goods features a cross-border element, the choice of law is essential as it determines the applicable substantive law, for example, on requirements and modes of acquisition. In fact, the choice of law is of fundamental importance for cases in the realm of private international law. It concerns the question whether and to what extent foreign law can be applied or taken into account by domestic courts in cases of restitution claims of looted cultural objects. However, the connecting factors for determining the applicable law differ across the EU Member States.

The fourth area of weakness – insufficient measures for trade with Nazi looted art and contradictory restitution recommendations in cases of restitution claims of Nazi looted art – concerns, on the one hand, future transactions and future proceedings of Nazi looted art. On the other hand, it concerns restitution claims for past transactions which need to be considered based on moral guidelines. In the case of future transactions of Nazi looted art, a clear definition of the seller’s due diligence and the buyer’s remedies under a European sales law is missing. There are no clear rules establishing to what extent a seller of an item of Nazi looted art should be obliged to investigate the item’s provenance and to inform the buyer about it in preparation of the sale. Likewise, as there are no clear rules for the due diligence of the seller, there are also no clearly defined remedies a buyer of Nazi looted art could have recourse to should the seller breach the duty of diligence.

In respect to restitution claims for transactions in the past, decades after the art was looted by the Nazis, jurisdictions face difficulties in establishing the precise circumstances of the looting and/or the forced sale. However, these circumstances would usually be necessary in court proceedings and to fulfil the standards and legal constraints of the existing general legal frameworks. The above-mentioned 1998 Washington Declaration, with non-binding principles, was thus established to support restitution along just and fair solutions instead of relying on legal claims. In order to do so, and according to the Washington Declaration, many participating states set up commissions, such as the previously mentioned Dutch Restitution Committee, or other bodies ‘to identify art that was confiscated by the Nazis and to assist in addressing ownership issues...’. However, an increasing number of inconsistent recommendations by these commissions has put into question the quality of the intended ‘just and fair’ recommended solutions in restitution cases of Nazi looted art.

Principle No 10 of the 1998 Washington Declaration. For example, Austria, Germany, the Netherlands and the United Kingdom have established such commissions.
Possible EU legislative action

In order to address the four areas of weakness of the EU legal systems listed above, a set of measures for EU legislative action could be developed. Drawing upon the findings of the external expert study, this EAVA outlines the most far-reaching possible measures:

(i) To overcome the first area of weakness – no single definition of the term cultural property/object (measure 1) and regulatory fragmentation (measure 2):

1) The EU could consider adopting the definition of cultural property of Article 2 UNIDROIT Convention in Art. 7(4) of Regulation 1215/2012 in order to create a sphere of harmonisation.

2) The EU could consider introducing a general in rem jurisdiction for movable property (not only limited to cultural objects), following the Commission proposal for the recast of the Brussels I Regulation.

(ii) To overcome the second area of weakness – fragmentation of anti-seizure legislation (measures 1 and 2) and unclear relation between national anti-seizure statutes and Directive 2014/60 (measure 3):

1) The EU could consider adopting a joint declaration on immunity from seizure for foreign states for cultural property on loan for the purpose of cultural exchange in other states.

2) Based on Article 114 TFEU or Article 81(2) TFEU, the EU could consider harmonising anti-seizure statutes (legislative immunity granted by statute to all lenders of cultural property) across the EU Member States.

3) The EU could consider clarifying the relation between anti-seizure legislation of the Member States and Directive 2014/60/EU to the effect that the protection and support of collection mobility, cultural exchange and public access to important cultural objects by national anti-seizure statutes is not affected by the directive.

(iii) To overcome the third area of weakness – differing substantive law (measure 1) and choice of law rules across the EU Member States (measures 2 and 3):

1) Subject to respective competences, the EU could consider incorporating Chapter II on the restitution of stolen cultural objectives from the 1995 UNIDROIT Convention as a new part of Directive 2014/60.

2) The EU could consider enacting a harmonised choice of law rule, following, for example, Article 90 of the Belgian Code of Private International Law.

Further alternative options are to be found in the external expert study at Annex I.
3) The EU could consider clarifying that there is no obstacle in principle to the application by EU courts of foreign cultural property law of non-EU states (source states), for example, in a recital to the harmonised choice of law rule.

(iv) To overcome the fourth area of weakness – insufficient measures for trade with Nazi looted art in cases of future transactions (measure 1) and contradictory restitution recommendations in cases of restitution claims of Nazi looted art in cases of past transactions (measure 2):

1) Through a directive, the EU could consider defining minimum standards for pre-contractual information for sales of Nazi looted art based on necessary provenance research and harmonising the buyer’s remedies in cases of non-compliance with the seller’s pre-contractual duties to inform the buyer.

2) Based on Article 167 TFEU, the EU could consider promoting a non-binding re-statement of restitution principles in order to support the 1998 Washington Declaration and to achieve more consistent recommendations among the commissions in the Member States for the restitution of Nazi-looted art by addressing key issues such as, for example, the understanding of forced sales, the requirements for a sufficient causal link between persecution and loss, and the relevance of post-war indemnification.

Additionally, the EU could consider taking four complementary measures:

1) Setting-up a meta-database collecting all data established on the provenance of cultural property in order to increase the effects of existing provenance research.

2) Establishing a common cataloguing system and an object ID as a market standard with information on (i) the type of object, (ii) the materials and techniques, (iii) the measurements, (iv) the inscriptions and makings, (v) distinguishing features, (vi) the title, (vii) the subject, (viii) the data or period, and (xi) the maker.

3) Establishing a specific alternative dispute resolution mechanism for dealing with contested cultural property and creating specialised units for organising and providing alternative dispute resolutions in cases of restitution claims of looted works of art and cultural goods.

4) Based on Article 167 TFEU, establishing a department or self-standing agency on the protection of looted art in order to advise Member States on question related to trafficking in cultural goods, to collect the results of provenance research, to link existing databases, to issue object IDs, to set-up a meta-website collecting all other relevant websites and internet resources, and to act as a body providing alternative dispute settlements.
European Added Value

As this study shows, there are various weaknesses within the EU legal system in cases of restitution claims of works of art and cultural goods looted in armed conflicts and wars. These weaknesses could be greatly reduced by taking legislative action at EU level according to some or all of the proposed measures outlined above.

EU legislative measures aimed at harmonising rules for restitution claims of looted works of art and cultural goods would help to create more legal certainty for such cases than is currently the case. For example, ending the huge diversity of rules and instruments existing across the EU Member States in the area of substantive law and choice of law rules would contribute both to strengthening the international private law dimension and effectuating private enforcement. In addition, EU legislative measures to overcome the definition-related uncertainties and regulatory fragmentation in the relevant legal instruments would allow for a simplification of the EU legal system. In short, EU legal action would present an added value in terms of creating a more effective default regime in such cases of cross-border restitution claims.

Furthermore, the impact of these legislative measures could be boosted by the implementation of the suggested complementary measures. For example, the provenance research of looted cultural property could be eased by exchanging cross-border provenance data as freely as possible and setting up an EU-wide meta-database. Moreover, this would contribute to reducing costs for provenance research.

In general, the more claimants have to spend on provenance research or on additional legal advice concerning evidence on foreign rules, when facing difficulties in a cross-border restitution claim, and the longer proceedings take, the more expensive restitution claims will become. Therefore, measures such as, for example, facilitating provenance research and especially the simplification of the EU legal system, through a harmonisation of rules in cases of restitution claims of looted works of art and cultural goods, would also generate European added value in terms of reducing legal and other costs.
Annex 1

Study on the European added value of legislative action on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil procedure

Research paper by

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Abstract:
Cross-border restitution claims are central tools within a regulatory framework for the protection of and legal trade with cultural property. In the past, legislators, including the EU, (rightly) put much emphasis on the design of restitution claims under public international, administrative and criminal law. However, such claims are limited in scope in many respects. It is therefore necessary to supplement these claims by effective claims under private law (“private enforcement”) in order to best achieve the regulatory objective. This study explores the potential for a European added value in effectuating private enforcement of the cross-border restitution of cultural property in relation to international jurisdiction, immunity, choice of law and certain aspects of substantive law as well as possible complementary measures, the latter in particular with regard to Nazi looted art.
AUTHOR

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LINGUISTIC VERSIONS

Original: EN

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Manuscript completed in August 2017


PE 610.988
doi: 10.2861/461637
QA-06-17-103-EN-N
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Executive Summary

1. There are no reliable statistics on the precise scale of looting of cultural goods in armed conflicts and wars, nor on the scale of illicit trade with such cultural goods. Further investigations into the precise structures and scales should be undertaken. In principle, however, there cannot be any doubt that there is substantiated reason for deep concern.

2. Most current political initiatives and legislative measures to combat illicit trade with cultural goods looted in armed conflicts and wars focus on public, administrative and/or criminal law (“public enforcement”). In order to increase the effects of the regulatory framework on looting and illicit trade with cultural goods, private law must be taken into account far more than at present (“private enforcement”).

3. On private enforcement of the protection of cultural goods against looting and illicit trade, effective claims of private litigants for the restitution of looted cultural property are central. This includes states acting in their capacity as private litigants based on their ownership of or proprietary interest in their looted cultural property. In order to effectuate such claims, the EU could consider the following measures:

4. Introducing a ground of general jurisdiction in rem (not only limited to cultural objects) as it was suggested by the Commission in its Proposal for the Recast of the Brussels I Regulation.\(^1\) Such a provision would have a model in Article 98 of the Swiss Federal Act on Private International Law. At least, Article 7 no. 4 Brussels Ibis Regulation,\(^2\) currently limited to certain cultural objects, should copy the definition of “cultural object” in Article 2 of the 1995 UNIDROIT Convention on the return of stolen property\(^3\) in order to create a sphere of legal harmonization as far-reaching as possible.

5. In the case of loans of cultural property from one Member State to another Member State to exhibitions in the interest of public access and cultural exchange, (“collection mobility”) despite pending conflicts about the loaned object in question, the special question arises, whether and to what extent claimants should be allowed to benefit from the temporary location of the loaned object in another jurisdiction (“forum shopping”), thereby bringing about a chilling effect on the

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\(^3\) International Institute for the Unification of Private Law (“UNIDROIT”), Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.
mobility of collections and cultural exchange. The deeply fragmented national legislation on this issue ("anti-seizure statutes") amongst the EU Member States should be harmonized by an EU instrument of a plausible scope and reliable structure, in particular in respect to Nazi looted art.

6. In this context, Directive 2014/60/EU should be clarified to the effect that the protection and support of collection mobility and cultural exchange by national anti-seizure statutes (or a future EU instrument of harmonized anti-seizure law) is not affected by the Directive.

7. Further, the EU should motivate, and join the Member States to acknowledge the rule under customary public international law, that cultural property of foreign states on loan for the purpose of cultural exchange in other states are immune from seizure. The aforementioned three measures (paras. 5, 6 and 7) will balance the interests of claimants with the interest of public access to cultural property, cultural exchange and collection mobility despite pending conflicts about the loaned object.

8. In virtually any litigation about contested cultural property, questions on choice of law arise. Therefore, the EU could consider enacting a harmonized choice of law rule. A possible model could be the Belgian choice of law rule in Article 90 of the Belgian Code of Private International Law. The EU could clarify, e.g. in a Recital to the harmonized choice of law rule, that there is no obstacle in principle to the application by EU courts of foreign cultural property law of non-EU states ("source states").

9. There are large and fundamental differences in the substantive laws of the Member States on good faith acquisition and prescriptive acquisition in respect to cultural property. Therefore, the law on these issues should be harmonized. However, at present, it appears to be impossible for the EU to become a Contracting Party to the 1995 UNIDROIT Convention, because this Convention allows the accession of States only. Therefore, the EU could seek, under Article 167 TFEU, to encourage those Member States to accede to the Convention that have not yet done so.

10. Alternatively, the EU could incorporate Chapter II of the 1995 UNIDROIT Convention as a new part of Directive 2014/60/EU. Alternatively, the EU could harmonize the rules on good faith acquisition and acquisition by a longer period of possession on the basis of the respective provisions in the Draft Common Frame of Reference ("DCFR"), Articles VIII.3-101 DCFR and VIII.4-102 DCFR, i.e. along the lines of international standards which many Member States have already

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Cross-border restitution claims of looted works of art and cultural goods

endorsed by ratifying and acceding the UNIDROIT Convention. Again, such a measure could be inserted in (a recast of) Directive 2014/60/EU.

11. The special issue of Nazi looted art requires special solutions. Retroactive legislative measures that change the status of otherwise valid legal acquisitions of Nazi looted art in the past, e.g. by good faith acquisitions or acquisition by a longer period of possession after the Second World War, would not be in conformity with guarantees under the European Convention on Human Rights, the EU Charter of Human Rights and national constitutional guarantees.

12. In respect to future transactions about Nazi looted art, the EU should consider defining minimum standards for pre-contractual information on the provenance of the object to be sold, in particular whether and to what extent there is reason to suspect that the object is spoliated. The EU could further consider clarifying/harmonizing the buyer’s remedies in case of non-compliance with the seller’s pre-contractual duties to inform the buyer. These issues could be regulated e.g. in a Directive on certain aspects of the sale of (potentially) Nazi looted art, structurally mirroring Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

13. In respect to transactions in the past and in order to further support the implementation of the Washington Principles and to bring about greater consistency, the EU could consider funding a “Restatement of Restitution Principles” under Article 167 TFEU. Such a restatement would collect and analyse the recommendations of the Spoliation Advisory Panels in the Member States (and beyond) on the restitution of Nazi looted art and extract and carefully develop and also supplement, as the case may be, the respective ratio of the recommendations in order to provide the Panels with a reliable source of common thought and evaluation.

14. Further, the EU could support the cross-linking of provenance research amongst local and national institutions and initiatives in order to increase the effects of existing provenance research. In this respect, the EU could fund research on data protection law regarding the chances and limits of exchange and/or central collecting of provenance data. A particularly effective tool in this respect is a common cataloguing system based on the collection of the aforementioned data. In particular, such a system could generate object-IDs and thus contribute to setting market standards.

15. The EU could support existing general mechanisms for alternative dispute resolution. Ideally, the EU should set up a specific alternative dispute resolution institution for dealing with contested cultural property.
16. In the long term, the EU could consider establishing an EU Agency on the Protection of Cultural Property.
Chapter 1 – Terms of Reference

I. – Mission: Tackling legal uncertainty within the civil law dimension of cross-border restitution claims by EU legislative action

According to the technical specifications for the production of this study, the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament, seeks to: “identify and analyse possible provisions for EU legislative action and evaluate the added value of these provisions in tackling legal uncertainty in the context of cross-border restitution claims of looted art and cultural goods to individuals, having account of the already existing EU law in the field of looted art and of the relevant international instruments”. In this context, “[t]he study’s focus will be clearly directed towards questions and issues related with the civil and procedural law dimension in cases of cross-border restitution claims of looted works of art and cultural goods, including the special issue of Nazi looted art.”

II. – Overall objective: Improving “private enforcement” against looting of art and cultural property

The focus on civil law, or private law, and (civil) procedural law in the context of cross-border restitution claims of works of art and cultural goods (in the following simply: cultural goods or cultural property5) looted in armed conflicts and wars is of particular relevance and importance for a comprehensive and effective regulation on the restitution of looted cultural property. This is because the framework of special restitution claims under public international law, EU law and national administrative law, and criminal law, whilst it has considerably grown over the past decades, remains fragmented and incomplete due to pervasive limits in scope ratione temporis/loci/personae/materiae.

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5 The term ”cultural property” includes works of art but also many other objects, see e.g. the definition in Article 2 UNIDROIT Convention on stolen or illegally exported cultural objects: “For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention”. Works of art are covered as objects of importance, often on secular grounds, for art. See also Matthias Weller, „Protection of Cultural Property”, in Jürgen Basedow/Franco Ferrari/Giesela Rühl (eds), European Encyclopedia of Private International Law, Edward Elgar Publishing 2017.
III. – *Reason: Limited scope and success of public enforcement*

For example, 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), applies only to cultural objects in the sense of Article 2 unlawfully removed from the territory of a Member State on or after 1 January 1993, Article 14, and it only grants claims to Member States. Under the previous instrument, Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, the material scope was additionally limited by Article 1 and the categories of cultural objects covered by the Directive in the Annex. The Reports by the EU Commission on the Directive show that the instrument is rarely used.6

Similarly, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property only applies to the extent of its implementation in the respective Contracting State, and the Contracting States provide for fundamentally differing implementations.7 For example, Germany introduced a rather restrictive and formalistic implementation upon its – very late8 – ratification of the Convention as of 30 November 2007.9

These limits in scope and shortcomings in the implementation and enforcement of public (international) cultural property law are typical and structural. It is

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6 See e.g. European Commission, Fourth report on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, COM(2013), p. 7, sub 4.1.: “The Member States blamed the fact that the Directive is seldom used on the limitations of its legal scope, in particular the categories defined in its Annex, and on the short period of time allowed to bring return proceedings and the difficulty in ensuring uniform application by the national judges of Article 9 concerning compensation for the possessor in the event that the object is returned”. Some of these issues were addressed in the Recast of the Directive by Directive 2014/60/EU.

7 See e.g. Sabine von Schorlemer, Kulturgutzerstörung, Die Auslöschung von Kulturerbe in Krisenländern als Herausforderung für die Vereinten Nationen, Baden-Baden 2016, pp. 295 et seq. and pp. 365 et seq.

8 According to the German Government in the legislative materials for the implementation legislation, there were “concerns against certain points” whereas the overall objective was declared to be fully endorsed, see Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zu dem Übereinkommen vom 14. November 1970 über Maßnahmen zum Verbot und zur Verhütung der rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut, BT-Drucks. 16/1372 of 4 May 2006, p. 18 et seq. These concerns mainly related to a lack of predictability of the scope of restitution claims – which objects will be covered – and resulted in the aforementioned restrictive and formalistic implementation (“Listenprinzip”) in order to improve legal certainty. However, this approach turned out to be hardly workable in practice, see Report of the German Government on the Protection of Cultural Property in Germany, Berlin 2013, pp. 43 et seq.

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essential, therefore, to provide an effective complementary regime for restitution claims under civil law. Of course any claim under civil law for restitution requires a title or right of the claimant, be it ownership, be it a possessory claim, be it a claim in tort or on other legal grounds, and it is up to the claimant whether to go to court to enforce it. If so, the claimant will have to establish his title to the satisfaction of the court hearing the case. These conditions will not always be met. Thus, civil law is fragmentary as well and has its inherent limits in scope.

Yet, the aim must be to improve private enforcement next to public enforcement in order to create a comprehensive regulatory framework as best as possible.10

It has to be noted, however, that private enforcement is usually understood as referring to the civil law consequences, in particular claims for damages, as follow-up to and a supplemental element of enforcement after the violation of public norms by private individuals, such as antitrust or data protection rules. Whereas the damages are to be paid to the victims of the violation of the respective rule, the violation is typically sanctioned by fines to be paid to public authorities.

This is of course different here. The overall objective of a claimant is to recover the cultural property in question, and there are different “avenues” to achieve this objective – the public law avenue and, in parallel, the private law avenue. However, the common core of this setting with “classical” private enforcement is that private law is understood as a complementary element of law enforcement, necessary to achieve the best protection of the interests at stake.

IV. – Caveats: Procedural and material justice of civil law

“Best protection”, however, cannot mean that the claim for restitution of looted cultural property needs to be successful and as convenient for the claimant as possible under all circumstances. On the contrary, competing and conflicting interests are at stake and need to be taken into account, for example, the legitimate interest of a defendant of a civil law suit to be sued only in courts to which there are sufficient links, either by the subject matter or by the location of the defendant’s domicile.11 Likewise, there is a legitimate interest of a defendant that his good faith in an acquisition from a non-own will be taken into account in one way or another – one of the pervasive challenges of property law in general - and cultural property law in particular.12

10 For a similar approach recently see e.g. Kelly Hill, The Problem of Auction Houses and Illicit Antiquities: A Call for a Holistic Solution, 51 Tex. Int'l L.J. 337 (2016).
11 These principles of procedural justice are clearly reflected in particular in Recital 13 and Articles 4 and 5 of EU Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“Brussels Ibis Regulation”). This Regulation will be discussed below in more detail.
12 This issue will be addressed in detail below in Chapter 3 Error! Reference source not found.
In addition, even where private law is understood as a supplement to public enforcement, private law remains embedded in its own traditions and systemic settings. Thus, there are inherent limits by material justice for designing or even instrumentalising private law for the purpose of enforcement of public interests. In addition, constitutional limits such as guarantees of property or prohibitions of retroactive legislation, must be taken into account.

And of course, private enforcement in this sense exists already. It does not start from scratch in the field of restitution of cultural property: Private individuals in their capacity as owners deprived of their possession\(^\text{13}\) and also foreign states based on their right as owner of their cultural property, have always attempted to enforce restitution claims in civil proceedings.\(^\text{14}\)

Nevertheless, the complementary function of private law for an effective restitution of looted cultural property appears to be underestimated and not sufficiently explored, perhaps because it has become somewhat overshadowed by the recent focus on public enforcement.

