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**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**Cross-border restitution claims of art  
looted in armed conflicts and wars and  
alternatives to court litigations**

**IN-DEPTH ANALYSIS**

**Abstract**

Restitution of art looted during past and present armed conflicts is a major issue for our societies. Claiming restitution before courts – often in a foreign country – has proven to be difficult. That is why parties turn more and more to dispute resolution means alternative to court litigation. This Report examines the legal difficulties related to art restitution claims and proposes policy recommendations for States and EU institutions to overcome these difficulties and seek to achieve just and fair solutions.

**DOCUMENT REQUESTED BY THE COMMITTEE ON LEGAL AFFAIRS**

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## LIST OF ABBREVIATIONS

- AAMD** Association of Art Museum Directors
- ADR** Alternative Dispute Resolution
- ICOM** International Council of Museums
- ILA** International Law Association
- CoE** Council of Europe
- EFTA** European Free Trade Association
- MOMA** Museum of Modern Art, New York
- MNR** Musées Nationaux Récupération, France
- TFEU** Treaty on the Functioning of the European Union
- UN** United Nations
- UNODC** United Nations Office on Drugs and Crime
- UNESCO** United Nations Educational, Scientific and Cultural Organization
- UNIDROIT** International Institute for the Unification of Private Law
- UNITAR** United Nations Institute for Training and Research
- WIPO** World International Property Organization
- WWII** Second World War

## GENERAL INFORMATION

### KEY FINDINGS

- The reaction of States to transnational restitution claims of art looted in armed conflicts and wars is **very diverse** in light of how the different interests are taken into consideration.
- The **international instruments** applicable to the looting of cultural property in armed conflicts appear **sufficient**, both on the **prevention** and the **reparation/restitution** sides. As such, there is no need to add any additional international norm. However, existing rules need to be promptly **implemented** at the **national level** through effective legislative and administrative measures.
- Claimants involved in cross-border restitution cases face **multiple legal obstacles**, such as the burden of proving title and that the claimed object has been looted, the expiry of limitation periods, the hurdles posed by the conflicts of law and/or jurisdiction often arising in international cases, and the applicability of anti-seizure legislation in some States.
- The procedural hurdles that bar lawsuits and the shortcomings of court litigation make **alternative dispute resolution (ADR) means** and the possible **original associated solutions** more appealing.
- Many European States and museums have created **provenance research programs or commissions** to ensure that they do not possess any looted object in their collections. However, the experience shows that collecting institutions have **not yet been able to overcome the limits** of said provenance research and hence to identify looted materials.
- **Uniformity** seems to be the most urgent matter to ensure the restitution of art looted in armed conflicts. This uniformity can be reached either at the level of the **determination of the applicable law**, or at the level of national standards and legislations through **the implementation of the international conventions and their protocols**.
- It would also be advisable to set up some form of **body at the EU level** in charge with proposing **long term solutions** and/or **giving its advice** in specific cases.

# 1. LEGAL BASES OF CLAIMS FOR THE RESTITUTION<sup>1</sup> OF LOOTED ART IN EUROPE

## 1.1. Historical Perspective

Wars and plunder have gone hand in hand throughout history. For a very long time, no particular rule of international law prevented armies from taking the property of enemies or destroying it after their defeat. On the contrary, the taking was generally recognized as “right to booty” (*jus praedae*).<sup>2</sup> Examples of art looted during wars date back to antiquity.<sup>3</sup> As Toman recalls, “the appropriation of a nation’s art treasures has always been regarded as a trophy of war which adds to the glory of the victor and the humiliation of the vanquished”.<sup>4</sup>

It was only by the end of the nineteenth century that provisions protecting the enemy’s property, including cultural property, found their place in international conventions codifying the laws and customs of war.<sup>5</sup> Article 56 of the Hague Regulations<sup>6</sup> prohibited explicitly “[a]ll seizure of, destruction or wilful damage done to institutions [dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science” on occupied territory.

The Hague Regulations were, however, completely ignored during the Second World War (WWII), “which saw not only the destruction of cultural property but also the systematic pillage of the occupied territories”<sup>7</sup> by the the Nazi regime, which is considered to have undertaken the greatest displacement and plunder of paintings of all times.<sup>8</sup>

The restitution of art looted during WWII is now not only a matter for specialists, but also a general public concern. This is not only due to films such as “Monuments Men” (2014) and “Woman in Gold” (2015). The question of the restitution of Nazi looted art remains a highly relevant topic because it is in this context that the most inventive and courageous initiatives have been developed by States, collecting institutions and art trade businesses to deal with the claims of the victims (and the heirs) of Nazi looting.

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<sup>1</sup> The terms “restitution” and “return” will be used interchangeably in the present Report. Note, however, the distinction proposed by Kowalski: the remedy of restitution concerns wartime plunder, theft, the violation of national laws vesting ownership of cultural objects in the State and all transfers based on immoral laws in force at the time of the deprivation; return involves claims for cultural objects taken away by colonial powers or illicitly exported (KOWALSKI W Wojciech, “Types of Claims for Recovery of Lost Cultural Property”, Museum, 2004, 85-102). Note also that, regarding illicit traffic in times of peace, the UNIDROIT 1995 Convention, discussed later in this Report, has very clearly distinguished the *restitution* of stolen cultural objects from the *return* of illicitly exported cultural objects.

<sup>2</sup> TOMAN Jiri, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth, Aldershot, 1996, 3.

<sup>3</sup> GREENFIELD Jeanette, “The Spoils of War”, in SIMPSON Elizabeth (ed.), *The Spoils of War*, New York: Harry N. Abrams, 1997, 34-38.

<sup>4</sup> TOMAN, supra note 2, 337.

<sup>5</sup> Two international peace conferences took place in The Hague in 1899 and 1907. The rules adopted in the first conference (Convention II on the Laws and Customs of War on Land) were revised in the second one (Convention IV respecting the Laws and Customs of War on Land and its annexed regulations). See TOMAN, supra note 2, 10-13; Roger O’KEEFE, *The Protection of Cultural Property in Armed Conflict*, Cambridge, Cambridge University Press, 2010, 22-34.

<sup>6</sup> Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907.

<sup>7</sup> TOMAN, supra note 2, 337.

<sup>8</sup> GREENFIELD, supra note 3, 38.

Recent conflicts, such as the wars in Iraq and Syria, show that the problem of looting is far from concerning only last century's world conflicts. UNITAR has reported that since the beginning of the conflicts, looting at certain Syrian archaeological sites has dramatically increased.<sup>9</sup> It is important to consider that the main threat in conflicts has "shifted from the destruction of immovables and their contents during attack to the plunder of archaeological sites and museums".<sup>10</sup> The latest additional concern is that looting is used to finance terrorism.<sup>11</sup>

The first Chapter of this Report addresses two key themes: the **prohibition** and **prevention** of the looting of cultural objects in armed conflicts on the one hand and the **restitution** of looted objects on the other hand. It does so by examining the responses to these problems at the levels of international law (1.2.) and European law (1.3.), and by exploring the efforts deployed by a number of selected States (1.4.) and the developments at the level of soft law (1.5.).

## 1.2. International Law

The nature and extent of the Nazi art looting and the massive destruction of cultural property during WWII led to the adoption of the first international convention dedicated exclusively to the protection of cultural property: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (the Hague Convention).<sup>12</sup> The drafting of the Hague Convention was heavily influenced by the principles embodied in the 1943 London Declaration.<sup>13</sup> This Declaration publicized the extent of Nazi plunder and warned Axis States and neutral nations that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the" Nazis. In particular, the Allies declared "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". However, the London Declaration did not introduce new international law obligations, it merely reiterated the prohibitions set forth in the Hague Regulations.

The Hague Convention was adopted together with the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol).<sup>14</sup> This regulates the circulation of cultural property in time of war, by contemplating obligations for occupying powers to prevent and avoid any export of cultural objects from occupied territories and, in the event that such export would occur, to provide for their return.

More recently, the Hague Convention was completed by the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol) of 1999.<sup>15</sup> The adoption of the Second Protocol was deemed necessary to reinforce the protection system of the Hague Convention as a result of the disastrous

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<sup>9</sup> "Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria" (2014), <https://www.unitar.org/unosat/chs-syria>.

<sup>10</sup> O'KEEFE, *supra* note 5, 132.

<sup>11</sup> See UN Security Council Resolution 2199 (2015) of 12 February 2015, Art. 16, which states: "ISIL, ANF and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria".

<sup>12</sup> 14 May 1954, 249 UNTS 240.

<sup>13</sup> Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, 5 January 1943, 1943, 8 Department of State Bulletin 21.

<sup>14</sup> 14 May 1954, 249 UNTS 358.

<sup>15</sup> 26 March 1999, 38 ILM 769 (1999).

cultural losses undergone, for instance, by Cyprus following the Turkish invasion of 1974, Croatia and Bosnia during the Balkan war, and Iraq and Kuwait during the First Gulf War.<sup>16</sup>

The Hague Convention and its two Protocols constitute the main specific body of international law applicable to the protection of cultural property in armed conflicts. However, other international instruments contain provisions applicable to the looting of art during armed conflicts, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),<sup>17</sup> and a number of resolutions of the United Nations (UN) Security Council and General Assembly (see the next Section).

### 1.2.1. Prohibition and Prevention

The Hague Convention establishes that the theft, pillage, or misappropriation of works of art and other items of public or private cultural assets in the course of armed conflicts is unlawful. Consequently, Article 4 provides for the obligation of respect for cultural property. According to this provision, State Parties must “prohibit, prevent and, if necessary, put a stop to any form of **theft, pillage or misappropriation** of, and any acts of vandalism directed against, cultural property”<sup>18</sup> and to “refrain from requisitioning” such property situated in the territory of another state party. It is important to underline that under this provision the occupying State has more than an obligation to refrain from such acts: it should also take all measures to restore the public order by putting a stop to the commission of such acts by, for instance, the local population or the opposing armed forces.<sup>19</sup> Similarly, the First Protocol obliges State Parties to prevent the **export** of cultural property from a territory occupied by them (Article 1).

