

Cross-border claims to looted art ¹

ABSTRACT

This study addresses cross-border restitution claims to looted art, considering Nazi-looted art and colonial takings, but also more recent cultural losses resulting from illicit trafficking. Although these categories differ considerably, commonalities exist. The study highlights blind spots in the legal and policy frameworks and formulates recommendations on how these could be bridged.

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Cultural objects have a protected status in international law and their pillage and destruction is prohibited. Today, the importance of protection of cultural heritage has been acknowledged as a matter of peace and security; criminal justice; fundamental human rights; and the sustainable development of societies. Nevertheless, around the world and throughout history cultural objects have been, and are still being, looted. This causes great harm to those individuals, groups and communities who were deprived of their heritage. Moreover, especially if the looting took place in the course of persecution or other human rights violations, over time such objects may turn into symbols of a (lost) cultural identity or of a (lost) family history. Restitution of looted cultural objects, therefore, is not merely a matter of ownership and (domestic) private law but a matter of global policy and fundamental rights.

This study addresses the main obstacles related to cross-border restitution of looted art, considering historical losses such as colonial takings and Nazi-looted art, but also more recent cultural losses resulting from illicit trafficking.

Different models

Different models for such claims exist. The traditional public international law and private law mechanisms to resolve claims have serious shortcomings, mostly because dispute resolution takes place at the national level; ownership laws differ widely; and international treaties aimed at harmonization only have effect in as far they were adopted and implemented. The 'ethical model', based on non-binding 'soft law' instruments, also has important drawbacks, most notably the absence of neutral mechanisms for dispute resolution and, consequently, vague notions of what exactly is 'unlawful looting'. Over the last few years, two trends can be witnessed in cultural heritage law: 'humanization' and 'criminalization' – both of which have implications for the field of restitution. In that sense, two more models exist, namely a human rights' model, where restitution is seen as a reparation for a violation of human rights; and a criminal law model, where restitution is facilitated following seizure after a violation of an import or trade ban of looted artefacts.

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/754126/IPOL_STU\(2023\)754126_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/754126/IPOL_STU(2023)754126_EN.pdf)



Common problems

The various categories of claims addressed in this study differ considerably but commonalities exist. Two common problems are: (i) a lack of clear standards and procedures to address and resolve title issues, and (ii) the fact that cultural objects can be traded and possessed without documentation demonstrating their lawful provenance (ownership history), making it difficult to distinguish between artefacts that were unlawfully looted or lawfully obtained. These factors cause for a reality where looted artefacts may be owned lawfully, which complicates restitution.

Recommendations

Against this background, the following recommendations are made:

1. Introduce mandatory due diligence standards for the trade

Making transactions dependent on minimum standards of documentation on their provenance will encourage provenance research and discourage future transactions that involve cultural objects with a tainted provenance. An example of such mandatory due diligence standards can be found in the German Cultural Property Protection Act of 31 July 2016. A logical way to regulate this would be to include such mandatory due diligence standards for the trade – in combination with a registration obligation as proposed under (2) – in a revised version of Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State.

2. Develop a central registration system

Registration of cultural objects is not only essential for their traceability and to prevent looting, but also for restitution efforts. Setting up a registration system has many aspects and could be done in various ways: the entry into force of the licensing system in EU Import Regulation 2019/880 appears to be the logical moment to set up a comprehensive registration system. In the same spirit, museums should be supported to have (digital) inventories of their collections, and a certification system should be considered for art market professionals.

3. Set up a knowledge-centre for provenance research

The measures above will result in the increased attention to provenance research, and this implicates that expertise is needed to assess what is a 'good' provenance. In this context, the establishment of a permanent knowledge centre - or at the minimum a permanent academic network - for provenance research is recommended.

4. Set up a central ADR mechanism

In light of the institutional vacuum in European jurisdictions for (many) restitution claims that concern past looting, the establishment of a European (ADR) claims procedure should be considered. This is a public task and would also meet the obligation that states have taken upon themselves – by signing instruments like the Washington Principles and the UNDRIP – to develop neutral and accessible procedures to ensure that promises about justice are upheld.

5. Set up an EU Agency for cultural objects

A pragmatic and integrated approach to address the above-mentioned tasks would be to do so by the establishment of an EU agency, or embed this task in an existing agency in a related field (e.g., EUIPO). Logically, the licensing system envisaged in the EU Import Regulation 2019/880 needs to be accompanied by the establishment of a clearance system to address the problems that will surface regarding cultural objects without a clear provenance. Such an organisation should provide for neutral and transparent procedures to assess title and provenance issues, but beyond that could set up/coordinate a knowledge centre for issues

relating to provenance research; a central registration system; a transparency register for *unprovenanced* cultural objects; a certification system for art market professionals.

The main message here is that the present institutional vacuum in terms of access to justice, coordination and compliance needs to be addressed at the EU level.

6. Further measures

- To prevent the looting and smuggling of cultural objects in the future, criminalizing their trafficking and setting minimum penalties is crucial. Given the cross-border nature of this crime, the EU should take a coordinating role and EU Member States should consider acceding to the 2017 Nicosia Convention.
- To avoid stagnation of the art market and cultural objects from going 'underground', consider setting up a transparency register for unprovenanced cultural objects ('orphan objects') and regulate the notion of 'safe havens' for artefacts that can (temporarily) not be returned.
- Support the funding of (digital) inventories and provenance research by museums.
- Promote adherence by Member States to the obligations concerning Indigenous cultural property in UNDRIP, and, more generally, promote the participation of source communities in decisions concerning their cultural objects.
- Raise awareness and support education programmes on cultural heritage protection and regulations: if rules are not known they will not be followed or enforced.
- Support the adoption of the *lex originis* – whereby title issues are governed by the law of the country of origin or discovery rather than the law of the country where the object is located – as a special conflict of law rule for cross-border claims to cultural objects, and set up an accessible database of national laws (or support an update of the existing UNESCO database).
- Keep this topic on the agenda and periodically monitor developments.

In sum, public guidance at the EU level is urgently needed for a successful transition from a market with many grey areas to a transparent and licit art market. Measures in that regard would not only serve the interests of former owners but of *all* stakeholders, and help safeguard the cultural heritage of all people.

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