**V. – Incomplete history of public and private “partnership” in the protection of cultural property**

In his seminal contribution “UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects”, Lyndel V. Prott drew attention once more to the fact that the 1970 UNESCO Convention brought about considerable progress, but could not resolve imminent questions in relation to private law. In particular, how to strike the balance between acquiring no title at all in case of acquisition of stolen

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\(^{13}\) E.g. recently Cassirer v. Thyssen-Bornemisza Collection Foundation, Case No. CV 05-3459-JFW-E (C.D. Cal. June 4, 2015) [Docket No. 315]: applying Spanish Law on adverse possession of Nazi looted art under Californian choice of law rules and thereby vesting title to the cultural property in question (Camille Pissarro’s „Rue St. Honoré, après midi, effet de pluie”, 1887) in the Thyssen-Bornemisza Collection Foundation, not the original owner’s heirs; reversed and remanded most recently for misapplication of Spanish law on acquisitive prescription by Cassirer v. Thyssen-Bornemisza Collection Foundation (10 July 2017, 9th Cir.); see also e.g. Federal Court of Justice (Bundesgerichtshof), judgment of 16 March 2012, docket no. V ZR 279/10, Neue Juristische Wochenschrift (NJW) 2012, pp. 1796 et seq.: Peter Sachs, son of Hans Sachs who was persecuted by the Nazi regime and deprived of his large collection of theatre posters raised a claim based on his position as heir and thus owner of the posters against the German Museum of History (Deutsches Historisches Museum) in Berlin. On this case see e.g. Matthias Weller, Die Plakatsammlung Hans Sachs – Die Plakatsammlung Hans Sachs – Zur Ausschlusswirkung des alliierten Rückerstattungsrechts heute, in Matthias Weller et al. (eds.), Diebstahl – Raub – Beute: Von der antiken Statue zur digitalen Kopie, VI. Heidelberger Kunstrechtstage 28. und 29. September 2012, Baden-Baden 2013, pp. 91 et seq.

cultural property, and full-fledged good-faith acquisition, especially since UNESCO does not have a mandate in matters of national law:¹⁵

“There are many elements in the problem of illicit traffic which are simply not directly manageable by the organizations working on illicit traffic, such as impoverished local populations looting their heritage, corruption in administrations, or the involvement of organized criminal elements. Several reports had, however, isolated aspects of private law, which, it was thought, might have a noticeable impact on the passing of illegally acquired cultural objects into the licit trade”.¹⁶

It is generally known that one of the products of this insight was to set in motion the process for a convention on aspects of private law which resulted in the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects.¹⁷ Even though this Convention brought about considerable progress,¹⁸ its effects are limited because only 40 States are Contracting States, whilst amongst EU Member States only some are Contracting States¹⁹, and not all of the pervasive issues relating to restitution claims under private law are addressed.

Thus, there is a history of public and private “partnership” in the protection of cultural property, but it has remained incomplete so far.²⁰

VI. – Support for a comprehensive regulatory framework by the United Nations

Against this background, it is with good reason that the United Nations recently recognized the necessity to consider both public and private enforcement. The United Nations stated in its report entitled “Protecting Cultural Heritage – An Imperative for Humanity, Acting together against Destruction and Trafficking of Cultural Property by Terrorist and Organized Crime Groups” of 26 September 2016:²¹

"In light of the increasing number of international crimes related to the looting and trafficking of cultural heritage, a first international response was the Convention on the Means of Prohibiting and Preventing the Illicit

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¹⁷ This Convention will be discussed below in more detail.
¹⁸ See e.g. Sabine von Schorlemer, Kulturgutzerstörung, Die Auslöschung von Kulturerbe in Krisenländern als Herausforderung für die Vereinten Nationen, Baden-Baden 2016, pp. 367 et seq.
¹⁹ Contracting States amongst the Member States of the European Union are the following 14: Croatia, Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, France and the Netherlands are only Signatory States. The only Contracting EFTA State is Norway.
²⁰ See also Sabine von Schorlemer, Kulturgutzerstörung, Die Auslöschung von Kulturerbe in Krisenländern als Herausforderung für die Vereinten Nationen, Baden-Baden 2016, p. 399.
Import, Export and Transfer of Ownership of Cultural Property established by UNESCO in 1970. Today, these crimes are increasingly linked to international criminal activity including the financing of terrorist groups. During 2015 and 2016, the Permanent Missions of Italy and Jordan chaired a series of meetings at UN Headquarters in New York dedicated to different aspects of the protection of cultural heritage. This initiative was organized together with INTERPOL, UNESCO, and UNODC, who retain the related and complementary expertise on the issues. To ensure the protection of cultural heritage, Italy, Jordan, INTERPOL, UNESCO, and UNODC have drawn up a list of suggested key actions (...). These are based on the outcomes of these meetings, the comprehensive guidelines adopted to support the implementation of the 1970 UNESCO Convention and the UN Convention on Transnational Organized Crime, and the priorities of experts working in the field."

And one of the suggested key actions is laid down in the following statement:

“[G]reater collaboration is needed between the public and the private spheres to prevent illegal transit and trafficking, hamper illegal conduct, and disrupt criminal networks”.22

This appears to be a clear and correct assessment of the regulatory challenge that legislators are facing today in relation to the protection of cultural property, in particular against looting in armed conflicts and war.23

VII. – Focal points of an effective private enforcement for claims for restitution of looted cultural property by EU legislative action

For the purposes of this Report, the following issues of an effective private enforcement to be supported by EU legislation appear to be central and will be dealt with as focal points in Chapter 3: (1) International jurisdiction of Member State courts to hear cross-border claims for the restitution of works of art and cultural property looted in armed conflicts and wars; (2) Immunity from jurisdiction and seizure of works of art and cultural property on temporary loan in a foreign state (“collection mobility”); (3) Choice of law for claims under private law for the restitution of works of art and cultural property looted in armed conflicts and wars; (4) Substantive law and its harmonization on the restitution of works of art and cultural property looted in armed conflicts and wars; (5) proposals in relation to the special issue of Nazi looted art; (6) complementary measures.

Chapter 2 – On the scale of illicit trade with Looted Cultural Property

KEY FINDINGS

- There are no reliable statistics on the precise scale of looting and illicit trade with cultural property. However, there is substantiated reason for deep concern. Further investigations must be undertaken.
- Most current political and legislative initiatives focus exclusively on public, administrative and/or criminal law. In order to set up a comprehensive regulatory framework, private law must be taken into account with greater prominence.

I. – The global art market: Up to USD 57 billion per annum?
According to the latest TEFAF art market report 2017, auctions and private sales in 2016 amounted to approximately USD 45 billion in total.\(^ \text{52} \) Another study commissioned by Art Basel and UBS estimated these sales at around USD 57 billion.\(^ \text{53} \) Thus, the global art market is of huge value, although there are considerably differing estimations of its size.

II. – Illicit trade: Up to USD 8 billion per annum?
It is commonly accepted that there is – naturally – no reliable data on the scale and volume of illicit trade in art and cultural property.\(^ \text{54} \) Older estimations range from 6 billion to 8 billion USD per annum,\(^ \text{55} \) but these estimations are partly contested as exaggerated, or at least unsubstantiated.\(^ \text{56} \)

III. – ILLICID: A German pilot project for investigating the illicit art market
Unfortunately, only a handful of current research projects attempt to shed light on the illicit art market. For example, the German research project “ILLICID” (Illicit

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56 See e.g. Antiquities Dealer Association, ADA (UK), http://thead.co.uk/facts-figures (17 July 2017).
Traffic in Cultural Goods in Germany) seeks to identify and discover unreported cases as a basis for the prevention of crime. The project is conducted by the Prussian Cultural Heritage Foundation (Stiftung Preussischer Kulturbesitz), the GESIS Leibniz Institute for the Social Sciences and the Fraunhofer Institute for Secure Information Technology. The objectives of the project are described as follows:

“Based on a pilot study effective methods and tools for the collection, documentation and analysis of information will be developed and tested about illicit traffic in cultural goods in Germany. Considering the background of recent political developments in Iraq and Syria, this study concentrates on the active trade with ancient cultural goods in the eastern of the Mediterranean area. The function of GESIS is to realise a systematic survey of different agents which are operating in the field of cultural goods. These agents are for example departments and administrations, but also dealers, auctioneers, museums and others. (...) Following the data collection, the data will be prepared, documented and analysed”.

Evidently, further projects would be of significant value in order to gain an improved basis of information. This would be helpful to design any further action and also, as necessary, disprove doubts and counterarguments against the need for better protection of cultural property on all levels of the legal order or, alternatively, remove concerns as unfounded.

IV. – Figures from Databases in the field
There is a variety of databases on lost cultural property in the field. The figures of these databases indirectly indicate at least a large scale of loss and looting and thus illicit traffic:

1. - INTERPOL
According to INTERPOL,

“[t]he illicit traffic in cultural heritage is a transnational crime that affects the countries of origin, transit and final destination. The illicit trade in works of art is sustained by the demand from the arts market, the opening of borders, the improvement in transport systems and the political instability of certain countries. Over the past decade we have seen an increasing trend of illicit trafficking in cultural objects from countries in the Middle East affected by armed conflict. The black market in works of art is becoming as lucrative as those for drugs, weapons and counterfeit goods. (...)”.

58 https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art (17 July 2017). On the "frequently asked question: Is it true that trafficking in cultural property is the third most common
In 1995, INTERPOL created its Stolen Works of Art Database. As of 1 September 2016, this database combines descriptions and pictures of around 49,000 items.

2. – Art Loss Register
The Art Loss Register, the world’s largest private database of lost and stolen art, antiques and collectables, currently holds 500,000 items (including pre-loss registries).\textsuperscript{59}

3. – Lost Art Database (Nazi Looted Art)
In respect to the special issue of Nazi looted art, the German Lost Art Database registers cultural objects which were relocated, moved or seized as a result of persecution under the Nazi regime and the Second World War, especially from Jewish owners.\textsuperscript{60} As of 2014, 150,000 entries were reported.\textsuperscript{61}

4. – Central Registry of Information on Looted Cultural Property 1933 – 1945 (Nazi Looted Art)
The Object Database of the Central Registry of Information on Looted Cultural Property 1933 – 1945\textsuperscript{62} contains details of over 25,000 objects looted, missing and/or identified from over fifteen countries.

The substantial numbers of entries support the assumption that the illicit traffic in art and cultural property amounts to large volumes. Presumably, the number of unregistered objects of looted cultural property exceeds the number of registered objects by far.\textsuperscript{63}

V. – Many more recent signs of concern
These assumptions are further supported with initiatives by international organisations and regional communities of states or single states worldwide. They express a deep concern about an ongoing and increasing looting of cultural

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\textsuperscript{60} http://www.lostart.de/Webs/DE/LostArt/Index.html (17 July 2017).
\textsuperscript{63} The Archaeological Institute of America has been cited as estimating that as many as 90% of classical artifacts in collections may be stolen antiquities, see e.g. Loveday Morris, Islamic State Isn’t Just Destroying Ancient Artifacts--It’s Selling Them, Washington Post, 8 June 2015, https://www.washingtonpost.com/world/middle_east/islamic-state-isnt-just-destroying-ancient-artifacts--its-selling-them/2015/06/08/ca5ea964-08a2-11e5-951e-8e15090d64ae_story.html?utm_term=.ca79b111d20a (17 July 2017).
property on a large scale, in particular in connection with wars and crises and increasingly as a means of financing terrorism.

1. – UN Security Council Resolution 2347 (24 March 2017)

For example, the United Nations Security Council adopted at its 7907th meeting on 24 March 2017, Resolution 2347 (2017) on the maintenance of international peace and security: destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict.\(^{64}\) In this Resolution the Security Council:

“[d]eplores and condemns the unlawful destruction of cultural heritage, inter alia destruction of religious sites and artefacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, in the context of armed conflicts, notably by terrorist groups”.

Against this background the Council:

“[r]equests Member States to take appropriate steps to prevent and counter the illicit trade and trafficking in cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance originating from a context of armed conflict, notably from terrorist groups, including by prohibiting cross-border trade in such illicit items where States have a reasonable suspicion that the items originate from a context of armed conflict, notably from terrorist groups, and which lack clearly documented and certified provenance, thereby allowing for their eventual safe return (...).”

Furthermore, the Council:

“[u]rges Member States to introduce effective national measures at the legislative and operational levels where appropriate, and in accordance with obligations and commitments under international law and national instruments, to prevent and counter trafficking in cultural property (…).”

And the Council:

“[c]alls upon Member States to request and provide cooperation in investigations, prosecutions, seizure and confiscation as well as the return, restitution or repatriation of trafficked, illicitly exported or imported, stolen, looted, illicitly excavated or illicitly traded cultural property, and judicial proceedings, through appropriate channels and in accordance with domestic legal frameworks (...).”

\(^{64}\) On this Resolution see e.g. Konstantinos D. Magliveras, A critical reading of UNSC Resolution 2347 (2017) on unlawful attacks against and looting of religious and historic sites, 3 No. 5 Int’l Enforcement L. Rep. 188 (2017).
2. - Terrorism and Illicit Finance Subcommittee of the US House of Representatives (23 June 2017)

Furthermore, the Terrorism and Illicit Finance Subcommittee of the United States House of Representatives (115th Congress) held a hearing on 23 June 2017 entitled “The Exploitation of Cultural Property: Examining Illicit Activity in the Antiquities and Art Trade”. The Memorandum announcing the Hearing stated:65

“The theft, fraud, looting, and trafficking of artifacts and cultural materials, including antiquities, is a longstanding transnational phenomenon that can enrich criminal actors and terrorists and destroy the cultural heritage of nations. It has been estimated that illicit art and cultural property crimes result in annual financial losses ‘in the billions of dollars.’ The Subcommittee will receive testimony from government experts concerning the scope of illicit activity in the art and antiquities trade, the ways in which recent instances of looting and destruction of cultural artifacts by terrorist groups like ISIS have been combatted, and how this looting and theft can be prevented in the future.”


For its estimation of the scale of illicit art and cultural property crimes “in the billions of dollars”, the Memorandum refers to the United States Federal Bureau of Investigation (FBI) Report “Art Theft”.66 The FBI’s website states:

“The FBI established a rapid deployment Art Crime Team in 2004. The team is composed of 16 special agents, each responsible for addressing art and cultural property crime cases in an assigned geographic region. The Art Crime Team is coordinated through the FBI’s Art Theft Program, located at FBI Headquarters in Washington, D.C. Art Crime Team agents receive specialized training in art and cultural property investigations and assist in art related investigations worldwide in cooperation with foreign law enforcement officials and FBI legal attaché offices. The U.S. Department of Justice provides special trial attorneys to the Art Crime Team for prosecution support. Since its inception, the Art Crime Team has recovered more than 14,850 items valued at over $165 million”.

4. – Council of Europe Convention on Offences relating to Cultural Property (3 May 2017)

On 3 May 2017, the Council of Europe adopted a new convention on aspects of criminal law to prevent and combat the illicit trafficking and destruction of cultural

property. This Convention on Offences relating to Cultural Property,\textsuperscript{67} which will be open for signature to all countries in the world, aims to foster international co-operation to fight related crimes:\textsuperscript{68}

“The Convention will be the only international treaty specifically dealing with the criminalisation of the illicit trafficking of cultural property, establishes a number of criminal offences, including theft; unlawful excavation, importation and exportation; and illegal acquisition and placing on the market. It also criminalises the falsification of documents and the destruction or damage of cultural property when committed intentionally”\textsuperscript{69}

The “Fact Sheet” of 15 March 2017\textsuperscript{70} accompanying the Convention explains:

“The illicit trade in art and antiquities has been a widespread and profitable criminal business for decades. Today cultural objects continue to be stolen and looted from museums, galleries, public and private collections and religious buildings, whilst important archaeological sites and monuments are illicitly excavated and destroyed. Traffickers often take advantage of the chaos caused by war to perpetrate their crimes. Traditionally carried out by specialists operating in a restricted network based on trust, organised crime networks have increasingly become involved in trafficking, multiplying the volume and the value of the transactions. Fighting these crimes is difficult because they often have a transnational dimension involving several national jurisdictions: items are looted in one country, and illicitly traded and transported through others before reaching their final destination. In recent years armed conflicts in Iraq and Syria have triggered an increase in the number of looted and stolen antiquities, often by no-state armed groups and terrorists. These groups have plundered ancient sites such as Palmyra, Mosul and Nimrud to finance their activities, while at the same time destroying structures and artefacts for propaganda reasons. Illicit trafficking in cultural objects turns into a vicious circle: the buying of artefacts - often by Western buyers - encourages more theft, pillaging and destruction in conflict zones, and contributes to protract the conflicts.”

\textsuperscript{67} For a first assessment see e.g. Derek Fincham, http://illicitculturalproperty.com/some-thoughts-on-the-new-council-of-europe-antiquities-convention (5 July 2017).

\textsuperscript{68} For further background information see 127th Session of the Committee of Ministers (Nicosia, 19 May 2017), Council of Europe Convention on Offences relating to Cultural Property, Explanatory Report https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168070433 (17 July 2017).

\textsuperscript{69} Op.cit.

\textsuperscript{70} https://rm.coe.int/factsheet-convention-on-offences-relating-to-cultural-property/1680714665 (17 July 2017).
5. – European Commission Proposal for a Regulation on the import of cultural goods (July 2017)

Most recently, the European Commission submitted a Proposal for a Regulation on the import of cultural goods. This proposal is to be seen in light of the declaration of the G-20 Summit of 8 July 2017, in which the commitment was affirmed to tackle the alternative sources of financing of terrorism, including the looting and smuggling of antiquities, with the invitation of the Culture ministers of the G7 group in March 2017 to prohibit the trade in looted cultural property trafficked across borders. Moreover, the fight against the illicit trade in cultural goods will be a key European action in the course of the 2018 European Year of Cultural Heritage. In its Impact Assessment, the Commission once more summarises and explains the substantial scale and volume of illicit trade in cultural property.

VI. – Recommendations

Taking all these facts and figures together, there are no doubts regarding the urgent need to improve the regulatory framework for the restitution of looted cultural property. However, most of the initiatives described above focus exclusively on public, administrative and/or criminal law. Therefore, it appears highly advisable to consider:

**Recommendation 1:** Private law must be taken into account with greater emphasis (“private enforcement”). Options for the EU will be discussed in Chapter 3.

Furthermore, there must be more scientific investigations in order to shed light on the illicit art trade in cultural property such as e.g. by the ILLICID project currently conducted in Germany. Therefore, it appears highly advisable to additionally consider:

**Recommendation 2:** More research must be commissioned and conducted to obtain better information about scale, structure and size of illicit trade in cultural property.

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Chapter 3 – Focal Points of Private Law

Against this background, the following focal points of private law are discussed with a view to demonstrate the added value of actions at EU level aiming at tackling illicit trade of cultural property by means of private law. In particular, the study will look at cultural property looted in armed conflicts and wars.

I. – International jurisdiction for the restitution of cultural property

KEY FINDINGS

- The EU could (re-) consider introducing a ground of general jurisdiction in rem (not only limited to cultural objects) as proposed by the Commission in its Proposal for the Recast of the Brussels I Regulation and as laid down e.g. in Article 98 of the Swiss Federal Act on Private International Law.
- Alternatively, Article 7 no. 4 Brussels Ibis Regulation could mirror the definition of cultural object in Article 2 of the 1995 UNIDROIT Convention on the return of stolen property, in order to create a sphere of harmonization as far-reaching as possible.
- At least, Article 7 no. 4 Brussels Ibis Regulation could itself spell out the definition of cultural object, rather than upholding a reference to a Directive that has been recast in the meantime.

A first and central requirement for any claimant seeking to recover looted or stolen cultural property is to establish jurisdiction of the court where the proceedings for the restitution of the cultural property are to be instituted.

1. – General observations on the EU system of international jurisdiction for civil matters

The “standard” case is that the defendant is possessor of the cultural property under dispute. This case is easily covered by the general principle of jurisdiction which is actor sequitur forum rei – the claimant should go to the defendant’s domicile and sue there. This principle is fully reflected by the general EU legislation on international jurisdiction. For it is common ground that the defendant’s domicile is a fair place to sue, and there is no need for any special rule in relation to cultural property in this standard case. The crucial question for the purposes of this Study, however, is whether there is the need for a special rule in

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75 See Article 4 (1) Brussels Ibis Regulation (Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)).
case that the movable cultural property is located at another place than the defendant’s domicile, in particular in another (Member) state.

2. – Need for a special ground of jurisdiction based on the location of movable cultural property

There are indeed cases in which this scenario has become a reality. For example, on the basis of the German and Maltese national reports, as well as on the result of discussions at the conference of the national reporters, The “Heidelberg Report” \(^{76}\) recommended introducing a general in rem jurisdiction for movable property in order to provide for a forum close to evidence, and with direct access to enforcement against the res.

This recommendation was mainly based on the following case (“Heylshof case”) involving the Austrian auction house “Dorotheum” in Vienna: \(^{77}\) A Swiss consignor put up for auction a painting stolen from the Heylshof Museum collection in Worms in Germany. Both the Swiss consignor and the German foundation claimed to be the owner and approached the Dorotheum for restitution. The Dorotheum lodged the painting with the local court of Vienna in order to have the two parties to clear the case without the Dorotheum. On the level of substantive law, the presumptive owner would typically have to institute proceedings against the other presumptive owner, to have him allow the return of the object from the custody of the court.