The Second Protocol obliges the State Parties not only to prevent but also to prohibit “any **illicit export, other removal or transfer of ownership** of cultural property” in relation to an occupied territory (Article 9(1)(a)).<sup>20</sup> Furthermore, Article 15(1)(e) of the Second Protocol strengthens Article 4 of the Hague Convention by establishing that “theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention” constitute war crimes when committed intentionally.<sup>21</sup> Article 15(2) of the Second Protocol also establishes that States Parties should adopt “such measures as may be necessary to establish as criminal offences under their domestic law” the offences set forth in Article 15 “and to make such offences punishable by appropriate penalties”.

The 1970 UNESCO Convention considers illicit the “export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power” (Article 11). This provision supplements the Protocols to the Hague Convention by considering illicit such export and transfer with respect to all Parties to the 1970 UNESCO Convention, and not only the occupying State.<sup>22</sup>

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<sup>16</sup> BOYLAN J Patrick, “Implementing the 1954 Hague Convention and Its Protocols: Legal and Practical Implications”, February 2006, 3, Working Paper, available at: <https://culturalpolicy.uchicago.edu/implementing-1954-hague-convention-its-protocols-legal-and-practical-implications>.

<sup>17</sup> 17 November 1970, 823 UNTS 231.

<sup>18</sup> This limitation cannot be waived even for reasons of military necessity. TOMAN, *supra* note 2, 70; O’KEEFE, *supra* note 5, 133.

<sup>19</sup> O’KEEFE, *supra* note 5, 133.

<sup>20</sup> TOMAN Jiri, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Paris, UNESCO Publishing, 2009, 154.

<sup>21</sup> O’KEEFE, *supra* note 5, 133. The Second Protocol also makes it an offence to cause intentionally “extensive destruction or appropriation of cultural property” (Art. 15 (1) lit. c).

<sup>22</sup> TOMAN, *supra* note 20, 156.

With regard to **archaeological excavations**, the illicit removal of archaeological objects from sites is regarded as misappropriation within the meaning of Article 4(3) of the Hague Convention, provided that the law of the occupied State vests ownership of such object in the State, even without physical possession.<sup>23</sup> The Second Protocol further provides that States Parties must prohibit and prevent “any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property” in the occupied territory (Article 9(1)(b)).

As mentioned above (Section 1.2), the UN Security Council has adopted a number of resolutions under Chapter VII of the UN Charter that address the question of cultural objects looted in the context of armed conflict, thereby contributing to the implementation of the First Protocol. All in all, these resolutions provide for an “embargo” on the trade of cultural objects removed from conflict zones. This was the case of the resolutions adopted following the invasion of Kuwait by Iraq<sup>24</sup> and the entry of US forces into Iraq in 2003.<sup>25</sup> More recently, with Resolution 2199 (2015), the UN Security Council called on all States to “take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items”.<sup>26</sup>

Having recognized the criminal character of the trafficking in cultural property and its devastating consequences for the cultural heritage of humankind, the UN Office on Drugs and Crime (UNODC) developed – in collaboration with UNESCO and INTERPOL – the “International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences”. Adopted in 2014 by the UN General Assembly, these guidelines recognize the “growing involvement of organized criminal groups in all forms and aspects of trafficking in cultural property” and call on UN Member States to assess and review their legislation, procedures, and practices in light of the Guidelines “in order to ensure their adequacy for preventing and combating trafficking in cultural property and related offences”<sup>27</sup>.

### 1.2.2. Restitution

States Parties to the First Protocol of the Hague Convention undertake to return cultural property exported in contravention of the obligation contained in its Article 1 at the end of hostilities. The First Protocol clearly expresses that “such property shall never be retained as war reparations” (Article 1(3)). The return is unconditional and there is no time limit for bringing a claim for return.<sup>28</sup>

In case of return, the occupying State will pay an indemnity to the holders in good faith (Article 1(4)). This obligation creates a sort of liability for the occupying State whose obligation was to prevent the export from the occupied State. The nature of such an

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<sup>23</sup> TOMAN, *supra* note 20, 294-295. O’KEEFE, *supra* note 5, 134.

<sup>24</sup> See UN Security Council Resolution 661 (1990) of 6 August 1990 on the situation between Iraq and Kuwait: “all States shall prevent the import into their territories of all commodities and products originating in Iraq or Kuwait” (para. 3(a)).

<sup>25</sup> See UN Security Council Resolution 1483 (2003) of 22 May 2003: “Member States shall take appropriate steps to [prohibit] the trade in or transfer of [Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 2 August 1990]”.

<sup>26</sup> See UN Security Council Resolution No. 2199 (2015) of 12 February 2015, para. 17. See also UN Security Council Resolution No. 2249 (2015) of 20 November 2015.

<sup>27</sup> General Assembly Resolution 69/196 of 26 January 2015.

<sup>28</sup> TOMAN, *supra* note 2, 345.

indemnity remains a question of private law to be decided by the State Parties or national courts.<sup>29</sup>

The First Protocol further stipulates that each State Party should “take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory” upon importation or at the request of the authorities of the occupied territory (Article 1(2)). Cultural property deposited in another State Party’s territory for the purposes of protection against the dangers of an armed conflict should be returned at the end of hostilities to the authorities of the territory from which it came (Article 1(5)).

The Hague Convention does not as such contain provisions on the return of looted art. Nevertheless, it can be asserted that the obligation to return illicitly taken cultural objects is inherent in the obligation to respect cultural property and in the prohibition on seizing and pillaging of cultural property. If cultural objects should not be seized, then, *a fortiori*, they should be returned in case they have been wrongfully exported. On the same footing, the obligation to return follows the obligations contained in art. 9 of the Second Protocol: “[A] Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory: a. any illicit export, other removal or transfer of ownership of cultural property; b. any archaeological excavation [...]; c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence”<sup>30</sup>.

With regard to Article 11 of the 1970 UNESCO Convention, it is not clear whether it allows the recovery of cultural property exported or transferred under compulsion (against the will of the owner) during occupation. Some argue that by recognizing that the export and transfer of ownership under compulsion is illicit, the 1970 UNESCO Convention declares such acts null and void and makes possible the recovery of the property at the end of the occupation.<sup>31</sup> Others comment that the illicitness of a transaction will depend on “the legal system being asked to implement it”<sup>32</sup>. Therefore in ensuring return and restitution, the Protocols are considered more effective than the 1970 UNESCO Convention: they provide that if cultural property is taken outside of the territory, it must be seized and returned.<sup>33</sup>

The question of the return of looted cultural assets has also been addressed by the UN Security Council. With Resolution 686 (1991), the Security Council imposed on Iraq the obligation to “return all Kuwait property seized by Iraq, the return to be completed in the shortest possible period”<sup>34</sup>. The same demand was included in Resolution 1483 (2003), in which the Security Council established that States should “facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 2 August 1990”<sup>35</sup>. Likewise, with Resolution 2199 (2015), the UN Security Council called on all States to “take appropriate steps to prevent the trade in Iraqi and Syrian cultural property, thereby allowing for their eventual safe return to the Iraqi and Syrian people”<sup>36</sup>.

<sup>29</sup> TOMAN, *supra* note 2, 346, 347.

<sup>30</sup> HENCKAERTS Jeanne-Marie and DOSWALD-BECK Louise (eds.), *Customary International Humanitarian Law, Rules*, Vol. I, Cambridge, Cambridge University Press, 2003, 137.

<sup>31</sup> See FRAOUA Ridha, *Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels, Commentaire et aperçu de quelques mesures nationales d'exécution*, 85, available at: <http://unesdoc.unesco.org/images/0007/000723/072383fo.pdf>.

<sup>32</sup> O'KEEFE J. Patrick, *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Leicester, Institute of Art and Law, 2007, 78.

<sup>33</sup> O'KEEFE, *ibid.*, 15.

<sup>34</sup> UN Security Council Resolution 686 (1991) of 2 March 1991, para. 2(d).

<sup>35</sup> UN Security Council Resolution 1483 (2003) of 22 May 2003, para. 7.

<sup>36</sup> UN Security Council Resolution No. 2199 (2015) of 12 February 2015, para. 17.

This overview of the international law rules relating to the return and restitution of cultural property would not be complete without a reference to the 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) adopted by the International Institute for the Unification of Private Law, at the request of UNESCO.<sup>37</sup> The overall goal of the UNIDROIT Convention is to contribute to the fight against the illicit traffic in cultural objects by increasing solidarity between States. The UNIDROIT, as a specialized organization for the harmonization of national laws, aimed to rectify some of the weaknesses of the 1970 UNESCO Convention. The UNESCO Convention, in fact, admits no private action, contains a restricted restitution procedure, makes no reference to limitation periods, and does not deal with the question of the impact of its rules on domestic laws concerning the treatment of bona fide purchasers.

Specifically, the UNIDROIT Convention applies to claims of international character and deals with both theft and illicit exportation of cultural materials.<sup>38</sup> As far as theft is concerned, the Convention contains an outright obligation of restitution, even if stolen cultural objects are recovered in those systems of law that protect the good faith possessor.<sup>39</sup> Any claim for restitution must be made within specific time limits.<sup>40</sup> Upon restitution of the claimed artefact, the Convention entitles the bona fide purchaser to a "fair and reasonable compensation" if it is proved that he "exercised due diligence when acquiring the object"<sup>41</sup>. Art. 4.4 defines quite precisely the factors to be taken into consideration to establish such due diligence. As for illegal export, the Convention establishes that a Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State provided two conditions are fulfilled.<sup>42</sup> First, the requesting State must demonstrate that the removal of the object from its territory significantly impairs the physical preservation of the object or of its context, the preservation of information of a scientific or historical character, the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State. Second, the requesting State must act within the prescribed time limits.<sup>43</sup>

Such rules are obviously of importance when it comes to claims on works of art which were looted in times of conflict and later entered into the art trade during peace-time.

