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DRAFT REPORT

on cross-border restitution claims of works of art and cultural goods looted in
armed conflicts and wars
(2017/2023(INI))

Committee on Legal Affairs

Rapporteur: Pavel Svoboda

Rapporteur for the opinion (*):
Nikolaos Chountis, Committee on Culture and Education

(*) Associated committee – Rule 54 of the Rules of Procedure

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (2017/2023(INI))

The European Parliament,

- having regard to its resolution of 14 December 1995 on the return of plundered property to Jewish communities¹ and of 16 July 1998 on the restitution of property belonging to Holocaust victims²,
- having regard to Directive 2014/60/EU of the European Parliament and of the Council of 29 April 2014 on the return of cultural objects³,
- having regard to Article 1 of Protocol 1 to the European Convention on Human Rights,
- having regard to Article 17 of the Charter of Fundamental Rights of the European Union,
- having regard to Regulation (EC) No 116/2009 of 25 July 1985 on the export of cultural goods⁴,
- having regard to the report of the Committee on Legal Affairs and the Internal Market (A5-0408/2003),
- having regard to the 2016 study by its Directorate-General for Internal Policies on 'Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigation',
- having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation),
- having regard to its resolution of 17 December 2003 on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested⁵,
- having regard to Rule 52 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Culture and Education (A8-0000/2018),

A. whereas soon after the end of the Second World War, attempts were made to find and

¹ OJ C 17,22.1.1996, p. 141

² OJ C 292, 21.9.1998, p.112.

³ OJ L 195, 2.6.2004, p. 16

⁴ OJ L 210, 7.8.1985, p. 29

⁵ OJ C 91E , 15.4.2004, p. 500.

return looted property to its country of origin;

- B. whereas looting in armed conflicts remains a widespread problem with important legal implications;
 - C. whereas the Washington Conference Principles on Nazi-Confiscated Art, the Vilnius Forum and the Terezin Declaration on Holocaust Era Assets and Related Issues have all emphasised the importance of providing restitution for individual immovable property; whereas the number of artworks that have been restituted since the Washington Conference is perhaps 1 000 to 2 000¹; whereas there is no complete list of artworks restituted in recent years;
 - D. whereas artworks are still missing and are waiting to be returned to their rightful owners or to their heirs; whereas at the Washington Conference in 1998 Jonathan Petropoulos made an estimate that perhaps 650 000 artworks had been stolen throughout Europe, and Ronald Lauder stated that 11 000 pieces of art worth between USD 10 and 30 billion dollars at the time (1998) were still missing; whereas the Claims Conference-WJRO generally responds that there are no accurate estimates: approximately 650 000 artworks were stolen, of which perhaps 100 000 remain missing;
 - E. whereas litigants continue to encounter legal problems owing to the often very specific nature of their claims on the one hand and to the expiration of post-war restitution laws, the non-retroactivity of conventional norms, statute of limitations provisions on claims or provisions on adverse possession and good faith on the other;
 - F. whereas no EU legislation exists that explicitly and comprehensively governs restitution claims for works of art and cultural goods looted in armed conflicts by private individuals;
1. Regrets that, to date, there has been practically no follow-up to its resolution on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested, in which Parliament called on the Commission to undertake a study on a number of aspects related to civil and procedural law rules, provenance research, cataloguing systems, alternative dispute resolution mechanisms and the value of creating a cross-border coordination administrative authority; considers that Article 81(2) of the Treaty on the Functioning of the European Union (TFEU) could serve as a legal basis for conferring powers to the Union to act in this field;
 2. Notes that insufficient attention has been paid at EU level to the restitution of works of art and cultural goods looted in armed conflicts, in particular in the fields of private law, private international law and civil procedure; calls on the Commission therefore to explore the possibility of protecting cross-border restitution claims of cultural assets displaced and misappropriated as a result of state-sanctioned acts of plunder and looted during armed conflicts;
 3. Welcomes the recognition by some Member States that the unique problems associated with the restitution claims of works of art and cultural goods looted in armed conflicts and wars need to be addressed in order to arrive at legal solutions ensuring the property

¹ According to the Claims Conference-WJRO Looted Art and Cultural Property Initiative.

rights of private individuals unfairly dispossessed of their works of art during an armed conflict of war;