However, under the Brussels I Regulation \(^{78}\), there was no international jurisdiction for the courts in Vienna for proceedings by the Swiss party against the German party, and any recourse to national law of Austria was barred by the Regulation. Conversely, there was no jurisdiction for a claim of the German party against the


\(^{77}\) Erik Jayme, Ein internationaler Gerichtsstand für Rechtsstreitigkeiten um Kunstwerke, in Klaus Grupp/Ulrich Hufeld (Hrsg.), Recht – Kultur – Finanzen, Festschrift für Reinhard Mußgnug (2005), pp. 517 et seq. For another case where the defendant’s domicile was distinct from the location of the cultural good in question see e.g. Upper Regional Court (Oberlandesgericht) Schleswig-Holstein, 10 February 1989, Neue Juristische Wochenschrift (NJW) 1989, at p. 3105: A Greek national illegally excavated coins from the soil in Greece and exported them to Germany where he stored the coins in his German apartment. The case was solved on the basis of mutual criminal assistance in the provision of evidence. Had Greece decided to claim restitution as an owner of the coins – Greek legislation provided that any undiscovered archaeological object would be state property – it would have been an issue whether Greece could have instituted proceedings in Germany. Without a special ground of jurisdiction based on the location of the object in question this would not have been possible.

\(^{78}\) Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”). This Regulation was applicable at the time of the case but has been replaced by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)).
Swiss party under the Lugano Convention.\textsuperscript{79} Thus, the parties would have been forced to institute proceedings at a court outside Austria, even though the res was lodged with a court in Austria. This appears inadequate.

The consignment of cultural objects to auction in other Member States is a regular setting. Therefore, consideration should be given in the case where the domicile of the consignor differs from the current location of the object, and the plaintiff wants to recover the object directly from the consignor as defendant.\textsuperscript{80} This would be in line with international instruments that provide for such a ground of jurisdiction. For example, Article 8 (1) UNIDROIT Convention\textsuperscript{81} expressly provides that a claim may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

3. - Legislative Reaction of the EU: Article 7 no. 4 Brussels Ibis Regulation

On these grounds, the European Commission, in its Proposal for the Recast of the Brussels I Regulation, proposed in its Article 5 no. 3 a general \textit{in rem} jurisdiction.\textsuperscript{82} In the following however, this Proposal was given up and replaced by a special ground of jurisdiction exclusively for the recovery of cultural property, as it is now laid down in Article 7 no. 4 Brussels Ibis Regulation:

\begin{quote}
“A person domiciled in a Member State may be sued in another Member State as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised.”
\end{quote}

\textsuperscript{79} Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of Lugano of 30 October 2007. The objective of the Convention is to unify the rules on jurisdiction in civil and commercial matters and expand the applicability of the Brussels I regulation to the relations between Member States of the (then) EC on the one hand and the EFTA States Norway, Iceland and Switzerland on the other. The EFTA State Liechtenstein is not a Contracting Party.

\textsuperscript{80} Of course there is also the possibility to institute proceedings against the auction house as the actual possessor. The auction house will typically include the consignor as a third party (“third party joinder”). This is possible on the grounds of Article 8(2) Brussels Ibis Regulation.

\textsuperscript{81} UNIDROIT Convention on stolen or illegally exported cultural objects (Rome, 24 June 1995).

\textsuperscript{82} European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14 December 2010, COM(2010) 748 final, Article 5 no. 3: “The following courts shall have jurisdiction: as regards rights in rem or possession in moveable property, the courts for the place where the property is situated”. For a critique see e.g. Pietro Franzina, The Proposed New Rule of Special Jurisdiction Regarding Rights in Rem in Moveable Property: A Good Option for a Reformed Brussels I Regulation?, Diritto del commercio internazionale 2011, 789.
4. - Issues in relation to Article 7 no. 4 Brussels Ibis Regulation

However, there are several issues in relation to this provision.

a. - Definition of “cultural property”

A first issue in relation to Article 7 no. 4 Brussels Ibis Regulation is that its text refers to Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. Meanwhile, this Directive, has been replaced by 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). It is likely that now Article 7 no. 4 Brussels Ibis Regulation refers to this latter Directive as opposed to the old one. Nevertheless, this should be clarified, because the definition of a cultural object of the two instruments differ from each other:

Article 1 (1) of Directive 93/7/EEC of 15 March 1993 defined “cultural object” as an object which is:

“classified, before or after its unlawful removal from the territory of a Member State, among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures within the meaning of Article 36 of the [EC] Treaty, and belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of public collections\textsuperscript{83} listed in the inventories of museums, archives or libraries' conservation collection.”

The reports on the application of the Directive 93/7/EEC\textsuperscript{84} have pointed out its infrequent application, partly due to the limitation of its scope, which resulted from, \textit{inter alia}, the conditions set out in the Annex to that Directive.\textsuperscript{85} Therefore, in the recast of this Directive, the scope of the Directive was extended to any cultural object classified or defined by a Member State under national legislation or administrative procedures as a national treasure possessing artistic, historic or archaeological value within the meaning of Article 36 TFEU.\textsuperscript{86}

Thereby, the Directive now covers objects of historical, paleontological, ethnographic, numismatic interest or scientific value, whether or not they form

\textsuperscript{83} For the purposes of Directive 93/7/EEC, ‘public collections’ means collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority.


\textsuperscript{85} Recital 8 Directive 2014/60/EU.

\textsuperscript{86} Recital 9 Directive 2014/60/EU.
part of public or other collections or are single items, and whether they originate from regular or clandestine excavations, provided that they are classified or defined as national treasures. Furthermore, cultural objects classified or defined as national treasures no longer have to belong to categories, or comply with thresholds related to their age and/or financial value.\textsuperscript{87}

And indeed, Art. 2 (1) of Directive 2014/60/EU, now defines ‘cultural object’ simply as

\begin{quote}
“an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures within the meaning of Article 36 TFEU”.
\end{quote}

Against this background, Article 7 no. 4 Brussels Ibis Regulation should be clarified to the effect that now the new, broader definition of cultural objects of Article 2 Directive 2014/60/EU is relevant.

Even better, the wording of Article 7 no. 4 Brussels Ibis should itself spell out this definition rather than referring to another instrument in order to make it more “user-friendly”.

Spelling out the definition in the wording of Article 7 no. 4 Brussels Ibis Regulation would remove another uncertainty for the interpretation of Art. 7 no. 4 Brussels Ibis Regulation: The reference to the Directive might be misunderstood as referring to the entire material scope of the Directive, rather than merely to its definition of cultural property.\textsuperscript{88} To be sure, requiring for Article 7 no. 4 Brussels Ibis Regulation that the raised claim is covered by the Directive would not make sense, because the Directive does not cover civil claims at all, whereas Article 7 no. 4 Brussels Ibis Regulation exclusively covers civil claims. Thus, the reference to the Directive must be exclusively for the purpose of defining “cultural property”, and this should be made clear.

Restricting the reference to the Directive in this sense brings about a further and important consequence: cultural property of a third state (which would not be covered by the territorial scope of the Directive) is clearly covered by Article 7 no. 4 Brussels Ibis (as long as the defendant is domiciled in a Member State), and this should be clearly the case.\textsuperscript{89}

\textsuperscript{87} Recital 9 Directive 2014/60/EU.

\textsuperscript{88} Kurt Siehr, Das Forum rei sitae in der neuen EuGVO (Art. 7 Nr. 4 EuGVO n.F.) und der internationale Kulturgüterschutz, in Normann Witzleb et al. (eds.), Festschrift für Dieter Martiny zum 70. Geburtstag, Tübingen 2014, pp. 837 et seq., at p. 841.

\textsuperscript{89} Kurt Siehr, op.cit., at p. 841.
b. - Fragmentation

Beyond the technical details of Article 7 no. 4 Brussels Ibis Regulation, this ground of jurisdiction finds itself placed in a strongly fragmented surrounding:

(1) – Status quo

If it is an international matter and if the defendant is domiciled in an EU Member State, the Brussels Ibis Regulation applies. If the defendant is domiciled in a Contracting State of the Lugano Convention other than an EU Member State (for example Switzerland), the Lugano Convention applies. If the defendant is domiciled in another third State (neither a Lugano nor an EU Member State), the autonomous rules of jurisdiction of the Member States apply, Art. 6 Brussels Ibis Regulation.

In the autonomous laws of some states, there are special grounds for jurisdiction at the place of the location of either the cultural property in question or, more generally, of any movable property in question or even of any kind of asset.

For example, Article 98 of the Swiss Federal Act on Private International Law of 18 December 1987 provides in sentence 1 that Swiss courts have jurisdiction to entertain actions relating to personal property rights at the domicile or, in the absence of a domicile, at the habitual residence of the defendant. Additionally, according to sentence 2, Swiss courts have jurisdiction at the place where the property is located. Article 98a of the same Act provides that the court at the domicile, or at the registered office of the defendant, or the court at the place where the cultural property is located, has jurisdiction to entertain actions for recovery, within the meaning of Article 9 of the Act on the Transfer of Cultural Property of 20 June 2003 implementing the UNESCO Convention in Swiss law.

According to section 23 Sentence 1 of the German Code of Civil Procedure, German courts are competent at the place where (any) assets of the defendant’s are located (not necessarily the object in question) if the defendant has no place of residence in Germany (where he could be sued otherwise).

In addition, according to Art. 71 (1) Brussels Ibis Regulation and Art. 67 (1) Lugano Convention, these instruments of horizontal harmonization shall not affect any conventions by which the Member States or Contracting States are bound and which in relation to particular matters such as e.g. cultural property govern jurisdiction or the recognition or enforcement of judgments. Thus, for States that

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are parties to the 1995 UNIDROIT Convention,\textsuperscript{92} the jurisdictional rule of Article 8 applies.

Article 8 (1) UNIDROIT Convention provides for a non-exclusive ground of jurisdiction at the place of the location of the cultural object in question:

\textbf{“(1) A claim ... may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States”}.\textsuperscript{93}

However, Contracting States amongst the Member States of the European Union are (only) the following:\textsuperscript{94} Croatia, Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.\textsuperscript{95}

\textbf{(2) – Different results without reason}

This fragmentation leads to implausible differences in results:

If the defendant is domiciled in the EU Member State where at the same time the cultural object is located, Article 7 no. 4 Brussels Ibis Regulation is of no practical relevance, because the defendant may be sued on any grounds at the courts of the Member State of his domicile, according to Article 4 (1) Brussels Ibis Regulation.

If the defendant is domiciled in another EU Member State than the Member State where the cultural object is located, Article 7 no. 4 Brussels Ibis Regulation applies.

However, if the defendant is domiciled in a Lugano State, the defendant may be sued at his domicile but there is no equivalent to Article 7 no. 4 Brussels Ibis Regulation in the Lugano Convention.

And if the defendant is domiciled in a third state (neither EU nor EEA state), the autonomous rules of the Member State whose courts are seized apply. Sometimes there will be a forum based on the location of the object, sometimes not.

In some of these cases Article 8 UNIDROIT Convention will be available, namely if the cultural object is located in a Convention State irrespective of whether the defendant is domiciled in a Convention State, be it the same State, be it another

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\textsuperscript{92} UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of Rome, 24 June 1994. According to its Article 12 the Convention entered into force on 1 July 1998. Currently, 40 States are Contracting States.

\textsuperscript{93} Articles 8 (2) and (3) UNIDROIT Convention provide: ”(2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration. (3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.”

\textsuperscript{94} In alphabetical order.

\textsuperscript{95} France and the Netherlands are only Signatory States. Latvia seems to be in the process of acceding, see http://www.artlaw.online/en/read-it/running-commentary/latvia-to-enter-unesco-70-and-unidroit-95-conventions-3 (20 July 2017). The only Contracting EFTA State is Norway.
Cross-border restitution claims of looted works of art and cultural goods

State. Nor does it matter whether the object was stolen from a Convention State or whether the claimant is domiciled in a Convention State.

In sum, sometimes a claimant will be able to avail itself of a jurisdiction in rem, sometimes not. For example, if the defendant is domiciled in Turkey and stores the cultural object in Germany, there will be jurisdiction of the German courts whereas if, pari passu, the defendant is domiciled in Switzerland, there will be no jurisdiction of the German courts. This fragmentation is not satisfactory and should be reduced as best as possible.

(3) – In particular: Similar but not identical definition of cultural object under the UNIDROIT Convention and Article 7 no. 4 Brussels Ibis Regulation

Article 2 UNIDROIT Convention defines “cultural objects” for the purposes of the Convention as “those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex” to the Convention.96 Although there is no fundamental difference between the definition of cultural property in Article 7 no. 4 (i.e. Article 2 of Directive 2014/60/EU) on the one hand and Article 2 UNIDROIT Convention on the other hand, it might still appear advisable to synchronize Article 7 no. 4 Brussels Ibis Regulation fully with Article 2 UNIDROIT Convention, in order to create a unified system of jurisdiction as far-reaching as possible. There appears to be no normative reason for the EU legislator not to precisely mirror the definition of the UNIDROIT Convention.97 Rather, the definition for the purposes of Article 7 no. 4 Brussels Ibis could be conceptually fully detached from Article 2 of Directive 2014/60/EU.

96 The Annex of the UNIDROIT Convention lists the following, rather broad and abstract categories: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

97 There is no need to exactly follow the scope of the exception in Article 36 TFEU to the fundamental freedom of goods within the internal market. Rather, the EU legislator would certainly be free to introduce a general jurisdiction in rem (i.e. not limited to cultural goods) as it was suggested with good reasons by the EU Commission in its Proposal for the Recast of the Brussels I Regulation.
c. - Declaratory Relief

It is an unresolved question whether Article 7 no. 4 Brussels Ibis Regulation covers actions for declaratory relief. For example, a museum could institute proceedings for a declaratory judgment that it is the owner of a contested cultural object in question, and such proceedings would be directed against a person or body claiming to be the true owner. Although such proceedings are not directly addressed by Article 7 no. 4 Brussels Ibis Regulation, that expressly covers only civil claim for the recovery based on ownership, it appears to be a consequent extrapolation of the purpose and underlying ratio of this provision to extend it to actions for (positive and negative) declaratory relief.

5. - Recommendation and Policy Options

Against this background, it is recommended to improve Article 7 no. 4 Brussels Ibis Regulation. The following policy options appear to be available in order to achieve improvement:

a. - Option 1: Introducing jurisdiction in rem for movable property

Option 1 would be to introduce a ground of general jurisdiction in rem (not only limited to cultural objects) as proposed by the Commission in its Proposal for the Recast of the Brussels I Regulation and as laid down e.g. in Article 98 of the Swiss Federal Act on Private International Law.

b. - Option 2: Using the definition of cultural property of Article 2 UNIDROIT Convention in Article 7 no. 4 Brussels Ibis Regulation

Option 2 would be using the definition of “cultural object” in Article 2 UNIDROIT Convention in order to create a sphere of harmonization as far-reaching as possible by e.g. copying the text of Article 2 and pasting it into a new subsection of Article 7 no. 4 Brussels Ibis Regulation and placing the Annex of the UNIDROIT Convention in the respective Recital.

c. - Option 3: Spelling out the definition of Article 2 of Directive 2014/60/EU directly in Article 7 no. 4 Brussels Ibis Regulation

A “small solution” would be spelling out the definition directly in Article 7 no. 4 Brussels Ibis Regulation rather than upholding a reference to another instrument. This would remove uncertainty from certain aspects of interpretation and enhance the “user-friendliness” of the provision.

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98 See e.g., in relation to Nazi looted art, Toledo Museum of Art v. Ullin, 477 F.Supp. 2d 802 (N.D Ohio 2006).
99 See also Kurt Siehr, Das Forum rei sitae in der neuen EuGVO (Art. 7 Nr. 4 EuGVO n.F.) und der internationale Kulturgüterschutz, in Normann Witzleb et al. (eds.), Festschrift für Dieter Martiny zum 70. Geburtstag, Tubingen 2014, pp. 837 et seq., at p. 845.
d. – Option 4: Updating the reference in Article 7 no. 4 Brussels Ibis
An even smaller solution would be just updating the reference in Article 7 no. 4 Brussels Ibis Regulation to now Directive 2014/60/EU, rather than the previous Directive 93/7/EEC.

At least one of these options should be taken. Option 1 appears to be the best, Option 4 remains better than nothing.

II. – Immunity for cultural property on loan in foreign states

KEY FINDINGS

- Immunity for cultural property on loan in foreign states is a well-justified and widespread legal concept amongst the Member States of the EU and beyond.
- Immunity in favour of lenders of cultural property to foreign art exhibitions supports international cultural exchange, collection mobility and public access to cultural property – policy objectives endorsed by the EU (Article 167 TFEU).
- Immunity may emerge from domestic legislation and, if the lender of the cultural property is a State, from public international customary law.
- However, as far as immunity is granted, it blocks any enforcement of claims for restitution and sometimes even any litigation about the claim at the host state on the occasion of the loan.
- Therefore, immunity needs to be balanced against the interests of claimants: (1) There must not be a denial of justice; and (2) there must not be unconditional immunity for Nazi looted art.
- The deeply fragmented national legislation on granting immunity for cultural property on loan (“anti-seizure statutes”) amongst the EU Member States could be harmonized by an EU instrument of a plausible scope and reliable structure, in particular in respect to Nazi looted art.
- Directive 2014/60/EU could be clarified to the effect that the protection and support of collection mobility by national anti-seizure statutes (or a future EU instrument of harmonized anti-seizure law) is not affected by the Directive.
- The EU could motivate and join the Member States to acknowledge the rule under customary international law that cultural property of foreign states on loan for the purpose of cultural exchange in other states are immune from seizure.
1. - Context
This issue relates to interests that conflict with the interests of claimants for the restitution of cultural property: the interests of society to have public access to art and cultural property, and to the mobility of art and cultural property collections across borders. On the level of international relations, immunity supports cultural exchange, and thereby supports mutual understanding amongst different peoples and cultures and thus contributes to peace.

It is essential for these interests that art and cultural property, on loan from foreign states to a host state for temporary exhibitions, are safe from legal action against and seizure of any contested object. The typical scenario is that the claimants do not see a chance for enforcing their presumptive claims in the jurisdiction of the regular location of the contested object, but now that the object in question is moving to another jurisdiction, claimants want to take advantage of this unexpected change in location, and want to take action before the courts of the host state.

This scenario is most likely in relation to property expropriated or looted during past wars or periods of persecution such as within the October Revolution 1917 in Russia or from 1933 to 1945 in Germany under the Nazi regime, but has also been observed in other unresolved conflicts between states. Further, it has been observed in the context of enforcing ordinary money claims by private individuals (e.g. from international arbitration awards) against a state unwilling to pay and execute the claim within its own territory.100

2. - Fundamental distinction: Legislative immunity granted by a state and immunity from seizure under customary public international law
In relation to immunity for cultural property on loan in foreign states, it is to be distinguished between legislation of states on the matter (“anti-seizure statutes”101; “Freies Geleit”102) and immunity from seizure potentially arising from public

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100 Case studies will be presented below.
international customary law. This is relevant in the case that a state or a state entity, such as a state museum, lends cultural property to an exhibition in another state.\textsuperscript{103}

Given that the mobility of cultural property for the purposes of cultural exchange is of high relevance and symbolic value, both the level of state legislation (to protect cultural property on loan) and the scope of the protection under public customary international law (in case that no state legislation is in place or the conditions laid down for protection are not met in the particular case at hand) are of importance. Indeed, they will support collection mobility, public access to cultural property on display in exhibitions, and cultural exchange amongst states and peoples.

On both levels of the legal order – domestic and public international – the question arises whether and to what extent cultural property on loan in foreign states is or should be protected against third-party claims for recovery or restitution, if the claim is raised on the occasion of the temporary location of the object on a different territory, with different courts and different legislation.

3. - Case studies

The following case studies illustrate the issue:

a. - Exhibition “Treasures of the Sons of Heaven” at Bonn, Germany

In 1992, a diplomat of the Taiwanese consulate in Bonn, Germany, and the directors of the Art and Exhibition Hall of the Federal Republic of Germany, also in Bonn, developed the idea of the ambitious project of an exhibition „Treasures of the Sons of Heaven“ („Schätze der Himmelssöhne“) displaying leading objects of the Imperial time from China.\textsuperscript{104} At the beginning the project received little interest from Taiwan, and the negotiations took until 1996 to convince the National Palace Museum in Taipei to support it in principle. This museum is one of Taiwan’s greatest attractions. It houses more than 650,000 pieces of Chinese bronze, jade, calligraphy, painting and porcelain. The collection is estimated to be one-tenth of China’s cultural treasures.

Taiwan is the main island of the Republic of China and its government lost control over the Chinese mainland to the People’s Republic of China as a result of the Chinese Civil War. In the course of this war, the Government moved the collection from the Forbidden City in Beijing to Taiwan in 1949. Clearly, the National Palace Museum of Taipei sought to ensure that the exhibition would not provide the People’s Republic of China with an opportunity to gain possession of the treasures

\textsuperscript{103} Nout van Woudenberg, State Immunity and Cultural Objects on Loan, Leiden 2012, pp. 491.

while on loan in Germany. The Museum made clear that any kind of diplomatic declaration by the German Government to guarantee safe conduct for the treasures against claims raised by the People’s Republic of China would not be considered sufficient. In order to make the exhibition happen, an anti-seizure statute turned out to be *conditio sine qua non*.