### 1.2.3. Conclusion

This overview of the relevant international instruments applicable to the looting of cultural property in armed conflicts shows that this body of law is in itself sufficient, both on the **prevention** and the **reparation/restitution** sides, and that there is no need to add any additional international norm. However as shown above, these rules need to be efficiently implemented at the national level. This is what is cruelly missing today. Indeed, States do not abide by the provisions of the existing international legal instruments. The UNESCO Director-General has had to ask the belligerents to comply with their obligations, for instance in 1971 during the conflict between India and Pakistan, and in 1991 during the war in Yugoslavia.<sup>44</sup> During the 1990 Gulf conflict, the Kuwaiti authorities complained to

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<sup>37</sup> 24 June 1995, 34 ILM 1322 (1995).

<sup>38</sup> Article 1.

<sup>39</sup> Article 3(1).

<sup>40</sup> Article 3(3) and 3(4).

<sup>41</sup> Article 4.

<sup>42</sup> Articles 5(1) and 5(3).

<sup>43</sup> Article 5(5).

<sup>44</sup> CLEMENT Etienne, "Some Recent Practical Experience in the Implementation of the 1954 Hague Convention", *International Journal of Cultural Property*, 1994, 11-26, 16.

UNESCO about Iraqi officials transferring items from Kuwaiti museums to Baghdad.<sup>45</sup> Both States were at the time parties to the Hague Convention and to its First Protocol. The matter was eventually addressed by a UN Security Council resolution requesting to Iraq to return the items exported from Kuwait.<sup>46</sup>

Already in 1993, UNESCO's "Boylan Report" (a review of the 1954 Hague Convention by Professor Patrick J. Boylan) put forward that the Hague Convention and its First Protocol are "entirely valid and realistic as international law and remain fully applicable and relevant to present circumstances. The problem is essentially one of failure in the application (...) rather than of inherent defects in the international instruments themselves"<sup>47</sup>.

Therefore, our attention must focus on States' implementation of the Hague Convention and its Protocols (see section 1.4.).

### 1.3. European Law

At the European level, the European Union (EU) and the Council of Europe (CoE) have adopted a number of instruments that address the problem of the illicit trafficking and the question of the return of wrongfully removed cultural objects.

The establishment of the Internal Market by the EU Treaty prompted the adoption of specific measures on the protection of cultural property. As the Internal Market required the abolition of the internal frontiers, which would have undermined the power of EU Member States to prevent the illicit movement of cultural objects through the application of border controls, the Community enacted Regulation 3911/92 on the Export of Cultural Goods<sup>48</sup> and Directive 93/7 on the Return of Cultural Objects Illegally Exported from the Territory of a Member State.<sup>49</sup> These measures were not aimed at harmonizing national laws. Given that Member States retained the right to define "national treasures" and to take measures to protect them, and given the impossibility of reaching a broad consensus between Member States in this field, Regulation 3911/92 and Directive 93/7 merely aimed at fostering Member States' reciprocal recognition of domestic provisions designed to fight the illicit trade in antiquities.

Regulation 3911/92 has been reviewed and replaced by Regulation 116/2009 of 12 December 2008.<sup>50</sup> This text aims to prevent the export outside of the EU of works of art that have been unlawfully removed from one of the EU Member States through the exploitation of the more relaxed rules of other EU Member States. It sets up a procedure according to which the antiquities defined as national treasures within the meaning of Article 36 of the Treaty on the Functioning of the European Union (TFEU) and belonging to one of the categories listed in the Annex can be exported to third countries only if accompanied by an export certificate issued by the Member State of origin. The export of antiquities not falling within the definitions included in the Annex are regulated by national rules. National authorities can refuse to issue the licence if, pursuant to national laws, the object must be retained within the country.

Directive 93/7 has been entirely revised and replaced by Directive 2014/60 of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State.<sup>51</sup>

<sup>45</sup> Iraq claimed that objects were exported for safekeeping. CLEMENT, *supra* note 44, 17.

<sup>46</sup> UN Security Council Resolution 686 (1991) of 2 March 1991.

<sup>47</sup> BOYLAN J. Patrick, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO, Paris, 1993, 7, available at: <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>.

<sup>48</sup> OJ L 395/1, 31 December 1992.

<sup>49</sup> OJ L74/74, 27 March 1993.

<sup>50</sup> OJ L 39, 10 February 2009.

<sup>51</sup> OJ L 159/1, 28 May 2014.

This concerns the circulation of cultural objects within the EU, and provides a system under which the judicial authorities of the Member State where a cultural object has been unlawfully imported must order its return to the requesting Member State. In particular, the new Directive covers objects that are classified or defined as “national treasures” by national authorities, but it no longer requires that objects belong to categories or comply with thresholds related to their age and/or financial value in order to qualify for return. National government agencies from EU Member States are required to cooperate with each other and exchange details on unlawfully removed objects by means of the EU’s internal market information system. Importantly it describes in detail, in line with art. 4.4 of the UNIDROIT Convention, the characteristics of due diligence in the art market (art. 10.2 of the Directive).<sup>52</sup>

The CoE has adopted a number of conventions on the protection of various aspects of cultural heritage. These include the European Cultural Convention (1954), the European Convention on the Protection of the Archaeological Heritage (1969, revised 1992), and the European Convention on Offences relating to Cultural Property of 1985 (1985 Convention).

The 1985 Convention was adopted to combat illicit trafficking in cultural property through criminal law, to promote co-operation between States, and to raise public awareness of the damage caused by the illicit trade. It thus served as a complement to the European Convention on Mutual Assistance in Criminal Matters and the European Convention on Extradition.

However, the 1985 Convention has never entered into force. Only six States have signed it, and none have ratified it. Arguably, the Convention has not attracted much international support because of its formulation. In particular, the specification of the categories of cultural property and the criminal offences which fall within the scope of the Convention is achieved by way of enumerations in Appendix II (which lists examples of cultural objects) and Appendix III (which lists types of criminal offences). The lists provided for in Appendices II and III are subdivided into two sections. The first section of the two appendices enumerates the categories of cultural property and of criminal offences in respect of which the implementation of the Convention is mandatory. However, States were given the possibility to enlarge the scope of application of the Convention by including one or more of the categories of property and/or offences listed in the second section of Appendices II and III. As part of the same problem, under Article 26 on the reciprocity rule, a State has a duty to co-operate with another State ‘in so far as it would itself apply this Convention in similar cases’. One can also submit that most States decided not to ratify the 1985 Convention because some of the classical offences against cultural property were not among the core offences listed in the first section of Appendix III, namely the destruction or damaging of cultural property, the illicit excavation of archaeological objects, and the illicit exportation of cultural property. Finally, it can be argued that the 1985 Convention has not been ratified by CoE Member States because of political/commercial reasons. It cannot be excluded that the lobbies of merchants and collectors have put pressure on their governments either to negotiate or adopt a weak text, or not to ratify the treaty.

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<sup>52</sup> Art. 4.4 of the UNIDROIT Convention states the following: “In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object’s provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.”

At present, a revision of 1985 Convention is being considered by the CoE Committee on Crime Problems in order to simplify and streamline its language and structure and to ensure the harmonization of the relevant rules of criminal law. As such, the new Convention could become an important instrument to enhance inter-State cooperation and crime prevention and criminal justice responses with a view to preventing, fighting and punishing the criminal offences that affect the cultural heritage of European countries and beyond.

## 1.4. National Laws

States Parties to the Hague Convention and its Protocols are under an obligation to inform the UNESCO Secretariat about the measures adopted to ensure their implementation at the national level through periodic reports. A preliminary evaluation of the latest reports submitted by eighteen European States in the period 2011-2012<sup>53</sup> shows that different methods have been put in place to ensure the implementation of these international instruments (Annex 1). While certain States have adopted specific implementing legislation (such as Switzerland and the Netherlands), other revised their criminal codes or legislation on cultural property to integrate such rules.

Regarding the First Protocol, ten States claim having implemented its provisions in national legislation. With only two exceptions, all European States claim to have established the acts under Article 15 of the Second Protocol as criminal offences under domestic law and to have made them punishable by appropriate penalties. However, not all seem to provide for specific clauses on the plunder and appropriation of cultural property in wartime (see Annex 1).

In what follows, the legislation of two European States providing interesting innovations – Switzerland (1.4.1.) and the Netherlands (1.4.2.) – will be examined. Additionally, the laws of a non-European State – Canada (1.4.3.) – will also be discussed.

### 1.4.1. Switzerland

On 20 June 2014, Switzerland adopted the Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Disaster and Emergency Situations (Federal Law).<sup>54</sup> With this Act the Swiss Confederation expressed concern that cultural heritage be protected from hazards such as war, natural disasters and other emergency situations, and recognized the importance to prevent the looting and illicit trafficking in cultural objects.

With respect to the preventive protection of cultural objects, Article 12 of the Federal Law regulates the granting of “safe havens” (or “refuge” in French) to foreign States wishing to protect their cultural patrimony from the threats posed by war, terrorism, and disasters.<sup>55</sup> According to Article 12 of the Federal Law, the Swiss Federal Government may provide a safe haven for the cultural objects of foreign countries if they are threatened by armed conflicts, disasters, or emergency situations. The Law defines “safe haven” as any protected space established and managed by the Federal Government pursuant to national law where movable artefacts belonging to the cultural patrimony of a foreign State can be stored temporarily for safekeeping, provided that such assets are seriously threatened in

<sup>53</sup> See at: <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/2011-2012-periodic-reports/#c1369634>.

<sup>54</sup> Recueil systématique du droit fédéral 520.3. This law replaced and repealed the *Federal Law on the Protection of Cultural Property in the Event of Armed Conflict* of 1966.