4. Notes that much could be gained from assessing and fostering the development of fair practices in art trade and restitution from a transnational and global perspective;
5. Notes that there is a lack of coordination in the field of jurisdictional rules, which leads to forum shopping when it comes to claims for the restitution of looted art; notes that Articles 3 and 4 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects offer a key compromise between civil law and common law jurisdictions when resolving problems concerning stolen or illegally exported cultural objects resulting from differences among national rules; urges the Commission to consider how the rules of the 1995 UNIDROIT Convention can be implemented in EU and national law;
6. Considers that it is time to put an end to the years of convolutions and nuances if a responsible and ethical European art market is to be established; calls on the Commission, in this regard, to identify civil law measures to help overcome the difficult problems encountered by private parties seeking the restitution of works of art genuinely belonging to them;
7. Considers that care should obviously be taken to create a comprehensive listing of all Jewish-owned cultural objects plundered by the Nazis and their allies, from the time of their spoliation to the present day; urges the Commission to support a cataloguing system, to be used also by public entities and private art collections, to gather data on the situation of looted cultural goods and the exact status of existing claims;
8. Calls on the Commission to promote the use of alternative dispute resolution mechanisms for works of art looted in armed conflicts and wars; calls on the Commission to look into practical ways to help overcome existing legal obstacles, such as a hybrid form of arbitration and mediation; stresses the importance of clear standards and transparent and neutral procedures;
9. Notes that statutes of limitation often create difficulties for claimants in restitution matters; calls on the Commission to assess the issue and strike the right balance for the limitation period applicable to Nazi-looted art restitution claims, which should take into account both the protection of the interests of the victims of looting and theft and those of the market; considers that the US Holocaust Expropriated Art Recovery Act could serve as an example;
10. Calls on the Commission to clarify the notion of due diligence in relation to good faith; points, as an example, to Article 16 of the Swiss Federal Law on the International Transfer of Cultural Property, which bans dealers and auctioneers from entering into an art transaction if they have any doubt as to the provenance of the object; notes that under this law the burden of proof is partly transferred to the seller; however, the possessor of an artwork cannot rely on the principle of good faith if he or she is unable to prove that he or she paid due attention at the time of acquisition;
11. Calls on the Commission to develop common principles on access to public or private archives containing information on property identification and location and tying

together existing databases of information about title to disputed properties;

12. Calls on the Commission to identify common principles on how ownership or title are established as well as rules on prescription and standards of proof and the concept of looting and art;
13. Calls on the Member States and candidate countries to make all necessary efforts to adopt measures to ensure the creation of mechanisms which favour the return of the property referred to in this resolution and to be mindful that the return of artworks looted in the course of crimes against humanity to the rightful claimants is a matter of general interest under Article 1 of Protocol 1 to the European Convention on Human Rights;
14. Instructs its President to forward this resolution to the Council and the Commission, and to the governments and parliaments of the Member States.

EXPLANATORY STATEMENT

In recent years, the subject of looted art and the restitution of cultural property has come to the fore of historical enquiry and public consciousness alike. The problem of looted cultural goods, which were plundered in wartime through acts of violence, confiscation or by apparently legal transactions or auctions, remain part of human history. Looting in colonial times as well as looting in Syria and Iraq are still a massive problem.

One of the biggest organised and institutionalised theft of art works in history took place during the Second World War. Millions of objects of cultural significance were confiscated or stolen by the Nazis; today, more than seventy years after the end of the war, thousands of art items are still missing and are waiting to be returned to their rightful owners or their heirs. Courts are often not able to assess claims on their merits.

Under international law, this looting was illegal. During the war the United Nations made it clear that looted property recovered by States was to be restored to its nation of origin for return to its original owner. This looted property was then granted special status by the Nuremberg Tribunal, which expressly ruled that under Article 6(b) of the Nuremberg Charter, the looting of private property during the war could constitute a crime under international law. In its final judgment, the Tribunal specifically ruled that certain looting conducted after September 1, 1939 was a crime against humanity. National laws adopted after the war in Switzerland, Belgium, France, Germany, Greece, Italy and the Netherlands recognised this concept, creating a presumption in favour of the original owner of property looted during this period. The expiration of post-war restitution laws, the non-retroactivity of conventional norms, and various legal concepts such as limitation periods for claims or adverse possession, good faith and the missing definition of looted art, are reasons for the existence of international standards with regard to private claims to Nazi-looted art.