On the initiative of the directors of the Art and Exhibition Hall of the Federal Republic of Germany, and on the occasion of the then occurring implementation of Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, the German government extended article 2 of the bill\(^\text{105}\) by a provision (section 20) which may be taken as a paradigmatic example for a national anti-seizure statute. It reads in translation:

1. If foreign cultural property is to be loaned temporarily to an art exhibition in the Federal Republic of Germany, the competent highest state authority may – subject to consent by the Federal Central Authority – issue to the lender a guarantee of return in the moment of time as determined. In the case of art exhibitions instituted by the Federal Republic or a Federal Agency, the competent federal authority decides upon the issuing of the guarantee.

2. The guarantee is to be issued in writing prior to import of the cultural good and by using the term ‘Rechtsverbindliche Rückgabezusage [Legally Binding Return Guarantee]’. The guarantee cannot be withdrawn or cancelled.

3. The guarantee has the effect that no rights of third parties to the cultural good can be raised against the lender’s claim for recovery.

4. Until recovery by the lender judicial proceedings on recovery, interim measures, attachments and seizures are inadmissible.

This legislation was taken as a model e.g. by Austria for its own anti-seizure legislation\(^\text{106}\).

The German legislation was amended on the occasion of the implementation of Directive 2014/60/EU by the new German Act on the Protection of Cultural Property 2016 (Kulturgüterschutzgesetz; ‘KGSG’).\(^\text{107}\) The anti-seizure statute is now to be found in sections 73 et seq. KGSG.

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\(^{105}\) Article 1 of the Bill provided for the implementation legislature for the Directive. The Bill was to amend the German Act on the Protection of German Cultural Goods against Loss.


\(^{107}\) Kulturgutschutzgesetz (KGSG) of 31 Juli 2016 (BGBl. 1 S. 1914), modified by Article 6 para 13 of the Law of 13 April 2017 (BGBl. 1 S. 872).
b. – Exhibition “DYNAMIK! Kubismus / Futurismus / KINETISMUS” at the Belvedere, Austria

The Belvedere at Vienna, Austria, recently displayed the exhibition „DYNAMIK! Kubismus/ Futurismus / KINETISMUS“ including loans from all over Europe. Three loans came from the Czech Republic, namely the State owned National Gallery Prague. The Czech Republic, however, had been in dispute for many years with a company in Liechtenstein. In 2008, an arbitral tribunal in Paris had rendered an award against the Czech Republic for around 530 million Euros, and the claimant had been seeking enforcement of the award under the 1958 New York Convention all over the world. Valuable works of art and cultural property on loan in a foreign state thus presented an opportunity for another attempt to enforce the award. The claimant therefore moved to seize the three objects on loan in Vienna. The Czech Republic had not applied for protection against seizure under the Austrian anti-seizure legislation. Thus, the question arose whether the objects in question were protected as state property under customary public international law.

c. – Exhibition “From Russia” (Pouchkin Museum Moscow) in London

In 2008, the Royal Academy of Art in London planned the exhibition “From Russia” and intended to display around 120 loans from the state owned Pouchkin Museum in Moscow, including objects expropriated during the October Revolution 1917. Thus, Russia expected claims for restitution by heirs on the occasion of the temporary loan of these objects in the United Kingdom. In addition, Russia was facing attempts to enforce arbitral awards into assets located outside of Russia. Therefore, Russia insisted on the introduction of an anti-seizure

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109 The paintings „Tänzerin“ by Vincenc Beneš (1912) and „Zwei Frauen“ by Emil Filla (1913) and the bronze sculpture „Die Umarmung“ by Otto Gutfreund (1913/14).


111 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). This Convention provides for harmonized rules on the recognition and enforcement of foreign arbitral awards. It is one of the most successful conventions. Currently, 157 states are Contracting States.


113 See the Example above in relation to the Exhibition “DYNAMIK! Kubismus / Futurismus / KINETISMUS” at the Belvedere, Austria.
legislation in the UK. And indeed, such a legislation was enacted shortly afterwards in order to make the exhibition happen.114

d. – Exhibition from the Stedelijk Museum of Amsterdam to New York (“Malevich case”)
The Malevich case involved loans of Nazi looted art (“degenerate art”) from the Stedelijk Museum of the City of Amsterdam to New York and Houston in 2003:115 14 paintings by the Russian modernist Kazimir Malevich were on loan to the United States. Shortly before the end of the exhibition, the heirs instituted proceedings in United States courts against the City of Amsterdam. In 2005, it was decided that even if loaned art could not be seized under the Foreign Sovereign Immunity Act (FSIA),116 the presence of the loaned objects in the U.S. could still provide a basis for suing for damages. The case was ultimately settled.117 Nevertheless, the decision paved the way for immunity from seizure legislation and seems to have brought about a chilling effect for collection mobility.118 The most recent US legislation, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act 2016119, seeks to close the lacuna within the immunity legislation that became apparent by the Malevich case.120

4. – State legislation (“anti-seizure legislation”)
On the level of state legislation on immunity for works of art and cultural property on loan in foreign states, there are two pressing issues. First, there is a deep fragmentation within the EU. Second, the relation between national anti-seizure statutes and the Directive 2014/60/EU121 is unresolved.

a. – Fragmentation in the EU and beyond
The legal structure and scope of the legislative protection varies considerably from state to state. Some EU Member States established a procedure under

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114 Part 6 of the Tribunals Courts and Enforcement Act 2007, sections 134 ff.
117 For further details see Alessandro Chechi, Ece Velioglu, Marc-André Renold, “Case 14 Artworks – Malewicz Heirs and City of Amsterdam,” Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.
119 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, H.R. 6477 (114th Congress), to amend chapter 97 of title 28, United States Code, to clarify the exception to foreign sovereign immunity set forth in section 1605(a)(3) of such title, entered into force on 15 December 2016.
120 For further details on this legislation see below.
administrative law that results in an administrative decision ("Verwaltungsakt"), by which, once it is issued and as long as it remains in place, any proceedings or seizure aiming at the restitution of the loan is barred ("return guarantee"). Other Member States enacted self-executing legislation. The majority of Member States do not offer any legislative protection.

However, outside the EU, many states enacted anti-seizure legislation, including e.g. Australia, certain provinces of Canada, Israel, Liechtenstein, Switzerland and the U.S., both at federal and state levels such as e.g. New York.

The UK model appears suboptimal, because under a self-executing legislation it is entirely up to the lender and a potential claimant in the host state to assess whether the conditions of the statute for protection are fulfilled or not. Due to rather vague and broad conditions in connection with the object, this is not easy. This uncertainty on the part of those to be protected by the statute, or those who want to have access to justice and raise legitimately a claim for restitution, jeopardizes the very purpose of anti-seizure legislation.

122 E.g. Germany, Austria, France. For France see Loi no 94-679 du 8 août 1994 portant diverses dispositions d’ordre économique et financier.

123 E.g. United Kingdom, see Part 6 (Protection of Cultural Objects on Loan) of the Tribunals, Courts and Enforcement Act 2007 Section 134; Belgium: Loi de 14 Juin 2004 modifiant le Code judiciaire en vue d’instaurer une immunité d’exécution à l’égard des biens culturels étrangers exposés publiquement en Belgique.

124 (To the present knowledge of the Author): Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.


126 E.g. Alberta, Foreign Cultural Property Immunity Act, R.S.A. 2000, Chapter F-17; Manitoba Statutes, The Foreign Cultural Objects Immunity From Seizure Act, R.S.M. 1987, c. F140 s. 1; Ontario: Foreign Cultural Objects Immunity from Seizure Act, S.O. 1990, Chapter F.23, s. 1; Quebec: Code of Civil Procedure, Book IV Execution of Judgments, Title II Compulsory Execution, Chapter I Preliminary Provisions, Division III Exemptions from Seizure, R.S.Q., chapter 25

127 Loan Of Cultural Properties (Jurisdiction Restriction) Law, 5767-2007, enacted by the Knesset on 3 Adar 5767 (21 February 2007); see e.g. Shoshana Berman, Protection of Cultural Objects on Loan – The Israeli Perspective, Art, Antiquity and Law XII (2007), pp. 113 et seq.

128 Gesetz über die vorübergehende sachliche Immunität von Kulturgut (Kulturgut-Immunitäts-Gesetz; KSIG) v. 23.11.2007, LieGBl. 2008 Nr. 9 v. 15.01.2008.

129 Bundesgesetz über den internationalen Kulturgütertransfer (Kulturgütertransfergesetz, KGTG) of 20 June 2003.

130 22 U.S.C. Section 2459. Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display.


132 For example, Section 134 (2)(c) of Part 6 (Protection of Cultural Objects on Loan) of the Tribunals, Courts and Enforcement Act 2007 requires for protection of a cultural object that "its import does not contravene a prohibition or restriction on the import of goods, imposed by or under any enactment, that applies to the object, a part of it or anything it conceals". This is not easy to determine for a foreign lender and this lender takes the full risk in evaluating the legal situation.
In addition, some states protect only against the seizure of the cultural property,\textsuperscript{133} whilst other states\textsuperscript{134} protect against any kind of legal proceedings in relation to the property in the host state. Some of the states that installed an administrative procedure for issuing a return guarantee include a waiting period prior to issuing the guarantee that enables potential claimants to raise objections,\textsuperscript{135} others do not.\textsuperscript{136} Some states provide for exceptions when the removal of the property violated public international law which may be the case in the context of looting cultural property in armed conflicts and wars, in particular with regard to Nazi looted art.\textsuperscript{137}

This deep fragmentation should be eliminated. There should be an EU-wide harmonised anti-seizure legislation of a plausible scope and reliable structure. This instrument should install an administrative procedure for issuing a return guarantee after a certain waiting period (Swiss/German model), and the issuing authorities should not issue guarantees if there is a denial of justice, i.e. if there is no access to justice elsewhere for claimants, in particular no access to justice at the home jurisdiction of the loaned cultural object.\textsuperscript{138}

\textbf{b. – Unclear relation between national anti-seizure statutes and Directive 2014/60/EU}

Besides, there is an unclear relation between national anti-seizure statutes and Directive 2014/60/EU. The Directive grants a claim for restitution to a Member State to recover an object located in another Member State where an anti-seizure legislation is in place and blocks any kind of seizure of the object temporarily on loan at that Member State. Then, the question arises which legislation prevails.

This question had been already discussed under the previous Directive 93/7/EEC. Some commentators argued that the anti-seizure legislation of a Member State must be interpreted in light of EU secondary legislation, thus it must not impair any claim for restitution under the Directive.\textsuperscript{139} Others argued that the Directive

\textsuperscript{133} E.g. Belgium, France, or Quebec.
\textsuperscript{134} E.g. Germany, Switzerland, US Federal law, New York, Texas Rhode Island, Manitoba, British Columbia, Ontario.
\textsuperscript{135} Switzerland.
\textsuperscript{136} Germany, Austria.
\textsuperscript{137} Israel. The German authorities will presumably – and should – exercise their discretion to the effect that Nazi looted art would not be protected, but the administrative decisions by the authorities on this matter are not published and no such case has been reported so far, see e.g. Das „Freie Geleit“ für internationale Kunstleihgaben, in Martin Gebauer/Heinz-Peter Mansel/Götz Schulze (Hrsg.), Die Person im Internationalen Privatrecht, Symposium anlässlich des 80. Geburtstags von Erik Jayme, Tübingen 2017, forthcoming.
\textsuperscript{138} See Matthias Weller, op.cit.
\textsuperscript{139} See e.g. Angelika Fuchs, Kulturgüterschutz im Kulturgutsicherungsgesetz, Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 2000, 281, 286.
must be interpreted in light of primary EU law, in particular in light of (now) Article 167 TFEU.\textsuperscript{140} According to Article 167 (2) lemma 3 TFEU, action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action, \textit{inter alia}, in the area of “non-commercial cultural exchanges”. Also the mobility of collections is an express objective of the Action Plan of the EU Council for \textit{(inter alia) Culture 2015 to 2018}.\textsuperscript{141} Thus, collection mobility is an express objective of EU policy. Against this background, one may argue that protection and support of collection mobility by national anti-seizure statutes should not be impaired by Directive 2014/60/EU. Some Member States, supported by the European Parliament\textsuperscript{142}, suggested clarifying this point during the recast of Directive 93/7/EEC.\textsuperscript{143,144} However, the issue has not been clarified and this is not satisfactory. Rather, Directive 2014/60/EU should be amended.


\textsuperscript{142} European Parliament, Committee on Culture, Amendments 33-77, Draft Report Marie-Christine Vergiat, The return of cultural objects unlawfully removed from the territory of a Member State (recast), Proposal for a directive COM (2013) 0311 – C7-0147/2013 – 2013/0162 (COD), S. 20, Proposal for a directive Article 5(2)(a) new: “For the purpose of promoting the international exchange of cultural objects and the mobility of collections between cultural institutions, the requesting Member State cannot initiate proceedings against the possessor or the holder of a cultural object if that object is on loan and a legally binding return guarantee granting immunity from seizure has been issued by the competent authority of a Member State for the limited period of time of that loan”.


\textsuperscript{144} European Parliament, Committee on Culture, Amendments 33-77, Draft Report Marie-Christine Vergiat, The return of cultural objects unlawfully removed from the territory of a Member State (recast), Proposal for a directive COM (2013) 0311 – C7-0147/2013 – 2013/0162 (COD), S. 20, Proposal for a directive Article 5(2)(a) new: “For the purpose of promoting the international exchange of cultural objects and the mobility of collections between cultural institutions, the requesting Member State cannot initiate proceedings against the possessor or the holder of a cultural object if that object is on loan and a legally binding return guarantee granting immunity from seizure has been issued by the competent authority of a Member State for the limited period of time of that loan”.
c. Exception for Nazi Looted Art?

It remains important to discuss whether anti-seizure legislation should include Nazi-looted art. Certain national legislation provides for such exceptions, most do not. The Council of Europe, in its Resolution 1205 (1999) “Looted Jewish cultural property” suggests, in Article 15, “relaxing or reversing anti-seizure statutes which currently protect from court action works of art on loan”.

In order to take up this concern, it appears advisable to introduce a careful system for examining the provenance of loans and for informing the public before granting immunity and, in the case that Nazi looted art is to be loaned, to refuse any application for protection. However, if there is no sign of Nazi spoliation within the waiting period prior to issuing the return guarantee, and once protection was granted by the host state for the time of the loan, the protection should be upheld.

5. State Immunity under Public Customary International Law

If there is no legislation (or when the administrative procedure was not applied for or when the conditions of the respective legislation are not met), the question arises to what extent a state lender may enjoy protection under customary public international law in relation to its property on the territory of the host state.

As far as the foreign state uses the loan of the cultural property in question for public purposes, (i.e. to promote its culture abroad and support cultural exchange with other states) an increasingly emergent state practice, common amongst EU Member States, is to grant immunity from seizure. Then, a private claimant seeking advantage from the fact that the contested cultural property is temporarily located on foreign territory during the loan, will not succeed in his attempts to recover his property. On the other hand, a private lender cannot be protected under state immunity law.

a. Legal Foundation

It is common ground in public international law that a foreign state is immune against seizure of property used by the foreign state for its public purposes, such as real estate or bank accounts for running its embassy in other states. This

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145 Israel. See also the newly enacted Foreign Cultural Exchange Jurisdictional Immunity Clarification Act 2016 in relation to state loans, see on this Act in more detail below in this Chapter 3, sub II.5.a (2).
147 This would basically be the Swiss model of national immunity legislation.
148 E.g. Nout van Woudenberg, State Immunity and Cultural Objects on Loan, Leiden 2012, pp. 491; see also Matthias Weller, Völkerrechtliche Grenzen der Zwangsvollstreckung – vom Botschaftskonto zur Kunstleihgabe, Der Rechtspfleger (Rpfleger) 2006, pp. 52 et seq.
Cross-border restitution claims of looted works of art and cultural goods

premise leads to the question whether and if so, to what extent and in what situations, cultural property is used by the foreign state for public purposes.

(1) – Treaty Law
Article 19 (c) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property149 provides that:

“No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that (…)

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.”

It appears to be appropriate to consider this provision as part of customary public international law.150

Article 21 (1) of the 2004 UN Convention lists specific categories of property that are deemed to be used for public purposes, and literae (d) and (e) read:

“(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.”

Thus, according to Article 21(1)(e) 2004 UN Convention, cultural property of a foreign state on loan for an exhibition to another state is deemed to be used for public purposes, unless a commercial purpose is proven. However, as has been stated above, the Convention has not yet entered into force.151

149 United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, not yet in force. Signatory States amongst the EU Member States are (as of 14 July 2017) Austria, Belgium, Czechia, Denmark, Estonia, Finland, France, Portugal, Romania, Slovakia, Sweden, United Kingdom. EU Member States that (additionally, as the case may be) ratified the Convention are Austria, Czechia, Finland, France, Italy, Latvia, Portugal, Romania, Slovakia, Spain, Sweden. All EFTA States (Iceland, Liechtenstein, Norway, Switzerland) signed and/or ratified the Convention. According to its Article 30 the Convention enters into force upon its 30th state party. Currently there are 21 state parties (and 28 signatory states).

150 See e.g. the German Federal Constitutional Court in its decision of 12 October 2011 – 2 BvR 2984/09, 2 BvR 3057/09, 2 BvR 1842/10, Neue Juristische Wochenschrift (NJW) 2012, pp. 293 et seq., at p. 295, in relation to the Russian Federation concerning the use of the House of Science and Culture (“Russia House”) for public purposes, for example its cultural representation in the host state (Germany).

151 See above note Error! Bookmark not defined..
(2) – Customary International Law

Therefore, the question arises whether cultural property by foreign states on loan abroad is protected under customary international law. Necessary preconditions are state practice and opinio iuris. The threshold is high. Nevertheless, there are a number of signs supporting the assumption of a respective rule under customary international law:

First of all there is Article 21(1)(e) of the 2004 UN Convention itself. However, given the controversial preparatory works on this Convention over decades, the picture on this question is unclear. The Committee of Legal Advisers on Public International Law of the Council of Europe appear to continue investigating the issue. Academic analysis on a broad comparative survey worldwide by a member of the Foreign Ministry of the Netherlands came to the conclusion that such a rule exists (with certain limitations).

Secondly, in 2005, the state-owned Russian Pouchkin Museum loaned works of art with a total value of 1 billion USD to a museum in Switzerland. Upon the attempt by a creditor of an arbitral award against Russia to seize the objects, the Swiss government intervened and declared: Cultural property of a Foreign State must be deemed as public property (“öffentliches Eigentum”) which, as a matter of principle, must not be seized. The follow-on claim by the creditor for state liability against Switzerland was finally dropped due to a lack of prospects for success.

Thirdly, in 2013, after the seizure of loans from Czechia to the Vienna Belverede, Austria and Czechia were said to have mutually declared that both States accept and support the rule of customary international law, that cultural property of a

157 See above in this Chapter III, sub II.3.
foreign state on loan to an exhibition in another state is immune from seizure.\textsuperscript{158} Furthermore, it was said that both states took motion on the level of the Council of Europe to achieve a common declaration to this effect by all Contracting States, but no result of this initiative seems to be achieved or publicly recorded.

Fourthly, on the level of domestic legislation, the USA recently enacted the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act 2016,\textsuperscript{159} which:

“amends the federal judicial code with respect to denial of a foreign state’s sovereign immunity from the jurisdiction of U.S. or state courts in commercial activity cases where rights in property taken in violation of international law are in issue and that property, or any property exchanged for it, is: (1) present in the United States in connection with a commercial activity carried on by the foreign state in the United States, or (2) owned by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States”\textsuperscript{160}

Further, the Act:

“grants a foreign state or certain carriers immunity from federal or state court jurisdiction for any activity in the United States associated with a temporary exhibition or display of a work of art or other object of cultural significance if the work of art or other object of cultural significance is imported into the United States from any foreign country pursuant to an agreement for its temporary exhibition or display between a foreign state that is its owner or custodian and the United States or U.S. cultural or educational institutions; and the President has determined that such work is culturally significant and its temporary exhibition or display is in the national interest.”

And, the Act:

“denies immunity, however, in cases concerning rights in property taken in violation of international law in which the action is based upon a claim that the work was taken: (1) between January 30, 1933, and May 8, 1945, by the government of Germany or any government in Europe occupied, assisted,

\textsuperscript{158} There is no public evidence on this issue. Abstractly on the issue of bilateral agreements and informal diplomatic promises of immunity in the context of cultural objects on loan see Norman Palmer, Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title, 38 Vand.J. Trans’l. L. 947 (2005), at p. 965. No state practice seems to be recorded.

\textsuperscript{159} Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, H.R. 6477 (114th), to amend chapter 97 of title 28, United States Code, to clarify the exception to foreign sovereign immunity set forth in section 1605(a)(3) of such title, entered into force on 15 December 2016. See also the Bill to amend chapter 97 of title 28, United States Code, to clarify the exception to foreign sovereign immunity set forth in section 1605(a)(3) of such title (“Foreign Cultural Exchange Jurisdictional Immunity Clarification Act”), H.R. 4292, 113th Congress, 2nd Session, 25 March 2014.