<sup>55</sup> The concept of “refuge” is provided for in the Hague Convention (Arts. 1(b), 8, and 11) and the Second Protocol (Article 8).

the territory of that foreign State.<sup>56</sup> Article 12 of the Federal Law makes clear that the fiduciary safekeeping of threatened artefacts is provided under the auspices of UNESCO, and that the Swiss Federal Council has the exclusive competence to conclude international treaties with requesting States in order to implement this provision.<sup>57</sup>

Interestingly, other States, including France, as well as professional associations, such as the American Association of Art Museum Directors (AAMD), are currently moving towards the development of schemes for the creation of safe havens (see section 1.5.1.).

From the academic and historic point of view, it is interesting to note that, in 2008, the Committee on Cultural Heritage Law of the International Law Association (ILA) adopted the "Guidelines for the Establishment and Conduct of Safe Havens for Cultural Materials"<sup>58</sup> (Annex 2). The Committee's interest in the concept of safe havens grew out of the observation that cultural objects may need to be removed from the source State temporarily in order to ensure their safekeeping because of various threats, such as armed conflicts, natural catastrophes, civil disasters, and unauthorized excavations. The objective of the ILA Committee was to establish specific standards and procedures for rescuing, safekeeping, and returning cultural assets after the threats prompting their removal have come to an end and the materials can again be protected in the source State. Therefore, the Guidelines were intended to be integrated into State legislation and the internal rules of museums, professional associations and non-governmental organizations.

#### 1.4.2. The Netherlands

On the issue of restitution of art objects wrongfully removed in the context of armed conflicts, the Netherlands has adopted a statute in March 2007, the Cultural Property Originating from Occupied Territory Return Act.<sup>59</sup>

This Act was adopted as a result of a specific case which was brought before Dutch Courts and related to icons stolen in Cyprus in the aftermath of the Turkish invasion. The icons had been acquired by a Dutch collector and the Church of Cyprus demanded their restitution. The Dutch Courts did not return them to Cyprus, among other reasons because the First Protocol was deemed to be non-self-executing.<sup>60</sup> This led to the adoption of the 2007 Act, whose purpose is precisely to declare the Protocol directly applicable in the Netherlands. This eventually led to the restitution of the icons to Cyprus.

This Act is extremely interesting not only because it reveals one of the major flaws of the Hague Convention system, but also because it shows that it is not very difficult to overcome the non-self-executing character of the Protocol. States who ratified the First Protocol could easily follow this example.

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<sup>56</sup> Article 2(c).

<sup>57</sup> A decree for the implementation of the Federal Law was adopted on 29 October 2014, *Recueil systématique du droit fédéral* 520.31.

<sup>58</sup> See Resolution 2/2008, adopted at the 73rd Conference of the International Law Association, held in Rio de Janeiro, Brazil, 17-21 August 2008, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/13>.

<sup>59</sup> Act of 8 March 2007 containing rules on the taking into custody of cultural property from an occupied territory during an armed conflict and for the initiation of proceedings for the return of such property, available at: <http://www.unesco.org/culture/natlaws/>; the Explanatory Memorandum is available at: [http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands\\_actmarch2007\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_actmarch2007_engtof.pdf).

<sup>60</sup> See MATYK Stephen, "The Restitution of Cultural Objects and the Question of Giving Direct Effect to the Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954", *International Journal of Cultural Property* 2000, 341-346.

Section 2 of the 2007 Act provides that “it is prohibited to import cultural property from an occupied territory into the Netherlands or to have such property in one’s possession in the Netherlands”. Chapter 2 of the 2007 Act regulates the procedures for the custody of the object and Chapter 3 the legal proceeding for its return.

### 1.4.3. Canada

Canada has implemented the 1954 Hague Convention and its two Protocols through the *Crimes against Humanity and War Crimes Act*<sup>61</sup> and some articles of the *Cultural Property Export and Import Act*<sup>62</sup> and *Criminal Code*.<sup>63</sup> These acts have created various criminal offences in the case of persons violating provisions of the Hague Convention and its Protocols, including those relating to the theft and exportation of cultural property, and provide various remedies allowing for the restitution of said property.

For instance, the Canadian *Crimes against Humanity and War Crimes Act* adopts the same definitions of “war crimes” as in the Statute of the International Criminal Court. As such, are considered imprescriptible war crimes “seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”, “pillaging a town or place, even when taken by assault” and “seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict”<sup>64</sup>. If cultural property is obtained through the commission (in Canada<sup>65</sup> or abroad<sup>66</sup>) of such crimes, the Act notably allows for its seizure in Canada, as well as its return to the lawful owner or the person who is lawfully entitled to its possession.<sup>67</sup> This is an innovative measure in the field of international protection of cultural property; indeed, it has been said that “Canadian law is such that, for example, artworks appropriated during the Nazi-era could be returned to rightful claimants pursuant to the prosecution of individuals in Canada for crimes against humanity committed outside Canada that were connected with the way in which the property was originally appropriated”<sup>68</sup>.

Other actions, while not serious enough to constitute “war crimes”, may also be subject to the extraterritorial jurisdiction of Canada and thus be liable for prosecution in this country. For instance, the *Cultural Property Export and Import Act* imposes sanctions for the export or removal of cultural property (as defined in Article 1(a) of the Hague Convention) from an occupied territory of a State Party to the Second Protocol and allows the Attorney General of Canada, upon request from the concerned State Party, to institute a judicial action for recovery and return of said cultural property.<sup>69</sup>

The Canadian experience therefore appears to be a good example of effective implementation of the Hague Convention and its Protocols in national law.

## 1.5. Soft Law

Despite their non-binding character, soft law instruments provide an important source for the prevention of the looting of art and its restitution. A distinction should be made

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<sup>61</sup> S.C. 2000, c. 24.

<sup>62</sup> R.S.C. 1985, c. C-51.

<sup>63</sup> R.S.C. 1985, c. C-46.

<sup>64</sup> *Crimes Against Humanity and War Crimes Act*, Annex.

<sup>65</sup> *Crimes Against Humanity and War Crimes Act*, Art. 4(1).

<sup>66</sup> *Crimes Against Humanity and War Crimes Act*, Art. 6(1).

<sup>67</sup> Canadian Criminal Code, Art. 490(9)(d).

<sup>68</sup> PATERSON K. Robert, “Canada”, in KONO Toshiyuki (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage in the 21<sup>st</sup> Century*, Leiden, Martinus Nijhoff Publishers, 2010, 233-246, 243.

<sup>69</sup> *Cultural Property Export and Import Act*, Art. 36.1.

between soft law instruments applied to looted art in general (1.5.1.) and those focused on specific issues, in particular the restitution of art looted during the WWII (1.5.2.).

### 1.5.1. Looting in general

To **prevent the looting** of art both in times of peace and war, it is important that concerned actors act together in a diligent manner. This is the case for museums, where looted art often ends up.

The International Council of Museums (ICOM) provides, in its Code of Ethics, that museums should ensure before acquisition that the object in question has not been illegally obtained. To this end, museums should conduct a provenance research and establish the full history of the object.<sup>70</sup> This provision applies to all new acquisitions and concerns art looted during wars, as well as illegally exported or stolen objects.

National museums associations also took action in this respect. The AAMD requires that museum directors do not “knowingly acquire or allow to be recommended for acquisition any object that has been stolen, removed in contravention of treaties or international conventions to which the United States (U.S.) is a signatory, or illegally imported in the U.S.”<sup>71</sup>.

The AAMD adopted specific Guidelines on the Acquisition of Archaeological Material and Ancient Art (2013)<sup>72</sup> and recently, Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis (2015)<sup>73</sup> in support of the implementation of the Hague Convention.

To **facilitate the restitution** of looted art, in particular of archaeological objects, it is recommended to States to establish their ownership on such objects. As explained above, the illicit removal of archaeological objects from sites will count as misappropriation within the meaning of Article 4.3 of the Hague Convention only if States declare their ownership in national laws prior to the removal.

To support States' effort in this matter, UNESCO and UNIDROIT prepared the Model Provisions on State Ownership of Undiscovered Cultural Objects (Annex 3; see sections 2.4.1. and 2.4.2.).<sup>74</sup> This is an example of a soft-law tool, which can become “hard law” for States willing to integrate such principles in their national laws or revise them accordingly.

### 1.5.2. Restitution of art looted during the WWII

Restitution claims of victims of Nazi looting and their heirs and the increasing awareness on this issue led states to think about principles which should guide the resolution of disputes in this field. They are provided below in chronological order (1.5.2.1. to 1.5.2.4.). Museum associations and auction houses also developed ethical guidelines specifically dealing with Nazi-looted art (1.5.2.5.).

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<sup>70</sup> ICOM Code of Ethics for Museums, adopted in 1986 and revised in 2004, [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf).

<sup>71</sup> Code of Ethics. Adopted in June 1966; amended 1971, 1973, 1974, 1991, 2001, and 2011 <https://www.aamd.org/about/code-of-ethics>.

<sup>72</sup> See at: <https://www.aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf>.

<sup>73</sup> See at: <https://www.aamd.org/document/aamd-protocols-for-safe-havens-for-works-of-cultural-significance-from-countries-in-crisis>.

<sup>74</sup> UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects 2011. Explanatory Report with model provisions and explanatory guidelines available at: <http://www.unidroit.org/instruments/cultural-property/model-legislative-provisions>.

### 1.5.2.1. Principles of the Conference of Washington 1998

The 44 States who participated to the Washington Conference on Holocaust Era Assets in 1998 adopted a set of principles called "The Washington Principles".<sup>75</sup> The Washington Principles are the first international instrument focusing on the issue of Nazi-looted art following its re-emergence in the 1990s. They introduced the concept of "just and fair" solutions as a way to handle restitution claims. Thus Principle VIII stresses that:

"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.*"

In order to achieve this, principle XI encourages states to "develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues". In fact, a number of states – such as Austria, France, Germany, the Netherlands, and the United Kingdom (UK) – have established special advisory committees to resolve cases involving Nazi-looted art (see section 4.2.).