After the 1954 Hague Convention for the protection of cultural property in the event of armed conflict¹, the 1970 UNESCO Convention on the means of prohibiting and preventing illicit import, export and transfer of ownership of cultural property², the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects³, the Washington Conference brought back to the international table, the issue of provenance research and restitution of art works to their rightful pre-war owners or their heirs. International practice today is typified by a lack of transparency: often cases are settled and works ‘cleared’, in a confidential agreement without legal argumentation. However, Austria, France, the Netherlands, the UK, and Germany have formed panels to help assist institutions with restitution cases. In September 2018, Stockholm’s Moderna Museet and Nationalmuseum have submitted a proposal to the Swedish government also requesting the creation of an independent panel to assist in handling cases of Nazi-looted art.

Experts based at local, national and international institutions such as ministries, museums, auction houses, archives, galleries or even private collectors have begun adopting measures designed to motivate the art world to adopt fair practices for identifying, recovering and restituting looted art. The field, however, remains compartmentalized along national,

¹ 14 May 1954, 249 UNTS 240

² 17 November 1970, 823 UNTS 231

³ 24 June 1995, 34 ILM 1322

institutional and professional lines and still displays a marked tendency to focus on specific cases or collections¹. See the study commissioned by the Committee on Legal Affairs to the Policy Department for Citizens' rights and Constitutional Affairs "Cross-border restitution of claims of art looted in armed conflicts and wars and alternatives to court litigations".

Against this background, a number of efforts were made by the European Union to address the consequences arising from looting of art during the Second World War. These efforts started with Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, which established a mechanism of cooperation between Member States designed better to protect and guarantee the integrity of Member States' cultural heritage. This Directive was soon followed by the adoption by the European Parliament on 14 December 1995 of a Resolution regarding the return of plundered property to Jewish communities and on 16 July 1998 of a Resolution regarding the restitution of property belonging to Holocaust victims. The De Clercq's, report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contest was unanimously adopted at committee level on 17 November 2003². A month later, the plenary of the European Parliament adopted the resolution by an overwhelming majority of 487 votes in favour against 10 calling on Member States to make all necessary efforts to adopt measures to ensure the creation of mechanisms that would favour the return to their rightful claimants of looted works of art. It also requested action from the Commission, which should have undertaken a study on different aspects related to civil and procedural law rules, provenance research, cataloguing systems, alternative dispute resolution mechanism, and the value of creating a cross-border coordination administrative authority. The Commission did not give any follow up to the requests from Parliament.

No harmonized conflict of jurisdiction rules on this specific issue exist at international level. Regulation (EU) 1215/2012³ ("Brussels I") and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters aim at determining in advance which court or courts will have jurisdiction. Article 7(4) of Brussels I determines the competent court for examining civil claims for the recovery, based on ownership, of a cultural object. However, its application is limited to the defined category of cultural goods protected by Directive 93/7/EC (now repealed and replaced by Directive 2014/60). Brussels I brings some certainty to conflict of law issues about forum, but not to choice of law, statute of limitations, standards of proof or the manner of acquiring title. These are governed by Regulation (EC) No 593/2008⁴ ("Rome I") and Regulation (EC) 864/2007⁵ ("Rome II"). Rome I and II apply to a claim in respect of stolen or looted art or art obtained under duress, if the claim arose in the form of contract or tort litigation. By determining the law applicable to a dispute, the Rome Regulations will also determine the statute of

¹ See the study commissioned by the Committee on Legal Affairs to the Policy Department for Citizens' rights and Constitutional Affairs "Cross-border restitution of claims of art looted in armed conflicts and wars and alternatives to court litigations".

² A5-0278/2003

³ 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), OJ L 351, 20.12.2012, p. 1.

⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.6.

⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.

limitations, the manner of acquiring good title and the standards of proof that should govern the issues. However the Regulations are prospective in operation and apply only to contracts concluded as of 17 December 2009, and events giving rise to damage occurring on or after 11 January 2009, respectively. Claims against defendants domiciled outside of Member States do not fall within their scope. In those cases, the jurisdiction of the courts of the state shall be determined by the private international law rules of that state.

An important aspect of going forward with the cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars is to define the scope. Broadly speaking this can be divided in three large categories:

1. Looting and theft that took place in a historic area such as colonisation.
2. Looting and theft that took place in recent times such as World War II.
3. Looting and theft that takes place in present and future time.

All the three require different treatments and policy instruments.