\textsuperscript{160} https://www.govtrack.us/congress/bills/114/hr6477/summary (14 July 2017).
or allied by the German government; or (2) after 1900 in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group. For purposes of these denials of immunity, the court must determine that the activity associated with the exhibition or display is commercial and that determination must be necessary for the court to exercise jurisdiction over the foreign state.” According to section 3 “the Department of State must ensure that foreign states that apply for such temporary exhibition immunity are notified of the amendments made by this bill”.161

Thus, the US legislator extended the scope of protection to jurisdiction but limited the protection to state lenders only. Exceptions are particularly prevalent for Nazi looted art on loan. Nevertheless, the legislation may be taken as another expression of state practice.

Fifth, courts of several states relied on the assumed rule of customary international law, that cultural property of a foreign state on loan to an exhibition is immune from seizure.162 This includes the Austrian courts in the case of the exhibition of Czech loans displayed at the Belvedere at Vienna.163

On these grounds, it becomes more and more plausible to indeed assume the existence of a rule of customary international law - that cultural property of foreign states on loan for exhibition are immune from seizure in the host state.164 And the

162 E.g. Upper Regional Court (Kammergericht) Berlin, decision of 4 February 2010, docket no. 13 O 48/10 in respect to loans from Syria to the exhibition ”Treasures from Ancient Syria – The Discovery of the Kingdom of Qatna” in 2010 at the State Museum of Baden-Württemberg, Germany when victims of terrorist attacks attributed to the then Syrian governemnt on the French ”Maison de France” at Berlin in 1983 attempted to enforce damages claims against the state of Syria. The court expressly held that the loans served the public purpose of presentation and dissemination of the Syrian culture by the Syrian state and thus public purposes and therefore immune from seizure by the host state. The court did not even refer the question of the existence of such a rule under customary international law to the German Federal Constitutional Court which would have been necessary in case of doubt (”Normenverifikationsverfahren”, Art. 100 (2) German Basic Law); see e.g. Matthias Weller, Vollstreckungsimmunität für Kunstleihgaben ausländischer Staaten, Praxis des internationalen Privat- und Verfahrensrechts (IPRax) 2011, p. 574.
163 County Court of the Inner City of Vienna (Bezirksgericht Innere Stadt Wien), decision of 16 May 2011; State Court for Civil Matters Vienna (Landesgericht für Zivilrechtssachen Wien, decision of 29 October 2012, docket no. GZ 46 R 395/11w, 46 R 396/11t-50, see on these proceedings e.g. Matthias Weller, Vollstreckungszugriff im Wiener Belvedere: Völkerwohnehheitsrechtliche Immunität für ausländische staatliche Kunstleihgaben, in Reinhold Geimer et al. (eds.), Europäische und internationale Dimension des Rechts – Festschrift für Daphne Ariane Simotta, Vienna 2012, p. 691 ff. The Austrian Supreme Court (Oberster Gerichtshof, OGH), unfortunately left the matter open for procedural reasons, OGH, decision of 16 April 2013 – 3 Ob 39/13a; OGH, decision of 11 July 2012 – 3 Ob 18/12m.
164 In this sense e.g. Andrea Gattini, Immunity from Measures of Constraint for State Cultural Property on Loan, in Isabelle Buffard et al. (eds.), International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner, Leiden/Boston 2008, pp. 421 et seq., at
new element of such a rule would merely be to recognize that presentation and representation of a state’s culture in another state constitutes public purposes in the sense of general immunity law. Even this insight would not be that new: According to Art. 3(1)(e) of the Vienna Convention on Diplomatic Relations of 18 April 1961, the functions of a diplomatic mission consist, *inter alia*, in developing their “cultural relations”. The only new element within this context would thus be to recognize that cultural representation and presentation is – naturally – effectuated, *inter alia*, by loans of cultural objects.

b. - Conclusion: Rule of customary international law exists, but uncertainties remain

Even though many aspects point to the existence of a rule under customary international law, that cultural property of a foreign state on loan in another state for the public purpose of cultural exchange is immune from seizure, uncertainty remains as to its existence. In particular, uncertainty remains regarding the precise scope of this rule and the extent to which other states will share the practice and the *opinio iuris* related to this practice expressed so far by states.

6. - Recommendations

Against this background, the following recommendations appear to be cumulatively advisable:

a. - Joint Declaration on immunity from seizure for cultural property of foreign states on loan for the purpose of cultural exchange in other states

First, the EU should motivate Member States to declare the acknowledgement of such a rule and its precise preconditions. The EU should itself participate in its

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165 See also, acknowledging this result in relation to the "Russian House" in Berlin, German Federal Court of Justice (Bundesgerichtshof, BGH), judgment of 1 October 2009, docket no. VII ZB 37/08, Recht der internationalen Wirtschaft (RIW) 2010, p. 72; on this decision see e.g. Matthias Weller, Vollstreckungsimmunität: Beweislast, Beweismaß, Beweismittel, Gegenbeweis und Beweiswürdigung Recht der internationalen Wirtschaft (RIW) 2010, at p. 599.

function of a subject of international law in such a declaration. This would consolidate the state practice and the *opinio iuris* in relation to this practice beyond doubt. Of course, the protection granted under international immunity law only covers the loans of states (and none of the many non-state lenders of cultural property) and only seizures (and not also jurisdictional immunity).

b. - Harmonization of state legislation on legislative immunity

Therefore, action must also be taken on the level of state legislation to harmonize the legislative immunity granted by statute to all lenders of cultural property: It might appear advisable to consider a harmonization of anti-seizure statutes within the EU. Such an instrument could either be based on Article 114 TFEU or on Article 81(2) TFEU, either on (c), relating to the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction, and/or (e), relating to effective access to justice, and/or (f), relating to the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

c. – Clarifying the relation between anti-seizure legislation of the Member States and Directive 2014/60/EU

Finally, the relation between national anti-seizure legislation of the Member States and Directive 2014/60/EU should be clarified, to the effect that the protection of temporary loans of cultural property by national anti-seizure legislation of the Member States prevails. This is in order to support and encourage cultural exchange, collection mobility and public access to important cultural objects.

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167 The two grounds could not be used jointly because this is only possible if both grounds of jurisdiction are compatible procedurally, ECJ, Case C-300/89, Commission v Council (Titanium Dioxide), EU:C:1991:244, paras. 19 et seq. Whereas both Articles provide for the adoption of measures following the ordinary legislative procedure, pursuant to Protocol 22, Denmark is not bound by the provisions of Title V of Part Three of the TFEU, in which Article 81 TFEU is included. This means that Denmark does not participate in the adoption of measures related to judicial cooperation in civil matters. In the case of the UK and Ireland, even though they do not participate in the adoption by the Council of measures proposed pursuant to Title V of Part Three of the TFEU, they have the possibility, pursuant to Article 3 of Protocol 21, to opt-in for such proposed measures. In this situation, the adoption of a measure based on Article 114 TFEU and Article 81(2) TFEU seems impossible in practice; the non-participation of a Member State - or several Member States - leads to different definitions of the necessary qualified majority in the Council and even if independent votes were envisaged for the different parts of the instruments, it seems difficult to imagine how Denmark and the UK or Ireland - should the two later not have exercised an opt-in - would take part in the vote at the moment of the adoption by the Council of its position on the text as a whole.
III. - Choice of law

KEY FINDINGS

- There are considerable differences in the legal systems of the Member States not only on the substantive law but also on how to design the choice of law rule for the acquisition of looted or otherwise stolen cultural property.
- The EU could consider enacting a harmonized choice of law rule.
- A possible model could be the Belgian choice of law rule in Article 90 of the Belgian Code of Private International Law.
- The EU could clarify, e.g. in a Recital to the harmonized choice of law rule, that there is no obstacle in principle to the application by EU courts of foreign cultural property law of non-EU states (“source states”).

Another pervasive issue in relation to restitution claims for contested cultural property is the choice of law. Presumably, the majority of cultural objects looted in armed conflicts and wars (or otherwise stolen or misappropriated), travelled across one or several borders before the original owner is able to trace the object and institute restitution proceedings. Typically, the object will have been passed on to further owners/possessors in acquisitions during this time. In this scenario, choice of law rules select the applicable substantive law on the requirements and modes of acquisition, and a valid acquisition extinguishes the claim for restitution of the original owner under civil law.¹⁶⁸

1. - Different concepts in the legal regimes on property law

The design of the choice of law rule is important because the legal regimes on the acquisition of movable property, including looted or otherwise stolen cultural property, differ substantially from each other amongst the Member States as well as amongst third states.¹⁶⁹ In particular, the conflict between the original owner and the needs of a reliable transaction market are decided differently. Some jurisdictions allow good faith acquisitions in principle, but are of course subject to a number of varying conditions. Some exclude it in case of stolen property, but allow exceptions; other jurisdictions strongly favour the owner and do not allow

¹⁶⁹ See the comprehensive comparative study in Brigitta Lurger/Wolfgang Faber, Study Group on a European Civil Code, Principles of European Law, Acquisition and Loss of Ownership of Goods (PEL Acq. Own.), Munich 2011, pp. 902 et seq. See also e.g. Paul Lagarde, La restitution internationale des biens culturels en dehors de la Convention de l’ UNESCO de 1970 et de la Convention d’ UNIDROIT de 1995, Rev. dr. unif. 2006, pp. 87, presenting cases outside the scope of both the UNESCO and UNIDROIT Convention, thereby illustrating the differences in the legal systems; see also Mara Wantuch-Thole, Cultural Property in Cross-border Litigation – Turning rights into claims, Berlin 2015, pp. 228 et seq.
any type of bona fide acquisition, but seek to temper the drawbacks for the innocent buyer (by setting time limits for raising claims). Further, the moment from which these time limits start running differ substantially. Theoretically, such time limits could begin from the moment of theft, from the moment of acquiring possession by the buyer, from the moment of knowledge about the location of the object and its current possessor, or from the moment in which the claims for restitution were raised and the possessor refused to return the contested object. Further, the time limits vary considerably in their length (of course depending on the choice of moment in which the time limit starts running, but also on other policy considerations).

For example, Article 1153 of the Italian Codice civile allows immediate good faith acquisition, even of stolen property. Other jurisdictions allow good faith acquisition in principle, but exclude good faith acquisition of stolen property, whereas in common law oriented jurisdictions (e.g. England, Wales, Ireland, Cyprus, Malta) the true owner prevails in principle, subject to varying exceptions. Some jurisdictions protect the original owner only within a certain period of time. In cross-border situations, these differences have been exploited

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170 Article 1153 Italian Codice civile: "Effetti dell'acquisto del possesso: Colui al quale sono alienati beni mobili da parte di chi non ne è proprietario, ne acquista la proprietà mediante il possesso, purché sia in buona fede al momento della consegna e sussista un titolo idoneo al trasferimento della proprietà. La proprietà si acquista libera da diritti altrui sulla cosa, se questi non risultano dal titolo e vi è la buona fede dell'acquirente. Nello stesso modo si acquistano i diritti di usufrutto, di uso e di pegno.”

171 E.g. section 935 (1) German Civil Code: “The acquisition of ownership under sections 932 to 934 does not occur if the thing was stolen from the owner, is missing or has been lost in any other way. The same applies, where the owner was only the indirect possessor, if the possessor had lost the thing.” But see also the exceptions in section 935 (2) German Civil Code: “These provisions [on good faith acquisition] do not apply to (...) things that are alienated by way of public auction or in an auction pursuant to section 979 (1a).”


173 See e.g. Articles 714(2) and 934 of the Swiss Civil Code. Article 714(2) reads: “Zur Übertragung des Fahrneigentums bedarf es des Überganges des Besitzes auf den Erwerber. Wer in gutem Glauben eine bewegliche Sache zu Eigentum übertragen erhält, wird, auch wenn der Veräußerer zur Eigentumsübertragung nicht befugt ist, deren Eigentümer, sobald er nach den Besitzesregeln im Besitze der Sache geschützt ist”. Article 934 (1) reads: „Der Besitzer, dem eine bewegliche Sache gestohlen wird oder verloren geht oder sonst wider seinen Willen abhanden kommt, kann sie während fünf Jahren jedem Empfänger abfordern."
for “art laundering”. Some jurisdictions provide for special and more restrictive rules for cultural property, others do not.

Additionally, the legal systems vary on the issue of whether or to what extent acquisitive prescription is available; i.e. acquisition of title by possession of the object for a shorter or longer time, combined with the possessor’s good faith in the moment of the acquisition of possession and, as the case may be, during the time of possession.

For example, in Germany a time limit of 10 years applies, whereas in Austria a time limit of 3 years applies in general, but a time limit of 6 years applies in relation to goods held by the state and churches (which will be the case for many cultural objects).

Additionally, the question arises; if the possessor has to return the acquired object to the original owner, if he is entitled to receive compensation by the original owner, and if so, on what conditions.

2. – Choice of law issues

On the level of choice of law these national divergences lead to the question how a choice of law rule should be designed. Secondly, the question arises of what effect should be given to foreign public law. For example, legislation that effectuates a forfeiture of the cultural property or prescribes that the state acquires ownership in case the cultural property is illegally excavated and/or exported from the regulating state. This issue touches upon a general issue of private international law, i.e. the question whether and to what extent foreign public law can be applied and/or taken into account by domestic courts.

a. – Design elements of a choice of law rule for the acquisition of cultural property

Not only the substantive law solutions differ widely from state to state, but also the connecting factor for determining the applicable law on ownership do so. Generally, the territorial location of the object constitutes the connecting factor (lex rei sitae), but the moments of time to be considered relevant are different.

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174 Winkworth v. Christie’s Manson & Woods Ltd [1980] Ch. 496: Cultural property was stolen in England, transferred to Italy, where it was validly sold under Article 1153 to a good faith acquirer, and then retransferred to England for auction. The claim for restitution of the original owner against the auction house was rejected because of the valid transfer of title in Italy.
175 E.g. the Greece, The Netherlands, Switzerland, see the detailed analysis by Brigitta Lurger/Wolfgang Faber, Study Group on a European Civil Code, Principles of European Law, Acquisition and Loss of Ownership of Goods (PEL Acq. Own.), Munich 2011, paras 148 et seq., pp. 938 et seq.
176 E.g Austria, Belgium, France, Poland, Scotland, Sweden, op. cit.
177 See section 937(1) German Civil Code: "A person who has a movable thing in his proprietary possession for ten years acquires the ownership (acquisition by prescription).
178 See section 1466 Austrian General Civil Code (ABGB): "Das Eigentumsrecht, dessen Gegenstand eine bewegliche Sache ist, wird durch einen dreijährigen rechtlichen Besitz ersessen."
179 Section 1472 ABGB.
Sometimes, the time when the proceedings are instituted is considered relevant (even for acquisitions in the past), more often the respective moments in time when the object was acquired and, as the case may be, again passed on is held to be relevant (lex rei sitae in the strict sense). Sometimes the moment of dispossession is seen as decisive, even for acquisitions later in time and at other places (lex furti), sometimes the place of cultural origin (lex originis). In most cases, these differences are not expressly laid down in the text of the codifications, but are the result of statutory interpretation.

b. – Recommendation: Harmonized choice of law rule along the lines of Article 90 of the Belgian Code of Private International Law

Against this background it is possible to consider introducing a harmonized choice of law rule, for example along the lines of the Belgian legislation.

Art. 90 of the Belgian Code of Private International Law of 27 July 2004 reads:

”Lorsqu’un bien qu’un Etat inclut dans son patrimoine culturel a quitté le territoire de cet Etat de manière illicite au regard du droit de cet Etat au moment de son exportation, sa revendication par cet Etat est régie par le droit dudit Etat en vigueur à ce moment ou, au choix de celui-ci, par le droit de l’Etat sur le territoire duquel le bien est situé au moment de sa revendication. Toutefois, si le droit de l’Etat qui inclut le bien dans son patrimoine culturel ignore toute protection du possesseur de bonne foi, celui-ci peut invoquer la protection que lui assure le droit de l’Etat sur le territoire duquel le bien est situé au moment de sa revendication.”

Thus, the Belgian choice of law rule is close to a lex furti, i.e. a choice of law rule using the place of the wrong as connecting factor. For instance, it selects the law of the state from which the object is removed if the object is considered part of the cultural heritage of that state, under the cultural property law of that state, and if the removal from the territory of that state is considered illegal from the perspective of that state. Additionally, the claimant is given the option to choose the law of the place where the object in question is currently located (lex rei sitae). If the law of origin does not offer any protection for a good faith possessor, such a possessor may invoke the protection according to the lex rei sitae.

Other proposals rely more strongly on the cultural origin (rather than the place of wrong under the respective laws on cultural property protection). For example, Art. 2 of the Resolution of the Institute of International Law of Basel of 3 September

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1991 “The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage” reads:

“The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country.”

Article 4.1. restricts this rule by the following conditions:

“If under the law of the country of origin there has been no change in title to the property, the country of origin may claim, within a reasonable time, that the property be returned to its territory, provided that it proves that the absence of such property would significantly affect its cultural heritage.”

The difficulty of this rule is to define the “country of origin”. A variety of criteria has been suggested, but the connecting factor remains somewhat vague and difficult to apply, even though on an abstract level the *lex originis* meets with approval amongst many other scholars worldwide. In particular, this is because the *lex originis* prevents one from making easy use of jurisdictions with favorable rules for purchasers simply by placing the movable property there at the moment of transaction. In addition, the *lex originis* supports countries in enforcing their policies on the protection of cultural property. However, all of these virtues apply to the *lex furti*, whilst the *lex furti* is able to offer a rather predictable connecting factor. Therefore, the Belgian model is preferable.

c. – Application of foreign public law
Another recurrent issue relates to the application of foreign public law by domestic courts: In its recent action to recover certain antiquities of its national heritage from the current possessor (the Barakat Galleries Ltd in London), the Government of the Islamic Republic of Iran found itself confronted with the contention that any claim dependent on the legal effects of Iran’s legislation to protect its national heritage

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must fail, for the sole reason that domestic courts would not enforce foreign public law. Whilst Iran reserved its right to argue to the contrary at a later stage of the proceedings, the court focused on other issues first, and held that Iran had not discharged the burden of establishing its acquisition of title to the antiquities under the Iranian legislation. Nor could Iran successfully show the proprietary nature of its right of possession of the antiquities under the Iranian legislation – a necessary precondition to a successful claim for the recovery of the antiquities for conversion of or wrongful interference with them. Therefore, there was no need to address the issue of whether a domestic court should enforce, apply or at least take notice of foreign public law such as the Iranian legislation on the protection of its national heritage. However, the court amended its judgment “in case the proceedings go further” and expressed its conclusions on the preliminary issue of the non-justiciability of Iran’s claims: “Public laws, like penal laws, may not be enforced directly or indirectly in the English Court”.

This contention is not in line with choice of law methodology as it is understood by the majority of states and scholars: In its session of Wiesbaden in 1975, the Institut de Droit International in The Hague, an association of world-leading private and public international law scholars, adopted a resolution on the issue of the application of foreign public law by domestic courts. This “Resolution on the Application of Foreign Public Law” articulates its primary principle as follows:

“The public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy. The same shall apply whenever a provision of foreign law constitutes the condition for applying some other rule of law or whenever it appears necessary to take the former provision into consideration”.

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186 Government of the Islamic Republic of Iran v. Barakat Galleries Ltd [2007] E.W.H.C. 705 (Q.B.), para. 11: “Barakat submits that by this action Iran is seeking, directly or indirectly, to enforce in the domestic courts of this country an exercise of the sovereign power or authority of a foreign state”. Therefore, Barakat contended that the claim must fail on grounds of non-justiciability. But compare (after lengthy argumentation) the appeal decision Islamic Republic of Iran v. The Barakat Galleries Ltd., [2008] 1 All E.R. 1177, para. 151. The Iranian laws at issue in this case were the Legal Bill regarding clandestine diggings and illegal excavations intended to obtain antiquities and historical relics which are according to international regulations made or produced 100 or more years ago (‘1979 Legal Bill’); the National Heritage Protection Act 1930; Executive Regulations of the National Heritage Protection, dated 3 November 1930.

187 Id., at para. 77.

188 Id., at para. 81.

3. – Recommendation
Against this background, it would be important to clarify and confirm that this approach is correct for all courts of the Member States. This is because this approach guarantees that foreign “source states” will be able to base a claim for restitution on civil law before the courts of a Member States, thereby relying on the source state’s own legislation on the protection of cultural property that prescribes that the state becomes the owner of such property in case of e.g. illegal excavation and/or export. Only this approach provides for the necessary “tool” in the conflict of laws to effectuate what is suggested as 2014 Model Provisions on State Ownership of Undiscovered Cultural Objects by UNESCO and UNIDROIT. In line with general choice of law methodology, any application of foreign law, including foreign public cultural property law, must evidently be subject to a public policy control.