Another recent attempt towards the application of the Washington Principles can be found in the U.S. where the principles were adopted at the first place. The "Holocaust Expropriated Art Recovery Act" (Annex 4) introduced in the Senate aims to "ensure that claims to artwork stolen or misappropriated by the Nazis are not barred by statutes of limitations and other similar legal doctrines but are resolved in a just and fair manner on the merits"<sup>76</sup>.

### 1.5.2.2. CoE Resolution 1999

At the European level, the CoE took action following the Washington Conference and adopted a resolution<sup>77</sup> in 1999. This important text considers the restitution of Nazi-looted art as "a significant way of enabling the reconstitution of the place of Jewish culture in Europe itself" (Article 8). It recalls that legislative changes are necessary to enable restitution, for instance with regard to statutory limitation periods and alienability (Article 13) or anti-seizure statutes (Article 15). The role of dealers and intermediaries is also stressed: laws should require them to inform the authorities if they "know or suspect a work they have in their possession to be looted" (Article 18).

### 1.5.2.3. Vilnius declaration 2000

The Vilnius Declaration<sup>78</sup> is the result of the Vilnius International Forum on Holocaust Era Looted Cultural Assets held as a follow-up to the Washington Conference of 1998. The declaration adopted at the end of the forum encourages governments to implement the Washington Principles and the CoE resolution. It also calls on governments to share all information they have (Article 2), establish reference centres in each country (Article 3) and organize periodical international meetings (Article 5).

<sup>75</sup> "Washington Conference Principles on Nazi-confiscated Art", in CAMPFENS Evelien (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*, The Hague, Eleven International Publishing, 2015, appendix 2.

<sup>76</sup> Text of the bill is available at: <https://www.congress.gov/bill/114th-congress/senate-bill/2763>.

<sup>77</sup> Parliamentary Assembly of the Council of Europe, Resolution 1205 (1999): Looted Jewish Cultural Property.

<sup>78</sup> "Vilnius Forum Declaration", in CAMPFENS Evelien (ed.), *supra* note 75, Appendix 4.

#### 1.5.2.4. Terezin declaration 2009

The Terezin Declaration on Holocaust Era Assets and Related Issues<sup>79</sup> was adopted by the States participating in an international conference in Prague and Terezin held in 2009. It covers various Holocaust-related issues (welfare of the survivors, immovable property, memorial sites, etc.). Several provisions deal with Nazi-looted art. Provision 2 stresses the importance of provenance research in identifying potentially looted works of art: “we stress the importance for all stakeholders to continue and support intensified systematic provenance research [...] and where relevant to make the results of this research, including ongoing updates, available via the internet.” Provision 3 urges the governments to “ensure that their legal systems or alternative processes [...] facilitate just and fair solutions with regard to Nazi-confiscated and looted art.”

#### 1.5.2.5. Ethical guidelines

With regard to Nazi-looted art, ICOM recommends museums to “encourage action by their national governments to ensure full implementation of the provisions of [...] documents, which establish international principles” referring in particular to the Washington Principles.<sup>80</sup> An earlier recommendation underlines that museums should actively investigate and identify all their acquisitions, especially those acquired during or just after the WWII, that might be regarded as of dubious provenance.<sup>81</sup>

The AAMD prepared a set of questions that American museums directors should address to facilitate the identification of works that were stolen by the Nazis and to ensure “prompt and sensitive responses to claimants”<sup>82</sup>.

Christie's, one of the major actors in the art market, adopted Guidelines for Dealing with Nazi-era Art Restitution Issues in 2009. The guidelines explain which steps the auction house will take when a potential Nazi-era issue is identified in the provenance of an object and also when a claim is addressed with regard to a consigned object.<sup>83</sup>

## 1.6. Conclusion

In conclusion, international law prohibits and sanctions the looting of cultural property during an armed conflict, and enables its restitution. It is crucial however that States make these principles applicable in their domestic systems. Initiatives taken by Switzerland, the Netherlands and Canada may be good examples of this.

At the European level, legal instruments focus rather on the problem of the illicit trafficking in general. Yet, the current attention is on the harmonized rules on offences relating to cultural property. A possible revision of the 1985 Convention may be interesting in terms of the criminalisation of looting.

Finally, soft law instruments also play an important role in this field to inspire States and other actors such as museums both on the prevention and restitution side.

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<sup>79</sup> See at: <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

<sup>80</sup> Resolution No. 8 (2001), available at: <http://archives.icom.museum/spoliation.html>.

<sup>81</sup> ICOM Recommendations concerning the Return of Works of Art Belonging to Jewish Owners, 14 January 1999, available at: <http://archives.icom.museum/worldwar2.html>.

<sup>82</sup> AAMD, “Art Museums and the Restitution of Works Stolen by the Nazis”, 2007.

<sup>83</sup> See at <http://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf>.

## 2. LEGAL DIFFICULTIES RELATING TO RESTITUTION CLAIMS

Art looted in armed conflicts and wars is generally exported out of the country of looting; as such, most restitution claims and the resulting judicial cases have an international element. Unfortunately, claimants involved in such cross-border restitution cases face multiple legal obstacles, such as the difficult task of determining what constitutes looted art (2.1.), the varying statutes of limitation (2.2.), the conflicts of law and/or jurisdiction often arising in international cases (2.3.), burden of proof issues (2.4.) and the applicability of anti-seizure legislation in some States (2.5.), which render their case's outcome less than certain.

Case-law addressing those issues exists in multiple States throughout and outside Europe, which indicates that they currently constitute generalized problems in the international community. As such, it is difficult, at this point in time, to identify States where restitution claims brought before courts encounter most – or less – problems. For now, and as will be more fully explained in section 4, it appears that States with the best practices are those who encourage the settlement of conflicts through means of alternative dispute resolution (ADR) and/or who have put in place non-judicial bodies to help solve looted art cases.

### 2.1. The Notion of “Looted Art”

#### 2.1.1. The notion of art

Cultural objects are often of major cultural, artistic, historical or scientific importance. In addition, in many cases countries assert spiritual, emotional ties with iconic cultural materials as they are important for the national identity. Cultural heritage items are most important to the people who created them or for whom they were created or whose particular identity and history is bound up with. In addition, works of art and antiquities may have a significant financial value, which is established by the market and hence by the demand and supply rule. The illicit trafficking in cultural objects is due to this latter reason.

Because of artworks' uniqueness and values, as well as the emotional link between dispossessed owners and objects, those deprived of their artworks have often sought restitution instead of financial compensation. It is hence the uniqueness and the cultural importance of artworks that justify a different treatment – for example specific rules – from ordinary commodities.

However, having specific rules dedicated to the protection of art objects implies that the notion of art be defined, and this is one extremely difficult thing to do. For example: is a LOUIS XV buffet an artwork or is it “just” a very valuable object of practical use? Since national and international law instruments do not provide a definition of “art” or “culture”, the question will be left to judges, arbitrators or the parties themselves (as the case may be) in each case, which may create uncertainty. As explained above, it is submitted that what makes art different is its uniqueness and this element should be decisive.

#### 2.1.2. Looting vs forced sale

The notion of looting refers to the situation whereby an object is taken from a person, against the latter's will and in breach of existing legislation, typically in times of political and military disorder.<sup>84</sup> It can occur with the support of the State or independently of any

<sup>84</sup> Although most mediatised examples of looting (Nazi looting before and during WWII, ISIS' looting in Iraq and Syria, looting in colonial times, etc.) show looters in a position of power over their victims,

role played by it. Illicit excavations also fall within the definition of looting. The reason is that most countries have patrimony statutes conferring ownership of unearthened antiquities to the State and prohibiting citizens from removing them without a license.

The notion of forced sale, however, is more difficult to define. Broadly understood, a forced sale happens when State authorities seize someone's property in view of its own appropriation. Not all forced sales are illegal. For example, many national legislations authorize the forced sale of the goods of a debtor, under certain conditions. However, especially in times of conflict, illegal forced sales happen, for example, when an authoritarian State or the occupying force decide that certain people are not allowed to own anything, or some specific items. In such cases, forced sales resemble looting, especially when the proceeds of the sale are confiscated, and not given to the owner of the goods.

In certain cases, it may be difficult for a court to distinguish between those two occurrences (legal vs. illegal forced sales amounting to looting), especially when little or no evidence is available on the question.

For instance, a complicated case arises when the owner is forced (for example by racist rules, such as the Nuremberg laws of 1933) to sell his goods to cover fees such as "departure taxes" with the proceeds of the sale. In such a case, the price paid for the goods will be of central significance. When the price obtained for the sold goods is fair, it will be difficult to speak of looting, however condemnable the forced sale might be. On the other hand, if the price of the goods is clearly below the market price at the time of the sale – for example because the goods are wrongly presented as copies – then it is a case of "partial looting". Such cases can be quite difficult to apprehend because the owner is not fully deprived and the new owner, *i.e.* the buyer, is not necessarily in bad faith.

Another complicated case could be when the reason for a sale is not obvious and evidence on that matter is not readily available (e.g. if the original owner is dead). For instance, a person may have sold art to honour outstanding personal debts (no looting) or to feed his family during times of persecution ("indirect" looting).

For these reasons, victims of forced sales often face a specific difficulty that does not appear in cases of outright looting: demonstrating that they are victims and must benefit either from restitution or from some form of indemnification.

The ***Schoeps v. Museum of Modern Art*** case illustrates this issue. In December 2007, the Museum of Modern Art and the Solomon R. Guggenheim Foundation jointly asked a federal court in New York to declare them the rightful owners of two Picassos, "Boy Leading a Horse" and "Le Moulin de la Galette". Their ownership of the paintings was challenged by Julius Schoeps, the heir of Jewish banker Paul von Mendelssohn-Bartholdy, who asked for restitution claiming that the paintings has been sold under duress as a direct result of Nazi policies. Although von Mendelssohn-Bartholdy's will suggested he may have sold the paintings to keep them out of Nazi hands, the museums alleged that there was no evidence showing him to be a target of Nazi persecution, since there was no restraint of his freedom of movement, his right to serve as a director of the bank, or his ability to transfer artwork or other assets.<sup>85</sup> In an interim ruling following the museums' request to have the claim dismissed at a preliminary stage, a US judge concluded that German law applied to the

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it is important to note that cultural property is also often stolen, excavated or looted by the impoverished population living in conflict zones. Indeed, "[l]ooters sometimes have a direct ancestral tie to the crafts of excavated materials. They often have few employment options [...]. Essentially, the money illicit excavators earn from unearthing antiquities often goes to feed their families". ALTERMAN L. Kimberly and DAHM S. Chelsey, "National Treasure: A Comparative Analysis of Domestic Laws Criminalizing Illicit Excavation and Exportation of Archaeological Objects", *Mercer Law Review*, 2013, 431-465, 437.

<sup>85</sup> YIP J. Arabella and SPENCER D. Ronald, "Untouched by Nazi Hands, but Still...", *The Wall Street Journal*, 28 February 2008, <http://www.wsj.com/articles/SB120416063008298329>.

issue of duress and that under the relevant provisions of the German civil code, Schoeps had adduced sufficient evidence to reasonably support his “forced sale” allegations, thus allowing the case to proceed to trial.<sup>86</sup> However, the parties settled their case before trial under strict confidential terms, precluding this case from setting an important precedent on the question. The same US judge who had authorized Schoeps’ action expressed concern about the confidentiality of the settlement in light of the public interest issues raised by the case.

## 2.2. Statutes of Limitations and Legal Certainty

All legal systems subject the initiating of proceedings to certain time limits which may start from the time of the theft, from the discovery of the location of the object or of the identity of the holder or when the claim was rejected by the possessor.<sup>87</sup>

As mentioned above, statutes of limitations often create difficulties for claimants in restitution matters. The objective of these statutes of limitation is to secure a minimum of legal certainty. Indeed, laws are not solely dedicated to the protection of victims, but also to offer legal security of commercial transactions and encourage business transactions. In this regard, it would be difficult to imagine an efficient legal art market if a *bona fide* purchaser who possesses an artwork peacefully for decades could still not have good title over said artwork.

Statutes of limitations are therefore necessary and the difficulty is finding the right balance between the protection of the interests of the victims of theft/looting and those of the market.

Some European examples of statutes of limitation applicable to looted art cases will be discussed in section 2.4.3. If we look at examples outside Europe, in the U.S., most States have a three-year statute of limitations that restricts the time in which a party may sue for recovery of stolen property. The moment on which the “countdown” starts however varies between States. In California and Massachusetts, it usually starts when the claimant discovered or reasonably could have discovered his claim to the artwork and its whereabouts.<sup>88</sup> California attempted twice to pass statutes extending the time to bring suit for looted-art claims, but they were both ruled unconstitutional.<sup>89</sup> In Michigan, a federal court held that the statute of limitations starts from the date the alleged wrong occurred, which, in looted art cases, is when the original owner loses possession of the artwork. Other states are more generous. In New York, for instance, judges seized with a looted art claim generally apply the “demand and refusal rule” under which a claim accrues after the alleged rightful owner demands the property’s return and the possessor refuses to return it. Thus, under New York law, the statute of limitations does not begin to run until the possessor refuses a demand.<sup>90</sup> It is to be noted, however, that the U.S. *Holocaust Expropriated Art Recovery Act* (Annex 4), not yet in force, will standardize the limitation period applicable to Nazi-looted art restitution claims to “6 years after the actual discovery by the claimant or the agent of the claimant of (1) the identity and location of the artwork or cultural property; and (2) information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost” (section 5 of the Act).

<sup>86</sup> *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009).

<sup>87</sup> See REDMOND-COOPER Ruth, “Limitation of Actions in Art and Antiquity Claims”, *Art Antiquity and Law*, 2000, 185-206.

<sup>88</sup> SKINNER N. Katharine, “Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums”, *Vanderbilt Journal of Entertainment and Technology Law*, 673-712, 686.

<sup>89</sup> SKINNER, *ibid*, 694.

<sup>90</sup> SKINNER, *ibid*, 695.

### 2.3. Conflict of Law and of Jurisdiction

When claiming the restitution of looted art, the claimant must of course act at the proper venue (choice of jurisdiction) and demonstrate ownership under the applicable law (choice of law). However, the forum and the applicable law will depend on various factors, and some are specific to looted artworks.

First, due to the divergent private international law rules in force in each State, multiple national courts may, by basing themselves on various connecting factors, have jurisdiction over the same claim. In looted art claims, the authorities of the place where the looting took place might claim jurisdiction, as well as the authorities of the place where the artwork was brought after the looting and sold (or lent, given, pledged, etc.), the authorities of the place where the artwork is located presently, the authorities of the place where the contract related to the artwork is to be performed or even the authorities of the place where the current possessor resides.

There are unfortunately no harmonized conflict of jurisdiction rules at the international level. This creates uncertainty as to which courts are competent in each case, and encourages forum shopping for claimants (i.e. choosing the court most likely to provide a favourable judgment). In Europe, supranational instruments such as the Brussels I-bis Regulation<sup>91</sup> and the Lugano Convention<sup>92</sup> aim at determining in advance which court or courts will have jurisdiction (without regard to each State's private international law rules), thus minimizing the uncertainty.<sup>93</sup> Problems however remain. First, these instruments generally only apply when both the claimant and the defendant are domiciled in EU or European Free Trade Association (EFTA) Member States. Claims involving parties domiciled outside of Member States (such as in the U.S., where many looted artworks can be found today) do not fall within the scope of those European instruments. In those cases, the jurisdiction of the courts of a seized State shall be determined by the private international law rules of that State<sup>94</sup>, thus bringing the parties back to square one. Courts may also dismiss restitution claims on grounds of lack of jurisdiction due to sovereign immunity.<sup>95</sup> In addition, in common law countries such as the UK, the U.S., Australia and Canada, courts which are otherwise competent (as per the applicable private international law rules) may decline jurisdiction based on the principle of *forum non conveniens* when there is a more appropriate forum available to the parties (i.e. when another forum has stronger links with the case or the parties).

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<sup>91</sup> 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).

<sup>92</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 30 October 2007.

<sup>93</sup> In general, the domicile of the defendant determines which of the courts have jurisdiction in a given case. Other courts may also have jurisdiction based on the subject-matter of the dispute. In looted art claims, an additional subject-matter jurisdiction may include "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" (Art. 7(3) Brussels I-bis Regulation).

<sup>94</sup> See, for instance, Article 6 of the Brussels I bis Regulation.

<sup>95</sup> An interesting example is provided by the case *Andrew Orkin v The Swiss Confederation and Others*, 09 Civ 10013 (LAK) 770 F.Supp. 2d 612, US Dist Lexis 4357 (2011), U.S. Lexis 24507 (S.D. N.Y 2011), U.S. App. Lexis 20639 (2011). Andrew Orkin sued the Swiss Confederation, the Oskar Reinhart Foundation and the Oskar Reinhart Collection in the U.S. in order to recover possession of the drawing *View of Les Saintes-Maries-de-la-Mer*. Orkin alleged that his great-grandmother, Margarethe Mauthner, sold the painting under duress during the Nazi era. The action was dismissed for lack of subject matter jurisdiction on the ground that a court of law can affirm jurisdiction only when the initial taking of an object was committed by a State or a person or entity acting on a State's behalf.

Moreover, jurisdiction conferred to one court does not mean that the applicable law will be the law of that court. It is possible and frequent to have a national court apply foreign law. Unfortunately, there are no harmonized conflict of law rules in force either at the international or European level.<sup>96</sup> In looted art cases, the applicable law will generally be the law of the artwork's situation (*lex rei sitae*), but in some cases the applicable private international law rules may also point to the law applicable to the contract relating to the artwork (sale, pledge, lending, loan, etc.) or the place of destination (if the artwork is in transit). One might also have to take into account the law applicable to the past transactions regarding the artwork.

In looted art cases, the determination of the law applicable to both substantial and procedural issues is crucial since it will often influence the outcome of the claim. It will notably determine which limitation period is applicable and when it started to run (see section 2.2.). In cases where the actual possessor of the item acquired it in good faith, the chosen law may also or close (in common law systems) or open (in civil law systems) the door to a "good title" defence – the whole under certain conditions which also considerably vary, even between civil law systems (see section 2.4.3.).

In other words, similarly situated claimants may face completely different treatment of their cases across different States, depending on the connecting factor the seized court applies to determine the applicable law.

The ***Grunbaum Heirs v. David Bakalar***<sup>97</sup> case pertaining to a Schiele drawing illustrates the complications faced by litigants in that regard. In 1938, the Nazis expropriated the art collection of Fritz Grunbaum while he was detained in Dachau concentration camp. In 1963, David Bakalar purchased in New York, from a gallery in Bern, a Schiele drawing that had belonged to the Grunbaum family. In 2004, Bakalar consigned the drawing to Sotheby's for sale but upon discovering an issue in title, the auction house froze the sale. Bakalar filed suit in New York in 2005, seeking judgment that he had purchased the drawing in good faith and thus was the legal owner of the drawing. The Grunbaum Heirs counterclaimed alleging that under New York law, even a good faith purchaser cannot acquire good title to an artwork that has been stolen in the first place. The New York District Court was faced with the difficult question of which law to apply in determining who maintained ownership of the drawing: the law of Austria, where the Grunbaums lost possession; the law of Switzerland, where the drawing allegedly passed to the Gallery; or the law of New York, where Bakalar purchased the drawing and commissioned it for auction. Although Austrian law was rapidly found inapplicable, determining whether the Swiss or New York law applied to ownership issues was of the utmost importance. Indeed, under Swiss law, Bakalar maintained title to the drawing unless the heirs could prove that suspicious circumstances had existed of which Bakalar was aware, or that each party tracing back to the Grunbaums had failed to act in good faith upon purchasing the drawing. On the contrary, under New York law, Bakalar could never have obtained good title if the drawing was originally stolen. Applying New York State's choice of law rules, the District Court concluded that Swiss substantive law governed the dispute, but that New York law applied to the procedural issues, eventually concluding that Bakalar had purchased the drawing in good faith and therefore was its valid owner. However, on appeal this conclusion on the applicable law was reversed. The Appellate Court held that New York substantive law should have been applied and referred the case back to the District Court for a new review. Although the result was

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<sup>96</sup> In the EU, some regulations such as Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, and 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 provide harmonized rules to help determine the applicable law to specific disputes such as contractual and tort disputes, but they have no relevance in looted art (theft) disputes.