IV. – Substantive Law

KEY FINDINGS

- There are large and fundamental differences in the substantive laws of the Member States on good faith acquisition and prescriptive acquisition in respect to cultural property. Therefore, the law on these issues should be harmonized.
- Although it appears impossible for the EU to become a Contracting Party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (because the Conventions provides for the accession of States only and because the EU might not be competent under Article 216 TFEU), the EU at least should seek, under Article 167 TFEU, to encourage those Member States that have not yet done so to accede to the Convention.
- Alternatively, the EU (given the respective competency) could seek to incorporate Chapter II of the 1995 UNIDROIT Convention as a new part of Directive 2014/60/EU.
- Alternatively, the EU (given the competency) could harmonize the rules on good faith acquisition and acquisition by a longer period of possession on the basis of the respective provisions in the DCFR, Articles VIII.-3:101 DCFR and VIII.-4:102 DCFR, i.e. along the lines of international standards which many Member States have already endorsed by ratifying and acceding to the UNIDROIT Convention. Again, such measure could be inserted in (a recast of) Directive 2014/60/EU.
- Alternatively, and most effectively for a private enforcement of cultural property protection and along the lines of recent legislation in some Member States (e.g. Germany), the EU (given the respective competency) could introduce a general prohibition of sale and acquisition for stolen and illegally exported/imported cultural property. Again, such measure could be inserted in (a recast of) Directive 2014/60/EU. However, the precise concept of such a prohibition and its effects on legal trade with cultural property would need to be analysed carefully, in order to avoid unwanted chilling effects on the art market.

1. – Fundamental differences in the substantive laws of the Member States

The large, and partly fundamental, differences in the substantive laws of the Member States on good faith acquisition and/or prescriptive acquisition have
been observed and analysed many times.\textsuperscript{191} Even though a harmonized choice of law rule (see above in this Chapter 3, sub III.) would reduce the potential for “law shopping” by transferring the cultural object to the jurisdiction most favorable to purchasers, uncertainties and risks will remain.

2. - Recommendation and Policy Options
Thus, the substantive law on the acquisition of cultural property should be harmonized with a view to the general objective of providing for a more effective private enforcement of cultural property law (see Chapter 1 above). There are several options on how best to proceed:

a. - Policy Option 1: Encouraging the remaining EU Member States to accede to the 1995 UNIDROIT Convention
The UNIDROIT Convention of 1995 was the attempt to supplement the UNESCO Convention of 1971 with a special view to private law.\textsuperscript{192} This attempt was by no means unsuccessful in terms of the number of state parties.\textsuperscript{193} On the other hand, there could be more Contracting States, particularly amongst the Member States of the European Union.\textsuperscript{194}

Whereas Chapter III of the UNIDROIT Convention deals with the return of cultural property illegally exported from a Contracting State from another Contracting State (and thereby strongly resembling Directive 2014/60/EU which in turn was inspired by the Convention), Chapter II deals with the return of stolen

\textsuperscript{191} See in particular the seminal study by Gerte Reichelt, The international protection of cultural property – second study, Unif. L. Review 1988, pp. 52 et seq. See also UNIDROIT Secretariat (Marina Schneider), UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report Unif. L. Rev. 2001, pp. 476 et seq. Nothing fundamentally seems to have changed since, see e.g. recently Gerte Reichelt, 20 Jahre UNIDROIT Konvention – Status quo und Ausblick, in Matthias Weller et al. (Hrsg.), Kultur im Recht – Recht als Kultur, Tagungsband des Neunten Heidelberger Kunstrechtsstags am 30. und 31. Oktober 2015, Baden-Baden 2016, pp. 39 et seq.

\textsuperscript{192} See Article 7(b)(ii) of the UNESCO 1970 Convention, by which the States Parties “undertake, at the request of the State Party of origin, to take 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 provides for provisions on restitution and cooperation, http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention (5 July 2017). The 1995 UNIDROIT Convention undertakes to clarify and specify the obligations arising from this undertaking, see e.g. Irini Stamatoudi, Cultural Property Law and Restitution, A Commentary to International Conventions and European Union Law (2011), p. 66 et seq.

\textsuperscript{193} As of 20 July 2017 there were 40 Contracting States, http://www.unidroit.org/status-cp (5 July 2017), most recently Tunisia acceded to the Convention (as of 1 September 2017). Latvia seems to be in the process of acceding, see http://www.artlaw.online/en/read-it/running-commentary/latvia-to-enter-unesco-70-and-unidroit-95-conventions-3 (20 July 2017).

\textsuperscript{194} The 14 Contracting EU States are: Croatia, Cyprus, Denmark, Finland, France, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. France and the Netherlands are only Signatory States. The only Contracting EFTA State is Norway.
cultural property. According to Article 3(1) of the Convention, the possessor of a cultural object which has been stolen shall return it. Thus, there is no good faith acquisition under the Convention’s regime. The notion of “stolen” property includes unlawful excavation and/or unlawful retention when consistent with the law of the State where the excavation took place, Article 3(2) of the Convention. Article 3(2) thus helps to enforce the legislation on the protection of cultural property by source states (“private enforcement”). A claim must be brought within a period of three years from the discovery of the cultural object and the identity of its possessor, in any case within a period of fifty years from the time of the theft, Article 3(3). Articles 3(4) to (8) provide for special rules in relation to time limits. The current possessor is entitled to a fair and reasonable compensation on condition that he or she was in good faith as further specified in Article 4(4).

This regime appears to be suitable as a workable compromise between the competing and conflicting interests of the original owner and the bona fide possessor, as well as between the different legislative approaches to be found in the jurisdictions of the Member States (and other states).

However, there seems to be no possibility for the EU to accede to the Convention itself, since the Convention only accepts States as Contracting Parties and not additionally, as modern Conventions increasingly suggest, regional integration communities. In addition, the Commission seems to see no competency. However, this position would need further analysis. Article 216 (1) TFEU might provide for a competency, at least as far as there is internal competency for harmonizing the relevant substantive law and choice of law. If not, the EU should at least seek, under Article 167 TFEU, to encourage those Member States to accede to the Convention that have not yet done so. This would of course lead to a double regulation for the return of cultural objects illegally exported from one Member State to another (see Chapter III of the Convention and Directive 2014/60/EU), but any conflict could be easily resolved on the assumption that neither the Convention nor the Directive bars the Member States from granting more favourable options for the recovery of illegally exported cultural property than provided for in the respective instrument.

b. – Policy Option 2: Incorporating Chapter II of the 1995 UNIDROIT Convention into EU secondary law (e.g. as new part of Directive 2014/60/EU)

Alternatively, the EU could seek to autonomously incorporate just Chapter II of the Convention in a self-standing EU instrument or, perhaps, as a new part of Directive 2014/60/EU (which then would of course have to be renamed). Although this option appears technically easy and “smart” in that it only focuses

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195 Commission Staff Working Document Impact Assessment accompanying the document “Proposal for a Regulation of the European Parliament and of the Council on the import of cultural goods”, SWD(2017) 262 final, of 13 July 2017, at p. 7: “Moreover, under the TEU and the TFEU, the European Union has no general power to enter into such international treaty relations [such as the 1970 UNESCO or the 1995 UNIDROIT Convention]”. 
on those parts of the Convention that are still missing within the EU law body.\textsuperscript{196} However, the availability of this option depends on a competency of the EU to regulate the issue for the internal market, but Article 114 TFEU, the ground of competency for the current version of Directive 2014/60/EU, should be sufficient. Additionally, the EU might want to consider whether the function for the private enforcement of the regulatory objective of the Directive suffices to constitute a kind of “annex”-competence.


In 2008, the Study Group on a European Civil Code (the ‘Study Group’) and the Research Group on Existing EC Private Law (the ‘Acquis Group’) presented the Full Edition of its revised and final academic Draft of a Common Frame of Reference (“DCFR”).\textsuperscript{197} Based on comparative research in the legal orders of the Member States, the DCFR contains principles, definitions and model rules of European Private Law. It thus offers genuinely European solutions to pervasive questions of all legal orders of the Member States. Book VIII contains rules on the acquisition of property. Chapter III provides for the rules on good faith acquisition, Chapter IV on acquisition of ownership by continuous possession. Each Chapter provides for special rules in relation to cultural property, because cultural objects are considered, throughout Book VIII, to be a special category of goods where the bond of ownership to the original owner justifies a stronger protection as compared to “ordinary” goods.\textsuperscript{198}

Article VIII.–3:101 DCFR provides for the modalities and conditions of good faith acquisition through a person without right or authority to transfer ownership but, in subsection 2 Sentence 2, expressly excludes such acquisition in case of stolen cultural property. Article VIII.–3:101 DCFR reads:

“(1) Where the person purporting to transfer the ownership (the transferor) has no right or authority to transfer ownership of the goods, the transferee nevertheless acquires and the former owner loses ownership provided that:

(a) the requirements set out in VIII.–2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(a), (1)(b), (1)(d), (2) and (3) are fulfilled;

\textsuperscript{196} Note that according to Article 8 of the 1995 UNIDROIT Convention, a claim under Chapter II may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States. This optional ground of jurisdiction has conceptually already found its way into EU law by Article 7 no. 4 Brussels Ibis Regulation, see above in this Chapter 3, sub I.


\textsuperscript{198} Op.cit., p. 4164.
(b) the requirement of delivery or an equivalent to delivery as set out in VIII.-2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) is fulfilled;

(c) the transferee acquires the goods for value; and (d) the transferee neither knew nor could reasonably be expected to know that the transferor had no right or authority to transfer ownership of the goods at the time ownership would pass under VIII.-2:101 (Requirements for the transfer of ownership in general). The facts from which it follows that the transferee could not reasonably be expected to know of the transferor’s lack of right or authority have to be proved by the transferee.

(2) Good faith acquisition in the sense of paragraph (1) does not take place with regard to stolen goods, unless the transferee acquired the goods from a transferor acting in the ordinary course of business. Good faith acquisition of stolen cultural objects in the sense of VIII.-4:102 (Cultural objects) is impossible.

(3) Where the transferee is already in possession of the goods, good faith acquisition will take place only if the transferee obtained possession from the transferor.”

Article VIII.-4:102 DCFR deals with acquisition of cultural objects by possession and provides for prolonged time limits as a minimum standard. The Member States remain free to adopt higher standards in order to protect cultural property. DCFR VIII.-4:102 reads:

“Cultural objects: (1) Under this Chapter, acquisition of ownership of goods qualifying as a “cultural object” in the sense of Article 1 (1) of Council Directive 93/7/EEC, regardless of whether the cultural object has been unlawfully removed before or after 1 January 1993, or not removed from the territory of a Member State at all, requires continuous possession of the goods:

(a) for a period of 30 years, provided that the possessor, throughout the whole period, possesses in good faith; or

(b) for a period of 50 years.

(2) Member States may adopt or maintain in force more stringent provisions to ensure a higher level of protection for the owner of cultural objects in the sense of this paragraph or in the sense of national or international regulations.”
Without going into detail, the regulatory approach principally resembles the standards of international treaty law, in particular the 1995 UNIDROIT Convention.\textsuperscript{199} And indeed, the commentators to the DCFR expressly state that in particular Article VIII.\textsuperscript{–}4:102 (2) endorses the policy in relation to international conventions, concluded by some but not all Member States in the area covered by that Article.\textsuperscript{200} The idea of this Option is thus again to create harmony and a level playing field by autonomously adapting to the standards set by international conventions, rather than directly acceding them (due to a potential lack of competency). Again, such harmonization could be inserted in (a recast of) Directive 2014/60/EU (which would have to be renamed).

d. – Policy Option 4: Introducing a general prohibition of sale and acquisition for stolen and illegally exported/imported cultural property

An even more powerful tool for private enforcement would be introducing a general prohibition of sale and acquisition for stolen and illegally exported/imported cultural property. The new German 2016 Cultural Property Protection Act\textsuperscript{201} provides for a recent example. Section 40 reads:\textsuperscript{202}

“(1) It shall be prohibited to place cultural property on the market that has been [unwillingly] lost [in the sense of misappropriated, in particular stolen], unlawfully excavated or unlawfully imported.

(2) Executory contracts and transfer agreements prohibited pursuant to subsection 1 shall be invalid.”

This rule applies to anyone who intends to transfer cultural property to another party as an actor of the art market and invalidates the sale and transfer of title. Thus, the rule pre-empts any provision under general civil law on bona fide purchase and acquisition.\textsuperscript{203} The title remains unaltered even if the possession is transferred to the buyer in the course of the transaction, and the original owner may avail itself of all remedies for the restitution and recovery of his movable object under the applicable civil law.

The German legislator explains:\textsuperscript{204}

\textsuperscript{199} See above.
\textsuperscript{202} Official translation, see https://www.bundesregierung.de/Webs/Breg/DE/Bundesregierung/Beauftragte fuer Kultur und Medien/kultur/kulturgutschutz/_node.html (20 July 2017).
\textsuperscript{203} However, the rule seems not to exclude acquisitive prescription.
\textsuperscript{204} Die Beauftragte der Bundesregierung für Kultur und Medien, Das neue Kulturgutschutzgesetz, Handreichung für die Praxis, Berlin 2017, at p. 203 et seq. (in translation by the Author).
“Section 40 is one of the central regulations of the new Act in order to fight against illegal trade with cultural property and against illegal excavations. Section 40 deliberately abstains from taking cultural property entirely out of the market (“res extra commercium”), as it is done by other States, for example for archaeological artefacts. Instead, trade is only restricted (and not entirely barred) and put under certain conditions as it is done e.g. by Article 16(1) of the Swiss Act on the Transfer of Cultural Property of 20 June 2003. (...). Subsection (2) draws the consequences from the prohibition in subsection (1) in that it invalidates the sales contract and the title of transfer (...).”

Indeed, Article 16 of the Swiss Act on the Transfer of Cultural Property provides:

“In the art trade and auctioning business, cultural property may only be transferred when the person transferring the property may assume, under the circumstances, that the cultural property:

a. was not stolen, not lost against the will of the owner, and not illegally excavated;

b. not illicitly imported.”

Even though the provision does not state expressly that, as a consequence of the prohibition, all sales and transfers in execution of the sale are null and void, it is (at least partly) interpreted to this effect.

EU law makes use of such prohibitions in certain special areas of the market for cultural property, namely currently in respect to cultural property from Iraq and Syria.

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206 See e.g. Markus Müller-Chen, Grundlagen und ausgewählte Fragen des Kunstrechts, Zeitschrift für schweizerisches Recht (ZSR) 2010 II pp. 5 et seq., at p. 98. But compare Marc-André Renold, in Peter Mosimann et al (eds.), Basel 2009, Chapter 8 para 25. There seems to be no court decision directly to the point.

207 Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96, Article 3: 1. "The following shall be prohibited: (a) the import of or the introduction into the territory of the Community of, (b) the export of or removal from the territory of the Community of, and (c) the dealing in, Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance including those items listed in Annex II, if they have been illegally removed from locations in Iraq, in particular, if: (i) the items form an integral part of either the public collections listed in the inventories of Iraqi museums, archives or libraries' conservation collection, or the inventories of Iraqi religious institutions, or (ii) there exists reasonable suspicion that the goods have been removed from Iraq without the consent of their legitimate owner or have been removed in breach of Iraq's laws and regulations."

208 Council Decision 2013/760/CFSP of 13 December 2013 amending Decision 2013/255/CFSP concerning restrictive measures against Syria, Article 13a: "It shall be prohibited to
import, export, transfer or provide related brokering services for cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance which have been illegally removed from Syria, or where reasonable suspicion exists that they have been illegally removed from Syria, on or after 9 May 2011. The prohibition shall not apply if it is shown that the cultural items are being safely returned to their legitimate owners in Syria.”
V. – The special issue of Nazi Looted Art

KEY FINDINGS

- The special issue of Nazi looted art requires special solutions.
- Retroactive legislative measures that change the status of otherwise valid legal acquisitions of Nazi looted art in the past, e.g. by good faith acquisitions or acquisition by a longer period of possession after the Second World War, would not be in conformity with guarantees under the European Convention on Human Rights, the EU Charter of Human Rights and national constitutional guarantees.
- In respect to future transactions, the EU could consider defining minimum standards for pre-contractual information on the provenance of the object to be sold, in particular whether and to what extent there is reason to suspect that the object is spoliated.
- The EU could further consider clarifying/harmonizing the buyer’s remedies in case of non-compliance with the seller’s pre-contractual duties to inform the buyer.
- These issues could be regulated e.g. in a Directive on certain aspects of the sale of (potentially) Nazi looted art, structurally mirroring Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.
- In respect to transactions in the past and in order to further support the implementation of the Washington Principles and to bring about greater consistency, the EU could consider funding a restatement of restitution principles, under Article 167 TFEU. Such a restatement would collect and analyse the recommendations of the Spoliation Advisory Panels in the Member States and beyond on the restitution of Nazi looted art and extract, carefully develop and supplement, as the case may be, the respective ratio of the recommendations, in order to provide the Panels with a reliable source of common thought and evaluation.

1. – No retroactive legislation

Some of the measures considered above (in relation to e.g. jurisdiction under Article 7 no. 4 Brussels Ibis Regulation and to immunity) apply by their very nature only to future proceedings on the restitution of cultural property, looted in armed conflicts and wars, including Nazi looted art. To this extent, there is no issue of retroactivity.

209 See above in this Chapter 3, sub I.
210 See above Chapter 3, sub II.
All other measures considered above, such as a newly designed choice of law rule for the acquisition of cultural property, or modified elements of the applicable substantive law, cannot intend to have retroactive effects, but will be applicable only from the date of enactment for future transactions.

The European Convention on Human Rights (ECHR) and the EU Charta on Fundamental Rights (EU Charta) exclude retroactive legislation. The exclusion of retroactive legislation is an established principle of the rule of law (legal certainty and protection of legitimate expectations), of fair trial (in case legislation is changed during proceedings) and a firmly established part of the Member States’ (and other states’) constitutional traditions. Retroactive legislation takes away or impairs vested rights that were validly acquired under the law as it stood at the time of the acquisition of the right. Such legislation is not in conformity with the ECHR and the EU Charta. This is also a firmly established principle in the case law of the ECJ. Furthermore, it is a firmly established principle in international law, including international cultural property law. For example, Article 10(1) of the 1995 UNIDROIT Convention provides:

“The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought (...);”

Therefore, two different areas must be distinguished in relation to the restitution of Nazi looted art. Firstly, questions relating to future transactions and future

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211 E.g. ECtHR, judgment of 31 May 2011, Application No. 46286/09, 53727/08, 54486/08, 56001/08, Maggio and others v. Italy where the Court held that “interpretative” legislation, i.e. legislation that intends to interpret earlier legislation bindingly violates Article 6 of the Convention; similarly ECtHR, judgment of 7 June 2011, Application No. 43549/08, 6107/09, 5087/09, Agrati and others v. Italy; see also ECtHR, judgment of 27 September 2011, Application No. 7359/06, Agurdino SRL v. Moldova where the Court held that that retroactive legislation violated, inter alia, the right to enjoyment of possessions (Article 1 of the First Protocol of the Convention); see also e.g. ECtHR, judgment of 3 July 1997, Application no 17849/91, Pressos Compania Naviera SA and others v. Belgium where the State was held liable for extinguishing the applicant’s pending claims by enacting retroactive legislation.

212 See e.g. Ulf Bernitz, Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law, Scandinavian Studies in Law 2000 No. p. 43 et seq.: “In a state based on the rule of law the problems surrounding retroactive legislation are central.”

213 For the German constitutional law see e.g. Bernd Grzeszick, Maunz/Dürig, Grundgesetz-Kommentar (Lfg. 48 November 2006), Article 20 German Basic Law (Grundgesetz), para. 72. For the USA see e.g. Ronald D. Rotunda/John E. Nowak, Principles of Constitutional Law, St. Paul MN 2016, p. 288.

214 E.g. ECJ, Case C-107/10 – Iztok 3 AD v. Direktor ‘Obzhalvane i upravlenie na izpalnenieto’ NAP, para. 39: “[i]t should be noted that, according to the Court’s settled case-law, it is perfectly permissible and, as a general rule, consistent with the principle of the protection of legitimate expectations for new rules to apply to the future consequences of situations which arose under the earlier rules (Case C-60/98 Butterfly Music [1999] ECR I-3939, paragraph 25 and the case-law cited). However, a legislative amendment retroactively depriving a taxable person of a right he has derived from earlier legislation is incompatible with the principle of the protection of legitimate expectations (see, to that effect, Marks & Spencer, paragraph 45).”
proceedings about Nazi looted art, and secondly, questions relating to transactions in the past on the basis of moral considerations, in particular with a view to the 1998 Washington Principles on Nazi confiscated art.\textsuperscript{215}

2. - Sales law for transactions in the future

In respect to future transactions, and beyond the measures taken into consideration in this Study for cultural property looted in armed conflicts and wars or otherwise stolen or misappropriated (i.e. increasing the thresholds for good faith acquisitions etc.), sales law should be primary focus. The following case study illustrates the issue:

a. - Case study: The auction of Lodovico Carraci’s “St. Jerome” (Max Stern Gallery) by Lempertz

On 20 May 2000, the New York art dealer Richard L. Feigen purchased by auction at Lempertz in Cologne the painting “St. Jerome” by Lodovico Carraci. The provenance of the painting was described in the auction catalogue as follows (translated):

“Private Collection, Berlin (1933); Stern Gallery, Düsseldorf; 392th Lempertz Auction Cologne, 13 November 1937, lot 185 (stock of Stern Gallery, Düsseldorf); Rhenish Private Collection; Private Collection Zurich.”