<sup>97</sup> Andrea Wallace, Shelly Janevicius, Marc-André Renold, "Case Schiele Drawing – Grunbaum Heirs v. David Bakalar," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

ultimately the same due to Bakalar's laches defense,<sup>98</sup> it took eight years from the date of the first filing for Bakalar's lawful title to be recognized in a full and final judgment.

Even between two States with more similar legal systems, a judge's choice to apply one national law over another may have important consequences. For instance, in *Stato Francese v. Ministero per i beni culturali ed ambientali e De Contessini*,<sup>99</sup> two tapestries were stolen from a French state museum, taken to Italy and eventually bought in good faith by defendant De Contessini. When the French government filed an action in Italy for the recovery of the tapestries, the *Tribunale* of Rome held that Italian law applied to the sale to De Contessini and that consequently, the good faith purchaser had become the owner – this even though under French law the tapestries were classified as inalienable objects because of their artistic importance.<sup>100</sup>

In this context, the UNIDROIT Convention (see section 1.2.2.) represents an important instrument in that it aims at resolving the problems resulting from the differences among national rules. More specifically, it establishes a key compromise between civil law and common law jurisdictions at its Articles 3 and 4. Pursuant to these norms, "[t]he possessor of a cultural object which has been stolen shall return it", but "shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object". On the one hand, this means that the *nemo dat quod non habet* principle (see section 2.4.3.) is respected. On the other hand, the security of commercial transaction is safeguarded by the condition that purchasers of cultural objects can be protected provided they can prove having exercised the required due diligence.

## 2.4. Burden of Proof and Good Faith

In principle, claimants must demonstrate that what they allege is true. In other words, claimants carry the burden of proof.

In looted art matters, this implies that claimants face many challenges, and in particular:

1. proving that they (or their ancestors) were the owner of the artwork until it was looted (2.4.1.);
2. proving that the artwork was actually looted (2.4.2.);
3. demonstrating that the present possessor did not acquire good title, which implies that no one must have acquired such good title between the looting and the beginning of the litigation (2.4.3.).

### 2.4.1. Proof of past ownership

Claimants have to demonstrate that they had prior ownership of a specific artwork up until the moment it was looted.

In the case of Holocaust-related disputes, the problem of proving ownership can be particularly acute. Since more than half a century has passed since WWII, evidence is now

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<sup>98</sup> An equitable doctrine asserted by Bakalar that bars title actions in which there has been a lengthy delay in filing a claim. See GREENBERG J. Ariel, "Seven Year Saga of Bakalar v. Vavra Ends in Victory for Current Owner of Schiele Drawing and Settles Concerns Over Application of the Laches Defense", available at: <https://itsartlaw.com/2012/10/18/seven-year-saga-of-bakalar-v-vavra-ends-in-victory-for-current-owner-of-schiele-drawing-and-settles-concerns-over-application-of-the-laches-defense/>.

<sup>99</sup> *Corte di Cassazione* (Italy), No. 12166, 24 November 1995.

<sup>100</sup> MERRYMAN H. John, "The Good Faith Acquisition of Stolen Art", Stanford Law School, Research Paper No. 1025515, 5.

lost or extremely difficult to collect. While many of those involved have passed away, those who are still alive or their descendants may have no documentation, photos, or witnesses, and statements taken from witnesses such a long time after the event are not always fully reliable. Defendants in such cases use the fact that uncertainty remains regarding whether the artwork was sold before the looting actually occurred,<sup>101</sup> or regarding whether the claimants even ever owned the artwork.

Today electronic records as evidence of ownership will help future claimants, but these issues remain regarding claims for “older” looted art. They were notably raised in a dispute opposing the **Weinmann Heirs to Yale University Art Gallery** with regard to the painting “Le Grand Pont” by Gustave Courbet.<sup>102</sup> According to the claimant, Eric Weinmann, this painting had originally been owned by his mother Josephine and her family, but after they were forced to flee Germany from Nazi persecution, the painting was purchased by Herbert Schaefer, a Nazi militant. When Schaefer later loaned the painting to the Yale University Art Gallery, Weinmann learned about it and sued for its return. Multiple evidence issues complicated Weinmann’s task. First, there was no written record of his mother’s purchase of the painting. The details as to how Schaefer subsequently acquired the painting were also unclear (the detailed date of acquisition by Schaefer was unknown and the documentation pertaining to the sale was lost). Finally, Weinmann had no photos of the painting in his parents’ house. In sum, Eric Weinmann lacked proof of ownership and based his claim entirely on his memory of the painting hanging in his childhood home, claiming to have recognized it many years later in the Yale University Art Gallery. Unsurprisingly, the parties ended up settling this claim out of court.

As for looted archaeological heritage, the legislation of many States unequivocally vests ownership of certain categories of objects in the State. Consequently, a State with such legislation may base a restitution claim on its law making it the sole owner of such objects.<sup>103</sup>

However, not all legislations are drafted in clear terms and interpretation issues can arise, especially when the matter is judged before a foreign court. This is often the case as looted antiquities are generally exported from the countries of origin.

Moreover, in certain cases prior ownership by a third party can be established, for instance by the person who buries a cultural object belonging to him/her in order to protect it during a conflict, intending to retrieve it later so that he/she has not abandoned ownership.

In the absence of clear evidence on the origin of illicitly excavated antiquities, States cannot obtain their restitution from possessors located in a foreign country. As mentioned above, in some States the relevant national legislation is too vague in that it does not unequivocally vests ownership of archaeological artefacts in the State. In order to address this specific issue, the UNESCO and UNIDROIT Secretariats have adopted the “Model Provisions on State Ownership of Undiscovered Cultural Objects” (2011) (Annex 3). These provisions are intended to assist domestic legislative bodies in the establishment of a legal framework for heritage protection containing sufficiently explicit legal principles to guarantee the State ownership of archaeological artefacts and hence to facilitate restitution in case of unlawful removal. In particular, Provision 3, on State Ownership, suggests that national legislation should provide that: “Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership”.

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<sup>101</sup> Sometimes for good reasons, e.g. the private sale of a particular artwork before the war and without anyone’s knowledge.

<sup>102</sup> Lauren Bursey, Justine Ferland, Marc-André Renold, “Le Grand Pont – Weinmann Heirs and Yale University Art Gallery,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

<sup>103</sup> For instance Iran’s national ownership law allowed Iran to recover its antiquities before English courts. See *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWHC 705 QB.

#### 2.4.2. Proof of looting

If a claimant succeeds in proving ownership, he must then demonstrate that the particular object or collection was looted.

With the notable exception of the Nazis, looters seldom keep records of what they loot, when and to whom. Proving that one specific object was looted might hence be difficult, especially when witnesses are unavailable.

The situation might be slightly more favourable to claimants when it is admitted or common place that looting took place frequently during a specific conflict or in specific areas.

Proof of looting may be especially problematic when items are unearthed from archaeological sites, since their existence had never been acknowledged by State authorities prior to the clandestine looting. Provision 4 of the UNESCO-UNIDROIT "Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects" (2011) attempts to address this difficulty by suggesting that States provide in their national legislation that "cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects". However, this provision may not help States to prove looting in cases where the provenance of an item is not obvious (for instance when it has no distinctive features allowing experts to connect it to a particular State or population).

#### 2.4.3. Good title: the good faith argument

It is presumed that the current possessor of an object is its owner. In looted art matters this implies that the claimant has the burden of proof to demonstrate that the current possessor does not have good title over the artwork.

In civil law systems, good title can be gained in the following circumstances:

- peaceful possession in good faith over a certain period of time;
- acquisition in good faith;
- acquisition from someone who had good title.

As the good faith of the people involved in a transaction is presumed, it leaves the claimants with the burden to prove that:

- the current possessor did not acquire the artwork in good faith;
- the current possessor did not keep the artwork in peaceful possession for sufficient time;
- no one since the artwork was looted acquired the artwork in good faith nor kept it in peaceful possession for sufficient time.

These questions are central in every restitution claim subject to civil law systems. However, the conditions conferring legal title to a good faith purchaser vary between civil law countries and are often linked to the applicable limitation periods. For instance, Italy is probably the most "generous" European civil law State with regards to the protection of a good faith purchaser since the Italian Civil Code provides that the good faith purchaser immediately acquires valid title, except when artworks belong to public collections.<sup>104</sup> In contrast, in France, a good faith purchaser of a work of art gains title with possession, but the original owner of movable property that has been lost or stolen may reclaim it within 3

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<sup>104</sup> Art. 1153 of the Italian Civil Code. PROWDA B. Judith, "The Perils of Buying and Selling Art at the Fair: Legal Issues in Title", in VADI Valentina and SCHNEIDER E.G.S. Hildegard (eds.), *Art, Cultural Heritage and the Market: Ethical and Legal Issues*, Springer, 2014, 141-163, 147.

years from the date of the loss or theft.<sup>105</sup> In Switzerland, it will depend on when the theft occurred – a good faith purchaser of cultural property can acquire superior title to that of an original owner after 5 years if the theft or loss occurred before 1 June 2005<sup>106</sup> and 30 years if the event occurred on or after that date.<sup>107</sup>

These good faith questions are of much lesser importance in common law countries, because of the *nemo dat quod non habet* rule<sup>108</sup> (usually translated as “no one can transfer better title than he has himself”), which provides that good title cannot pass to the purchaser of stolen property, even if the purchase was made in good faith. Relying on this well-settled principle of common law, Anglo-American courts will generally order the return of looted art to its original owner, no matter how many subsequent owners buy in good faith and how long these subsequent owners have possessed the item (subject to the possible prescription of the claim, as explained in section 2.2.).