Two days before the auction, on 18 May 2000, Lempertz had confirmed upon Feigen’s question:

“The provenance of the Painting is clean. We sold it 1937 (stocks of Stern Gallery) to a collector in the Rhineland”.

One day before the auction, on 19 May 2000, Feigen had asked Lempertz to confirm that the painting had been checked with the Art Loss Register, which was the case, but without any result.

Upon this information, Feigen purchased the painting for DM 100,000 plus DM 16,000 premium. Feigen took the painting with him to New York. Nothing happened for the next nine years. In 2009, however, Feigen heard about the restitution of another painting from the stock of the Stern Gallery that had been auctioned in the same 392\textsuperscript{th} Lempertz auction in 1937. Feigen started researching the provenance of his painting on his own initiative and contacted the Max Stern

\textsuperscript{215} Compare European Parliament, Committee on Legal Affairs and the Internal Market, Rapporteur: Willy C.E.H. De Clercq, Report of 26 November 2003, on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested (2002/2114(INI)), p. 6, sub 4, lemma 3, where the Report, in respect to Nazi looted art “[c]alls on the European Commission, with due regard for Article 295 of the EC Treaty, to undertake a study by the end of 2004 on identifying common principles on how ownership or title is established, prescription, standards of proof, rights to export or import property which has been recovered”. This is a well justified call, but as far as it should aim at retroactive legislative measures, it would run into conflict with the prohibition of retroactive legislation.
Restitution Project at the Concordia University, Montreal. This project was founded in 2002 and works on the restitution of the works of art lost by Max Stern due to Nazi persecution. Feigen learned that his painting had been listed as lost under Nazi persecution with the Art Loss Register since 2004. Thereupon, the director of the Max Stern Project, Clarence Epstein, informed the US authorities who seized the painting. Feigen negotiated a settlement under which the painting was restituted in a ceremony at the Leo Baeck Institute in New York. Then, Feigen instituted proceedings against Lempertz for damages of USD 350,000 with the courts of Cologne.

The Court held that no legal claims for the restitution of the painting by the heirs of Max Stern (i.e. the Max Stern Restitution Project) existed at the time of the purchase by Feigen. This was neither under the old restitution legislation introduced by the Allied Forces shortly after the war, nor under the follow-up restitution legislation by the then young Federal Republic of Germany, nor under New York law from the perspective of a New York court. Therefore, in the view of the Cologne court, there was no defect of title or “legal” non-conformity in respect to the sold painting. However, the court held that Lempertz was in breach of contract by wrongly affirming that “the provenance is clean”, although the painting was lost due to Nazi persecution. Yet any claims for damages were already time-barred under the general prescription legislation in civil law, because the short prescription periods for claims for breach of duty under the applicable German law had long run out.

This case poses the general question on how sales law in respect to Nazi looted art should be designed in the future, in order to support a responsible attitude by all parties (sellers/auction houses or other intermediaries and buyers). It is beyond the scope of this Study to assess comparatively the respective answers by the sales laws of the Member States, but it appears fair to assume that (1) the answers are difficult to assess in respect to the rather special question of the effects of “bad provenance” of a painting to be sold, and (2) the answers, once precisely assessed, will differ from each other. Upon this latter assumption, the following is recommended:

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216 Upper Regional Court (Oberlandesgericht) Cologne, judgment of 8 July 2016, docket no. 1 U 36/13, Zeitschrift für offene Vermögensfragen (ZOV) 2016, pp. 102 et seq.

217 Under German general civil prescription law today (certain differences applied in the case under the old legislation that was repealed as of 1 January 2002), claims are time barred three years after the end of the year in which the claim arose and the claimant became aware of the claim or should have become aware, sections 195, 199(1) German Civil Code. Otherwise, claims for damages are time barred after 10 years, some only after 30 years, but the claims in the case at hand were of another type.
b. Recommendation: Defining the sellers due diligence and the buyer’s remedies under a European sales law when Nazi looted art is sold

The remedies by a buyer under sales law should be clearly defined in case he or she acquires Nazi looted art. The general assumption is that a buyer does not want to buy Nazi looted art, primarily because of moral reasons but also because the “bad provenance” creates the risk of reputational damage and usually reduces the market value and chances for resale.

The Upper Regional Court of Cologne held on this issue (in translation):\(^{218}\)

“[The] Claimant has a legitimate interest in being informed about the circumstances of the auction in 1937, because Claimant would be facing the risk of negotiating about moral restitution claims with heirs and incurring legal costs. There is additionally the legitimate interest of Claimant not to be connected with criticism by the public to take part in the trade of Nazi looted art, irrespective of whether this accusation holds true or not.”

Thus, if the seller declares that “the provenance is clean” and then this declaration turns out to be wrong, it should be clear that the buyer should have all remedies of sales law for defects and/or misrepresentation.

However, the picture becomes more complicated if, for example (like in the case at hand) the victim of Nazi persecution or the heirs had already received compensation in post-war indemnification proceedings.\(^{219}\) Furthermore, the question arises to what extent the buyer loses remedies (according to general principles of sales law) as soon as he or she positively knew or should have known himself/herself about the bad provenance (due diligence on the buyer’s part).

This point leads to the central policy question: To what extent should the seller be obliged to inform the buyer about the provenance and, in order to be able to inform properly, to investigate the provenance in preparation of the sale. To put it differently: how should the due diligence on the part of the seller be defined in the special case of Nazi looted art?

For example, section 44 of the German 2016 Act on the Protection of Cultural Property\(^{220}\) provides for increased due diligence requirements for traders:

“if it has been proven or is assumed that this cultural property was taken from its original owner between 30 January 1933 and 8 May 1945 due to National Socialist persecution, unless it was restituted to the original owner

\(^{218}\) Upper Regional Court (Oberlandesgericht) Cologne, judgment of 8 July 2016, docket no. 1 U 36/13, Zeitschrift für offene Vermögensfragen (ZOV) 2016, pp. 102 et seq., para. 54.


or his heirs or they have come to a different final agreement regarding the deprivation”.

Section 41 provides for general due diligence requirements:

“(1) Anyone who places cultural property on the market shall be obliged to exercise due diligence in checking whether the cultural property

1. has been lost;
2. has been unlawfully imported; or
3. has been unlawfully excavated.

(2) The person placing cultural property on the market shall comply with the general requirements to exercise due diligence pursuant to subsection 1 if a reasonable person might assume that one of the offences referred to in subsection 1 has been committed. This assumption shall be made especially if, during the previous acquisition of the cultural property to be placed on the market,

1. an extremely low price was demanded without further explanation; or
2. the seller demanded cash payment for a purchase price exceeding €5,000.

(3) Exercising due diligence also includes verifying relevant information that can be obtained with reasonable effort or carrying out any other examination that a reasonable person would carry out under similar circumstances related to the placing on the market.”

Section 42 (1) defines special due diligence obligations for traders:

“(1) Anyone who places cultural property on the market in conducting his business shall, in addition to the obligations referred to in Section 41, be obliged

1. to establish the name and address of the vendor, deliverer, acquirer or ordering party;
2. to provide a description and an illustration that can be used to establish the identity of the cultural property;
3. to examine the provenance of the cultural property;
4. to examine documents proving the lawful import and export;
5. to examine bans and restrictions regarding import, export and trade;
6. to examine whether the cultural property is registered in publicly accessible registers and databases; and

7. to obtain a written or electronically transmitted declaration of the deliverer or vendor stating that he or she is authorized to have the cultural property at his disposal.

The obligations pursuant to no. 2 of the first sentence shall not affect copyright rules. The obligations pursuant to no. 3 through 6 of the first sentence shall be met in compliance with the reasonable effort and the economic reasonableness, in particular."

Section 44 provides that the obligation for provenance research under section 42 (1) no. 3 for traders is not limited to: “reasonable effort and economic reasonableness” in case of, inter alia, Nazi looted art.

And in connection with section 41, the German Government explains:221

“The trader violates its duty of care if he or she does not comply with the due diligence requirements connected to the trade of cultural property and may thus be liable to his or her contractual partner”.

Consequently, the legislator assumes that the due diligence requirements of the new Act directly apply to civil law relationships between the seller and buyer. At the same time, the Act does not generally seem to extend the prohibition of trade with cultural property under section 40 (1) to Nazi looted art.

Irrespective of details and nuances of the regulatory scheme, the general approach appears to be balanced and suitable for generalization on the European level: Whereas trade with Nazi looted art is not prohibited generally, strict due diligence duties are imposed on traders, and in case of non-compliance, the buyer will be able to avail itself of the general remedies under the applicable sales law and civil law in general for defects and/or misrepresentation.

Against this background the EU should consider defining minimum standards for traders in respect to pre-contractual information of the buyer, and in respect to (potentially) Nazi looted art based on the necessary provenance research. The EU should further consider clarifying/harmonizing the buyer’s remedies in case of non-compliance with these pre-contractual duties.

These issues could be regulated e.g. in a Directive on Certain Aspects of the Sale of (potentially) Nazi looted Art, perhaps conceptually along the lines of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Of course, the time limits for the remedies would have to be extended compared to the

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Consumer Sales Directive in order to achieve the regulatory objective. And of course there must be a ground of competency. Whereas Directive 1999/44/EC is based on (now) Article 114 TFEU and (now) Articles 169 and 12 TFEU, there appears to be no equivalent to the latter provision that would cover the trade with Nazi-looted art: Article 167 TFEU does not appear to extend to this issue and would not be comparable with Article 169 TFEU in terms of supporting a competency under Article 114 TFEU. However, given that sales of cultural property and in particular of looted art regularly involve cross-border elements, Article 114 TFEU might alone be considered sufficient.

Following from this, the benefit of such an instrument could be that all actors in trade increase awareness and, above all, look more intensely for just and fair solutions to be negotiated with the victims or their heirs, in order to fully clear the provenance of a tainted object. In essence, the Policy Option considered here would take up, reflect and reinforce emerging perceptions of the market on the effects for the market value of a “bad” or “clean” provenance of a cultural object to be traded.

3. – Property law in respect to Nazi looted art

Additionally, on the level of property law, one might want to think about measures to make it more difficult to acquire Nazi looted art in the future. These would have to be measures that increase the thresholds for good faith acquisitions, even beyond the measures considered above for future good faith acquisitions of cultural property looted in armed conflicts and wars more generally. This would have to be considered under the following premises:

a. – Invalidity of „forced sale“ transactions from 1933 to 1945

If the transfer of title was valid at the time, there is no possibility to enact legislation today that would undo the legal effects of the valid transaction at the time (no retroactive legislation).222 Thus, only if there was no transfer at all or if the transfer of title was invalid, there is a chance today to raise a claim based on ownership.

In Germany, it appears to be common ground that any seizures by Nazi authorities for the purpose of persecution are invalid.223 In these cases, the ownership did not pass but remained legally untouched, even though naturally the persecuted person was deprived of his or her possession of the object.

Furthermore, it appears to be common ground that any sale of property by a persecuted person was invalid if the buyer could only buy the object due to persecution and intentionally benefited from that persecution (“forced sale”), on the grounds of immorality.224 Again, in these cases, the ownership did not pass but

222 See above at note Error! Bookmark not defined. and accompanying text.
224 Op.cit. See also Andreas Bergmann, Der Verfall des Eigentums, Tübingen 2015, p. 6.
remained legally untouched, even though of course the persecuted person was deprived of his or her possession of the object.

Likewise, in many EU Member States post-war legislation was enacted to invalidate transactions of forced sale, based primarily on the “London Declaration.” It must be noted, however, that this Declaration itself did not change the applicable private law on acquisition of property, but merely informed and expressly warned the public about the Allied Forces’ intent to regulate the issue. Simultaneously and by this warning, the Declaration will have influenced the application of existing provisions on good faith acquisitions. However, it would be a matter of further research to assess to what extent, (in particular from what moment in time and how long after the Second World War and whether located in enemy states, liberated territories or neutral third states) this factual effect could be taken into account.

b. Validity of „non-forced sale“ transactions from 1933 to 1945

Conversely, sales which, at the time, did not take place under the pressure of persecution (“non-forced sales”) were valid. The crucial question for any further analysis is therefore: who bears the burden of proof for the conditions of invalidity in the transaction at the time?

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225 Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control of 5 January 1943: “The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece, India, Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee: Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the counties and peoples who have been so wantonly assaulted and despoiled. Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories. This warning applies whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected. The Governments making this Declaration and the French National Committee solemnly record their solidarity in this matter.”


229 Op.cit., at p. 521, para. 43
c. - Burden of proof for invalidity of transaction during 1933 to 1945

Under general rules of private law, it is commonly asserted that the immorality and thus invalidity must prove the factual circumstances that constitute immorality. Since it is structurally very difficult to succeed in this matter, the post-war restitution legislation in Germany\textsuperscript{230} provided for a shift in the burden of proof (for a certain short period of time in which restitution claims had to be filed with the authorities), in favour of the victims of persecution. According to Article 3 Military Law No. 59,\textsuperscript{231} the conditions for establishing the restitution claim were only the following: (1) Persecution of the owner, (2) transfer of property in a sale. If these conditions were met, there was a presumption that there was a forced sale. This presumption could be rebutted by showing cumulatively that (a) the vendor received a fair market price, (b) that he could freely dispose of the proceeds and (c) in case of sales after 15 September 1935, which is the date of entering into force of the Nuremberg laws, that the sale would have taken place without the Nazi regime in power.\textsuperscript{232}

However, after the expiration of the short time limits for filing the special restitution claims with the respective restitution authorities - according to Article 56(1) Military Law No. 59, all claims based on the special restitution legislation in that Law had to be filed with the Central Filing Agency before 31 December 1948.\textsuperscript{233} The special presumption in Article 3 Military Law No. 59 is no longer

\textsuperscript{230} US Military Law No. 59 (Gesetz Nr. 59 der Militärregierung Deutschland (Rückerstattungsgesetz) vom 10. November 1947, Amtsblatt der Militärregierung Deutschland – Amerikanisches Kontrollgebiet, Ausgabe G, S. 1, Military Government Gazette, reprinted in 42 Am.J.Int’l.L. 12 et seq.) was the model law for the restitution legislation in all Western zones of occupation

\textsuperscript{231} Op.cit. Article 3 contained a presumption of “confiscation” and read as follows: “(1) It shall be presumed in favor of any claimant that the following transactions entered into between 30 January 1933 and 8 May 1945 constitute acts of confiscation within the meaning of Article 2: (a) Any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1; (b) Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any grounds set forth in Article 1 was to be eliminated in its entirety from the cultural and economic life of Germany be measures taken by the State or the NSDAP. (2) In the absence of other factors proving an act of confiscation within the meaning of Article 2, the presumptions set forth in paragraph 1 may be rebutted by showing that the transferor was paid a fair purchase price. Such evidence by itself shall not, however, rebut the presumptions if the transferor was denied the free right to disposal of the purchase price on any of the grounds set forth in Article 1”.

\textsuperscript{232} For further analysis of the impact of these provisions on the Guidelines and its application in another hard case see Matthias Weller, The Return of Ernst Ludwig Kirchner’s ‘Berliner Straßenszene’ – A Case Study, Art Antiquity and Law Vol. XII, Issue 1, March 2007, pp. 65 et seq.

\textsuperscript{233} On the large scale of restitution of Nazi looted assets in general as well as on technical details see comprehensively Bundesministerium der Finanzen in Zusammenarbeit mit Walter Schwarz (ed), Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland Vol. I – VIII, in particular Volume I: Rückerstattung nach den Gesetzen der Alliierten Mächte, München 1974 et seq.; see also recently e.g. Harald König, Claims for the Restitution of Holocaust Era Cultural Assets and their Resolution in Germany, Art, Antiquity & Law 2007, pp. 59 et seq.; Leonie Schwarmeier, Der NS-verfolgungsbedingte Entzug von Kunstwerken und deren Restitution, Hamburg 2014, pp. 161 et seq.
available in proceedings today, and according to numerous commentators, even the potentially remaining claims under general civil law (if it is possible to establish them without the presumption) have been extinguished by Military Law No. 59 after 31 December 1948.\textsuperscript{234} However, the German Federal Court of Justice held recently to the opposite, in the case that the property’s location was unknown during the time of filing the claim under the special restitution legislation.\textsuperscript{235}

Even if the claims of victims of persecution or their heirs were not generally extinguished by the post-war legislation of the Allied Forces, it is clear that today any claimant would have to establish the claim under general civil law, meaning there are no specific legislative presumptions available in favour of victims of Nazi persecution. This cannot be changed retrospectively by legislation today (no retroactive legislation).\textsuperscript{236}

d. - Valid post-war good faith acquisition / prescription in many (not all) cases
Even if a claimant managed to prove the invalidity of the initial transaction during 1933 to 1945, the claimant would still have to struggle with good faith acquisitions and in particular with acquisitive prescription according to the applicable general civil law, or general time bars for the claim for restitution. Therefore, in many (not all) cases of Nazi looted art, no legal claims exist anymore.

e. - No retroactive legislation on good faith acquisitions / prescription in the past
To the extent that legal claims do not exist anymore, or to the extent they cannot be enforced, e.g. due to legal prescription and comparable legal time bars, the state of law cannot be changed by retroactive legislation.\textsuperscript{237} Therefore, the restitution of Nazi looted art has shifted mostly from legal claims to moral pleas, such as has been laid down in the Washington Principles on Nazi-confiscated Art.\textsuperscript{238}

\textsuperscript{234} E.g. recently Andreas Bergmann, Der Verfall des Eigentums, Tübingen 2015, at p. 11: “eklatant falsch”; Wolfgang Ernst, Zur heutigen Rechtsbedeutung der alliierten Rückerstattungsgesetze in Deutschland, in Festschrift S.Chrag. 2010, pp. 115 et seq., at p. 127.
\textsuperscript{235} German Federal Court of Justice, judgment of 16 March 2012, docket no. V ZR 279/10, Neue Juristische Wochenschrift (NJW) 2012, pp. 1796 et seq. – Plakatsammlung Hans Sachs; for a positive and affirmative comment on this decision as well as for a detailed rejection of the proposition that the old restitution legislation extinguished even claims under general civil law upon the expiration of the special time limits and special benefits for victims of persecution see Matthias Weller, Die Plakatsammlung Hans Sachs – Zur Ausschlusswirkung des alliierten Rückerstattungsrechts heute, Matthias Weller et al. (eds), Diebstahl – Raub – Beute: Von der antiken Statue zur digitalen Kopie, VI. Heidelberger Kunstrechtstage 28. und 29. September 2012, Schriften zum Kunst- und Kulturrecht Nomos-Verlag Baden-Baden 2013, pp. 91 et seq., at pp. 99 et seq.
\textsuperscript{236} See above once more at note \textit{Error! Bookmark not defined.}, and accompanying text.
\textsuperscript{237} See above once more at note \textit{Error! Bookmark not defined.}, and accompanying text.
\textsuperscript{238} On these issues see below in this Chapter 3, sub V \textit{Error! Reference source not found.}. 

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f. - Case study: The Schwabing Art Trove (“Gurlitt case”)

Particularly complex problems arise when heirs, potentially in good faith, find themselves in possession of Nazi looted art upon succession to the estate of the deceased who was not in good faith. These difficulties arose in a recent case in Germany, the “Schwabing Art Trove”, also known as the “Gurlitt case”:

On 22 September 2010, German customs officials carried out a routine inspection and searched Cornelius Gurlitt travelling on a train from Zurich to Munich. He was subsequently suspected of having committed a tax offence because he carried a certain amount of cash (slightly below the threshold for notifying the customs authorities) with him. The following day, the District Court of Augsburg issued a search warrant and seizure order for Cornelius Gurlitt’s apartment in Munich. From 28 February to 2 March 2012, Cornelius Gurlitt’s apartment was searched and over 1400 objects were seized as evidence, including 121 framed and 1285 unframed artworks. The majority of these artworks were gathered by Cornelius’s father, Hildebrand Gurlitt, an important art dealer during the Nazi regime and as such involved in the looting of art by the Nazis.

On 11 November 2013 the ‘Schwabing Art Trove’ Taskforce was set up by the German government and the Free State of Bavaria. Its objective was to research the provenance of the artworks in order to assist the prosecution’s investigation into the legality of Gurlitt’s ownership. In this context, the question arose whether a restitution claim against Gurlitt would be time barred under German law after Gurlitt had been in possession of the objects for more than thirty years.

In the following, the Bavarian Government submitted a proposal to the German Parliament for a bill on the restitution of cultural assets. The Bill proposed that the statute of limitations should not be applicable in cases involving confiscated objects where the current owner acted in bad faith at the time of purchase. The law was meant to be effective retroactively, i.e. to property misappropriated in the past and in particular prior to the enactment of the new legislation, and applicable in general, not only to Nazi confiscated art.

239 The following selection of facts is drawn from the long and complex chronology of the case as provided by the ‘Schwabing Art Trove’ Taskforce which was set up by the Federal Government of Germany and the Free State of Bavaria, see http://www.taskforce-kunstfund.de/en/chronology.htm (21 July 2017). For the full chronology see op.cit.

On 9 June 2017 the Federal Government of Germany communicated that currently “alternatives were being discussed”, probably due to pressing concerns over the constitutionality of the Bill. This will presumably mean that no legislative action on this issue will occur before the end of the 18th Parliamentary Session and the general elections in September 2017. Thus, the Bill will be discontinued by the end of this Session.

In other jurisdictions, legislative measures in relation to prescription with a view to favour claimants retroactively, also turned out to be problematic.

g. Recommendation: No retroactive legislation
Since retroactive legislative measures are not in conformity with guarantees under the European Convention on Human Rights and the EU Charter of Fundamental Rights (and presumably most of the Member States’ national constitutions), such legislation is not an option.

Against this background, it appears possible only to prolong those time limits that are still running. However, if the EU should decide to implement the 1995 UNIDROIT Convention, or comparable general rules on cultural property as suggested above, there would be no longer any need to introduce special time limits for Nazi looted art, because the time limits for stolen cultural property would be sufficient.

Article 3(3) and (4) UNIDROIT Convention provides in this respect:

“(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.

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242 See e.g. the complex history of the legislative changes in California, in particular by the 2002 California Holocaust-Era Artwork Statute, Section 354.3 of the California Code of Civil Procedure. This law prolonged the prescription until 31 December 2010 to allow “any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, [to] bring an action to recover Holocaust-era artwork from any museum or gallery that displays, exhibits or sells any article of historical, interpretive, scientific, or artistic significance.” The US Court of Appeals for the Ninth Circuit invalidated section 354.3 as unconstitutional. Therefore, the US Government recently enacted the Holocaust Expropriated Art Recovery Act (“HEAR Act”) of 2016, for an analysis see e.g. Jennifer Anglim Kreder, 20 Chap. L. Rev. 1 (2017). However, even this Act does not affect legal relationships fully lying in the past, see section 5(c) of the Act on “Pre-existing claims”.

243 See above at note Error! Bookmark not defined. and accompanying text.

244 See above in this Chapter 3, sub Error! Reference source not found.
(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.”

And Article 3 (5) of the UNIDROIT Convention provides that:

“[a]ny 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.”

4. – Just and fair solutions beyond the law

All states and jurisdictions confronted with the need to restitute Nazi-looted art decades after the objects were looted faced structural factual difficulties. These regard establishing the precise circumstances of the looting and/or the forced sale, according to the standards that would usually be necessary in court proceedings and legal constraints under the general framework in place.\textsuperscript{245} In addition, some states did not take action in this regard, or fully endorse the necessity of taking up the issue.

a. – Background

Therefore, in 1998, the representatives of 44 states (amongst them almost all EU Member States\textsuperscript{246}) convened upon invitation by the U.S. Department of State for the Washington Conference on Holocaust Era Assets. The delegates agreed upon a number of non-binding principles, termed the “Washington Conference Principles on Nazi-Confiscated Art” or simply the “Washington Principles”.\textsuperscript{247} In the first part, these principles focus on establishment and support of provenance research in respect to Nazi looted art. In the second part, there are material principles for restitution. The central rule, Washington Principle no. 8, states:

\begin{itemize}
\item See above in this Chapter 3, sub Error! Reference source not found..
\item Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. The Republic of Ireland and Malta did not participate originally. Malta, however, joined in at the follow-up conference, the Vilnius International Forum on Holocaust Era Looted Cultural Assets of 5 October 2000. The Republic of Ireland joined in at the Prague Holocaust Era Assets Conference resulting in the Terezin Declaration of June 30, 2009.
\end{itemize}
“If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.”

This approach – non-binding principles to motivate restitution based on general considerations of justice and fairness – rather than relying on existing legal claims – was reinforced in the following by the Vilnius Declaration in 2000 and the Terezin Declaration in 2009.

The impact of the Washington Principles was substantial. For example, the International Council of Museums (ICOM) provided for recommendations. Other organisations followed. Further, many of the participating states implemented Washington Principle No. 10:

“Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership”,

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249 Upon the invitation of the Prime Minister of the Czech Republic the representatives of 46 states convened at the Prague Holocaust Era Assets Conference and agreed to the Terezin Declaration, for the Declaration and the conference materials see http://www.holocausteraassets.eu (25 July 2017); see also U.S. Department of State, https://www.state.gov/p/eur/rls/or/126162.htm (25 July 2017).


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Such commissions or panels were established for example in Germany,\textsuperscript{253} Austria,\textsuperscript{254} the Netherlands\textsuperscript{255} and the United Kingdom.\textsuperscript{256}

b. – Increasingly diverging and contradictory restitution recommendations

These commissions, constituted (in varying formations and combinations) by most honorable and independent representatives of the respective disciplines (generally legal, ethical, cultural and historic expertise) are entrusted with developing and recommending just and fair solutions in accordance with Washington Principle No. 8, and their work is generally highly respected. However, the more recommendations that were handed down, the more the tendency of divergence in principal matters became apparent. For example, on the question on what constitutes a sufficient causal link between persecution and loss affect the solution of a particular case.\textsuperscript{257}

For example: A Jewish family is faced with persecution but is able to transfer some assets, including a painting, to third states outside the range of power of the Nazi regime, for example to Switzerland or England. The Jewish family follows shortly afterwards. The family is now safe but has no income or other assets. Therefore, the painting is put up for auction and receives a market price at London or Luzern. Today, the painting is in a museum. What is a just and fair solution in this case?

The UK Spoliation Advisory Panel’s recommendation of March 2012 had to deal with such a case.\textsuperscript{258} The German Advisory Commission also dealt with a

\begin{itemize}
  \item \textsuperscript{253}Beratende Kommission (Advisory Commission), see https://www.kulturgutverluste.de/Webs/EN/AdvisoryCommission/Index.html?jsessionid=851AC7E54F9F75FED6AF8382920829E9.m7 (25 July 2017).
  \item \textsuperscript{254}Kunstrückgabebeirat (Art Restitution Advisory Board), http://www.provenienzforschung.gv.at/empfehlungen-des-beirats/?lang=en (25 July 2017).
  \item \textsuperscript{255}Restitutiecommissie (Restitution Commission), http://www.restitutiecommissie.nl/en (25 July 2017).
\end{itemize}
comparable case in its first recommendation of January 2005. Comparing the two recommendations, two quite different solutions emerge:

The UK Spoliation Advisory Panel had to decide in respect to fourteen clocks and watches now in the possession of the British Museum. The Panel held that the sale was a forced sale, in the sense that Nazi persecution caused the sale. Nonetheless, the Panel considered “that the sale is at the lower end of any scale of gravity for such sales. It is very different from those cases where valuable paintings were sold, for example, in occupied Belgium to pay for food”. Therefore, the Panel held that the claim is, despite the impact of the Nazi era on the claimant’s circumstances, insufficient to justify restitution or even an ex gratia payment. Rather, the Panel recommended displaying, alongside the objects, their history and provenance with special reference to the claimant’s interest therein.

The German Advisory Commission had to decide the case of Julius Freund. Julius Freund had transferred the paintings in question to Switzerland in 1933 and had emigrated to London in 1939. He died there in 1941. In 1942 his family put up for auction the paintings in Luzern, Switzerland, in order to make money for their living. The German Advisory Commission recommended the restitution of the paintings to the heirs.

Thus, there is a large distance between the two recommendations on a virtually similar case. Such divergence puts into question both the quality of justice and fairness of both recommendation.

Inconsistencies within the recommendation practice of one and the same commission are even more problematic: In a recent recommendation, the German Advisory Commission held, in the case of Alfred Flechtheim and the Art Collection of North Rhine Westphalia (in translation):

“If an art dealer who was persecuted by the National Socialists puts up for auction or sells in the regular art trade in a secure place abroad a painting, very special circumstances would need to be present before such a sale could be recognized as a loss due to Nazi persecution. In the case of Flechtheim and the painting “violon et encrier” no such circumstances are established. (...). Therefore, the Advisory Commission cannot recommend the restitution”.


Compared to the earlier recommendation in the case of Julius Freund,261 this is a turnaround. This once again illustrates the imminent need for greater consistency and leads directly to the following recommendation:

c. - Recommendation: (Non-binding) Restatement of Restitution Principles

In light of the large number of recommendations that have emerged from the work of the respective commissions and panels over the years, it is clearly time to start working on a restatement of restitution principles in order to ascertain a greater degree of consistency. Such a restatement would collect and analyse the leading recommendations. In addition, it would extract and carefully develop and also supplement the respective ratio of the recommendations. This would provide the commissions and panels with a reliable source of common thought and evaluation. This project would be perfectly located at the European level as it would include many (EU Member) states heavily affected by the issue, but other states outside the EU should not be excluded. In principle, all states of the Washington Conference as well as of the follow-up conferences and initiatives as well as all non-governmental organisations involved in the issue should be invited to contribute. Such a restatement could follow structurally non-binding instruments, e.g. as the DCFR. This should address key questions as the understanding of “forced sale”,262 the requirements for a sufficient causal link between persecution and loss,263 the relevance of post-war indemnification (in particular compensation264) and many more pertinent issues. The project could be funded by the EU under Article 167 TFEU and could possibly be conducted under the auspices of institutions like e.g. the European Law Institute265 or EU Member States’ universities leading in the field of cultural property protection and/or Nazi looted art, ideally interdisciplinary connected with provenance research expertise in e.g. faculties of history or art history, because thorough provenance research is the basis for each and any just and fair solution.

261 Arguably, there might be good reasons for distinguishing this case from the earlier recommendation in the case of Julius Freund, but they were not spelled out by the Commission, see Matthias Weller, Gedanken zur Reform der Limbach-Kommission, in Matthias Weller et al. (Hrsg.), 10 Jahre Kunst und Recht, Jubiläumstagung der Heidelberger Kunstrechtsstange am 21. und 22. Oktober 2016, Schriften zum Kunst- und Kulturrecht, Nomos-Verlag Baden-Baden 2017, forthcoming, pp. 46 et seq.
262 See above.
263 See above.
VI. – Complementary Measures

KEY FINDINGS

- The EU could support the cross-linking of provenance research amongst local and national institutions and initiatives in order to increase the effects of existing provenance research. In this respect, the EU should fund research on data protection law in respect to the chances and limits of exchange and/or central collecting of provenance data.
- A particularly effective tool in this regard is a common cataloguing system based on the collection of the aforementioned data. In particular, such a system could generate object-IDs and thus contribute to setting market standards.
- The EU could support existing general mechanisms for alternative dispute resolution. Ideally, the EU should set up a specific alternative dispute resolution institution for dealing with contested cultural property.
- The EU could consider establishing an EU Agency on the Protection of Cultural Property.

1. - Cross-linking provenance research amongst local and national institutions and entities

To a large extent, provenance research is conducted locally, in particular at public museums and comparable institutions and entities that endorsed the Washington Principles.266 In addition, many art dealers and auction houses conduct provenance research for the preparation of sales and auctions. And many national institutions are building up databases, or have since established them.

In Germany, for example, the leading institution is the German Lost Art Foundation (Deutsches Zentrum für Kulturgutverluste) in Magdeburg, which holds extensive data bases that document cultural assets which were displaced or relocated as a result of the events of World War II, or – in the case of Jewish ownership – items that were illegally confiscated by the Nazis under threat of...

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266 See e.g. ICOM, Code of Ethics for Museums 196/2004, http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (26 July 2017), at p. 21, Glossary, sub “provenance”: “the full history and ownership of an item from the time of its discovery or creation to the present day, through which authenticity and ownership are determined.” Principle 2.3 on provenance research in the course of acquisitions provides: “Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange 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 (including the museum’s own country). Due diligence in this regard should establish the full history of the item since discovery or production.”
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persecution. Additionally, The Foundation is setting up projects on databases on sales of art works from 1933 to 1945 based on general data from art traders. Also, databases sponsored by the Foundation, displaying and connecting data from former provenance research reports, are currently being set up. A complementary project has been recently set up by the University Library of the University of Heidelberg; “German Sales”, collecting data of art auctions from 1933 to 1945. The database covers more than 3.200 indexed and digitized auction catalogues, published between 1930 and 1945 in Germany, Switzerland and Austria. In other Member States similar local and national projects have been founded. Finally, organizations such as Interpol or the (private) Art Loss Register established databases on stolen art in general.

Against this background, it appears fair to state that much effort has been, is currently and will be undertaken in the future to increase transparency and documentation on all levels of the market and for all actors in the field. However, the impact of these efforts could be boosted if the provenance data on art works and cultural property could be exchanged as freely as possible, in particular cross-border, and/or ideally collected by an EU-wide meta-database. Since the identity of previous individual owners as well as sellers is an integral part of any provenance research, in many cases data protection law issues arise. Thus, the EU should fund research on the impact of data protection law on provenance research data exchange and, as necessary, consider special rules facilitating data exchange in this area. Ideally, the EU itself should consider setting up a meta-database collecting all data established on the provenance of cultural property. Of course,

267 See https://www.kulturgutverluste.de/Webs/DE/Datenbanken/Index.html;jsessionid=941F6C0987D3F09ECA58D8F3D5D7537E.m7 (26 July 2017).
268 On this database see e.g. the report by the Director of the Heidelberg University Library Veit Probst, German Sales 1930 – 1945: Auktionskataloge als neue Quellenbasis für die Provenienzforschung, in Matthias Weller et al. (eds.), Raub – Beute – Diebstahl, Tagungsband des Sechsten Heidelberger Kunstrechtstags am 28. und 29. September 2012, Schriften zum Kunst- und Kulturrecht Vol. 17, Baden-Baden 2013, pp. 113 et seq.
270 See Marc-André Renold, Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations, Study commissioned and supervised by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee, May 2016, pp. 33 et seq. with further details on provenance research initiatives and national projects and databases in, inter alia, e.g. Switzerland, France, the Netherlands and the UK.
273 There are some ongoing efforts to connect initiatives internationally, see e.g. the contacts of the German Lost Art Foundation (Deutsches Zentrum für Kulturgutverluste) in Magdeburg with the French Commission pour l’indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l’Occupation https://www.kulturgutverluste.de/Content/02_Aktuelles/DE/Meldungen/2017/Mai/17-05-15_Auslandsreise-Vorstand.html?nn=103256 (26 July 2017).
the interests of individual owners for privacy need to be adequately taken into account.

2. - Common Cataloguing System / Object IDs

On the basis of this data, a common cataloguing system could be generated, which would make it possible to generate standardised object IDs. Valuable analysis and suggestions have been put forward on this international standard for the description of cultural objects, including a picture of the object.\(^{274}\) This standard, initially developed by the Getty Trust and now held under the auspices of the International Council of Museums (ICOM),\(^{275}\) is recommended by “major law enforcement agencies, including the FBI, Scotland Yard, Interpol, UNESCO, museums, cultural heritage organisations, art trade and art appraisal organisations, and insurance companies”.\(^{276}\)

The Object ID provides for information on (1) the type of object, (2) the materials and techniques, (3) the measurements, (4) the inscriptions and markings, (5) distinguishing features, (6) the title, (7) the subject, (8) the date or period, (9) the maker. Additionally, it is recommended to add a short description of the object and to keep these details in a secure place.

“It is therefore a supplement to documentation on a cultural good, aimed at all users. Its use is in no way restricted to a single target group and may easily be adopted by an individual collector or owner of a stately home with period furniture, a museum or a cultural organization”.\(^ {277}\)

It would be highly recommended to further establish an object ID as a market standard. This would influence the due diligence standards and duties of care of all market actors positively.\(^ {278}\) Over time, good faith could no longer be established without receiving a valid Object ID certifying an impeccable provenance.

Thus, the EU should endorse and support the object IDs, as developed and promoted by ICOM and other organizations as the market standard within the entire Internal Market.

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\(^{274}\) CECOJI-CNRS, Study on preventing and fighting illicit trafficking in cultural goods in the European Union, October 2011, at pp. 61 et seq.

\(^{275}\) See http://icom.museum/programmes/fighting-illicit-traffic/object-id (26 July 2017): “ICOM holds a license to promote the use of this standard among museum professionals. In collaboration with UNESCO and INTERPOL, ICOM also organises workshops on its implementation to train government representatives and police and customs agents. INTERPOL has included the Object ID standard in its stolen objects database.”


\(^{277}\) CECOJI-CNRS, Study on preventing and fighting illicit trafficking in cultural goods in the European Union, October 2011, at pp. 61 et seq.

\(^{278}\) Op.cit., at p. 263.
3. – Alternative Dispute Resolution

It has been demonstrated elsewhere that despite all legislative initiatives, there will always remain certain drawbacks of court proceedings on contested cultural property – potentially lengthy proceedings, sometimes very costly proceedings, frequently very complex factual and legal scenarios, sometimes a lack of expertise on the restitution law of cultural property. At the same time, alternative dispute resolution mechanisms generally appear to be established to a sufficient degree, and are in fact used occasionally in the resolution of disputes about contested cultural property.

However, amongst arbitrators, mediators, and comparable functions as well as amongst party representatives, expertise in the special field of the restitution of cultural property and in particular Nazi looted art should be increased. This could be achieved e.g. by educational programs affiliated with leading Universities in EU Member States.

Furthermore, specialised units for organizing and providing alternative dispute resolution in the field of contested cultural property should be established and/or further developed. For example, there appears to be no visible specialised expertise in the field with leading arbitration institutions, such as the German Institution for Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit), or the International Chamber of Commerce (ICC), as opposed to other special areas such as sports law.

Thus, the EU should support existing general mechanisms for alternative dispute resolution. Ideally, the EU should set up a specific alternative dispute resolution institution for dealing with contested cultural property, and this institution could be part of a larger unit, namely an EU Agency on Cultural Property Protection:

4. – EU Agency on Cultural Property Protection

It has been suggested elsewhere to establish a cross-cutting coordination department at European level:

“Proper coordination of the various types of action pursued at international, European and Member-State levels is a major area of work, as has been stressed by all the stakeholders surveyed. Developing European expertise in this field entails setting up a cross-cutting department on a permanent basis (a number of the Commission’s Directorates General may be involved in

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279 See Marc-André Renold, Cross-border restitution claims of looted works of art and cultural goods and wars and alternatives to court litigations, Study commissioned and supervised by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee, May 2016, p. 35 et seq.


combating trafficking in cultural goods: Home Affairs, Education and Culture, Enterprise and Industry, Taxation and Customs Union, and Internal Market and Services). This department might be given multiple responsibilities and take Article 74 TFEU (administrative cooperation) as its legal basis. Its object would be to foster the emergence of a common culture and create a genuine network by facilitating contact between the persons and services concerned and developing mutual trust.”

As has been rightly pointed out by the authors of this Study, European Union law provided for a committee in Article 8 of Council Regulation No. 116/2009 and Article 17 of Council Directive 93/7/EEC. However, as Recital 21 of Directive 2014/60/EU explains:

“Since the tasks of the committee set up by Regulation (EC) No 116/2009 are rendered obsolete by the deletion of the Annex to Directive 93/7/EEC, references to that committee should be deleted accordingly. However, in order to maintain the platform for the exchange of experience and good practices on the implementation of this Directive among Member States, the Commission should set up an expert group, composed of experts from the Member States’ central authorities responsible for the implementation of this Directive, which should be involved, inter alia, in the process of customising a module of the IMI system for cultural objects”.

This expert group could be a part of the suggested cross-cutting coordination department, or potentially even of an EU Agency on Cultural Property Protection. As was explained by the authors of the aforementioned Study, such a department or self-standing Agency could, inter alia, advise Member States on questions related to trafficking in cultural goods. It could also establish a coordinated approach in this matter, collect and centralise the results of provenance research projects, and connect and link local and/or national data bases. Further, it could

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289 See above.
issue object IDs (if these were to be introduced), it could offer a meta-website collecting all other relevant website and internet resources, and finally it could act as the body providing alternative dispute settlement (either as the body charged directly with dispute settlement, or with facilitating the setting up and management of dispute resolution procedures).

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290 See above.
Chapter 4 – European Added Value by Proposed Measures

By establishing or supporting an integrated approach, the legislative and complementary measures on the level of private law, private international law and civil procedure proposed above will provide for substantial European added value (the following points 1 to 4). Furthermore, they will form a necessary counterpart of private enforcement for the protection of cultural property under public international, administrative and criminal law:

(1) a high level of protection for cultural property within the internal market, thereby setting a global benchmark for regional economic integration communities worldwide in pushing back illicit trade with cultural property, in particular cultural property looted and/or illegally excavated and/or exports from crisis areas and/or in war times by an improved and harmonized legal setting for claimants, including foreign states,

(2) a level playing field and best practice market standard for a legal trade in cultural property, relying primarily on transparency and information on all levels of legal relations of private law,

(3) a significant contribution on the policies concerning understanding Europe’s history, in particular from 1933 to 1945, by creating a legal framework that supports awareness about the history and provenance as well as each individual’s historical responsibility and thereby steps towards just and fair solutions,

(4) public access to cultural property and works of art by improving the mobility of collections across the borders within the internal market.
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Works of art and cultural goods looted in armed conflicts or wars usually travel across several borders when they are sold. The cross-border character of looted art creates legal challenges for restitution claims as they often concern various national jurisdictions, with differing rules, as well as fragmented and insufficiently defined legal requirements in international and European legal instruments. Against this background, this European Added Value Assessment identifies weaknesses in the existing EU legal system for restitution claims of works of art and cultural goods looted in armed conflicts and wars. Moreover, it outlines potential legislative measures that could be taken at the EU level and that could generate European added value through simplification and harmonisation of the legal system in this area.