In relation with these matters, difficulties arise when one does not know where the artwork was during a certain period of time, and especially when said period is long enough for a statute of limitations to intervene. Issues also arise in cross-border cases where relevant facts can be linked to both civil and common law States, as shown by the *Grunbaum Heirs v. David Bakalar* example discussed in section 2.3. above.

Lawmakers or courts have developed specific solutions with respect to the issue of good faith. For example, in Switzerland, the possessor of an artwork cannot rely on his good faith if he cannot demonstrate that he paid sufficient attention according to the circumstances at the moment of the acquisition. Buyers should verify the origin of the artwork they are interested in and the status of the transferor and whether it has been legally dealt with. Failure to engage in reasonable efforts to investigate the provenance of art to be bought or sold entails that the standard of care regarding due diligence has not been met. In a recent case, the Swiss Federal Tribunal decided that an art collector failed to comply with the due diligence obligation in the acquisition of a Malewicz painting as he had ignored a “rumour” as to the fact that a Malewicz painting had been stolen.<sup>109</sup> In addition, the *Swiss Federal Law on the International Transfer of Cultural Property*<sup>110</sup> imposes high standards of due diligence on sellers and their agents. Article 16 of the law states that dealers or auctioneers cannot enter into any art transaction if they have any doubt as to the provenance of the objects. Therefore, the burden lies not only on the purchasers’ shoulders, but also on those of the traders. This type of solutions allows restitution claims to have an actual chance of success and forces the actors of the art market to pay attention to provenance.<sup>111</sup>

## 2.5. Anti-Seizure Legislation

Another burden claimants may encounter when seeking the return of cultural objects are the national laws that grant immunity from seizure to items temporary on loan from abroad. The protection of loaned art from seizure has become a central concern for museums. Various controversies have made clear that such exhibitions expose art to the

<sup>105</sup> Art. 2276 of the French Civil Code.

<sup>106</sup> Arts. 728(1) and 934(1) of the Swiss Civil Code.

<sup>107</sup> Arts. 728(1ter) and 934(1bis) of the Swiss Civil Code. See PROWDA, *supra* note 104, 146.

<sup>108</sup> RENOLD Marc-André, “Stolen Art: The Ubiquitous Question of Good Faith”, in International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes*, The Hague, Kluwer Law International, 2004, 251-263.

<sup>109</sup> *A. v. B.*, ATF 139 III 305, 18 April 2013, *Journal des Tribunaux* 2015 II 79. See also *Insurance X v. A.M.*, ATF 122 III 1, 5 March 1996.

<sup>110</sup> 20 June 2003, RO 2005 1869. GABUS Pierre and RENOLD Marc-André, *Commentaire LTBC, Loi fédérale sur le transfert international des biens culturels*, Zürich, Schulthess, 2006.

<sup>111</sup> For the characteristics of the due diligence obligation, see art. 4.4 of the UNIDROIT Convention and art. 10(2) of the EU Directive 2014/60 (*supra* note 52).

public and, inevitably, to the scrutiny of potential claimants. In effect, the adoption of these laws is mainly due to an increasing number of legal disputes.

One of the most common scenarios occurs when an ownership claim is filed in the borrowing State by an individual claimant.<sup>112</sup> In this case, claimants base their action on the theft of the artwork, from them or their ancestors – often as a result of expropriations ordered by Communist regimes in Eastern Europe or the Nazis – and on the inability of any later alienation to extinguish the original title. When claimants are States, the action is based on ownership laws. Claims are filed in the borrowing State because action or enforcement are often not available in the lender State.

It follows that the purpose of anti-seizure statutes is twofold: (i) to prevent the seizure of loaned artworks by the courts of the borrowing State for reasons extraneous to the loan agreement; (ii) to facilitate inter-State exchanges of artworks by defeating the reluctance of museums and collectors to loan their artworks to foreign jurisdictions.

Correspondingly, anti-seizure legislation entails two notable problems. First, no judicial proceedings are allowed in the forum State (that is the State where the requested object is on loan) with regard to objects on loan. Stated differently, claimants in international art loan cases factually do not have the opportunity either to contest the title of the lending entity or to challenge the granting of anti-seizure immunity prior to the loan.<sup>113</sup> Second, the efficacy of the legal instruments deployed to curb the illicit trade in cultural objects is jeopardized. In effect, anti-seizure statutes can clash with treaty obligations requiring States to return wrongfully taken objects, such as the Hague Convention, the 1970 UNESCO Convention and the UNIDROIT Convention.<sup>114</sup>

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<sup>112</sup> KAYE M Lawrence, "Art Loans and Immunity from Seizure in the United States and the United Kingdom", *International Journal of Cultural Property*, 2010, 335-359, 353.

<sup>113</sup> WELLER Matthias, "Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in Light of the *Liechtenstein* Litigation", *Vanderbilt Journal of Transnational Law*, 2005, 997–1024, 1013.

<sup>114</sup> 24 June 1995, 34 ILM 1322 (1995).

## 3. IMPORTANCE AND DIFFICULTIES OF PROVENANCE RESEARCH

### 3.1. Researching the Provenance

ICOM's Code of Ethics for Museums defines provenance as "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."<sup>115</sup> It is important to note that until recently, provenance research was mainly the responsibility of art historians who were dealing with attribution and authenticity. With the rise of restitution claims related to, among others, Nazi-looted art, emphasis has been placed on ownership issues. Today, provenance research is a major concern for all the actors in the art market.

Museums for instance, have an ethical (if not legal) obligation to ensure that "any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained."<sup>116</sup> Given the complexity of this task, it is not surprising that museums are now hiring specially trained staff to work exclusively on the provenance of objects.

On the market side, buyers need to be more diligent when acquiring artworks, as the standards for establishing their good faith have risen (see Section 2.4.3).

As for auction houses, who usually act as intermediaries, they conduct their own provenance research while advising the owners in particular in case of potential Nazi-looted art works.<sup>117</sup>

### 3.2. Importance of Provenance Research

On a purely legal level, provenance research goes hand in hand with the necessary diligence a possessor is required to prove when his title over an artwork is challenged. The scope of the research will depend on the circumstances of the case. But buyers have to conduct the necessary provenance research to prove their valid title over the objects and overcome possible restitution claims.

Furthermore, acquiring, knowingly or by negligence, stolen artworks might be punishable under certain national laws.<sup>118</sup>

On a more ethical level, provenance research allows the identification of looted artworks and their restitution to the legitimate owners or the adoption of "fair and just" solutions (on the basis of the Washington Principles, see above Section 1.5.2.1 and below Section 4.3). By now, many European States and museums have initiated provenance research schemes in order to ensure that they do not possess looted items in their collections.<sup>119</sup>

<sup>115</sup> See the glossary of the ICOM Code of Ethics for Museums, *supra* note 70.

<sup>116</sup> Art. 2.3 of the ICOM Code of Ethics for Museums, *supra* note 70.

<sup>117</sup> See Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues, June 2009.

<sup>118</sup> See for instance Art. 24 of Swiss Law on the International Transfer of Cultural Property (*supra* note 110), and the U.S. National Stolen Property Act (18 USC §§ 2314-2315).

<sup>119</sup> International organizations such as Interpol ([www.interpol.int/Crime-areas/Works-of-art/Works-of-art](http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art)) or private institutions such as Art Loss Register ([www.artloss.com](http://www.artloss.com)) maintain databases on stolen art in general. ICOM's Red Lists classify the endangered categories of archaeological objects or works of art to prevent their illicit exportation and transfer (<http://icom.museum/resources/red-lists-database/>).

**France** created an online database of the “Musées Nationaux Récupération” (MNR) regrouping artworks entrusted to the national museums for safekeeping after the WWII.<sup>120</sup> Thanks to this research, families of the victims of Nazi spoliations can consult the database and bring claims for restitution. France recently took a proactive step to identify the legitimate heirs of the objects that may have been looted in the MNR collections.<sup>121</sup>

Similarly, the **Netherlands** conducted research on the objects of the Nederlands Kunstbezit (NK) collection, which were recuperated from Germany after World War II and managed by the state since then. The purpose of the research was to establish provenance in order to identify the original owners of the looted artworks.<sup>122</sup> Moreover, the Museum Association in the Netherlands initiated an “investigation into the provenance of museum collections in connection with the theft, confiscation and sale of objects under duress between 1933 and 1945.” In this context, many museums investigated on a voluntary basis the provenance of their collections.<sup>123</sup>

In the **UK**, public museums (national and non-national institutions) examined the provenance of the objects in their collections, which may have been looted by the Nazis. Their “List of Works of Incomplete Provenance for 1933-1945” is published online.<sup>124</sup>

In **Austria**, the Commission for Provenance Research investigates the federal collections to identify looted objects and to trace their history.<sup>125</sup>

In **Switzerland**, the provenance of the federal collections has been examined as well.<sup>126</sup> The provenance research in Swiss museums is performed on a voluntary basis.<sup>127</sup> The federal state supports them by creating tools and information material to facilitate the research process,<sup>128</sup> as well as by helping with funding. For example, the Art and History Museum of Geneva has recently undertaken a research to establish the provenance of three paintings that a person left to the museum as a deposit in 1969. The research revealed that this person probably acquired the paintings in 1945-1952 and had close relationships with Nazi agents in Spain.<sup>129</sup> Even if the research has not permitted to establish the full history of ownership for the time being, it showed how necessary it was to do it.

Finally, in **Germany**, the Lost Art Foundation (lostart.de) provides financial support to public institutions (museums, archives and libraries) and privately funded institutions and individuals (provided that they adhere to the Washington Principles) to conduct provenance research on Nazi-looted art.<sup>130</sup> Its Lost Art Database is an important tool as well.<sup>131</sup>

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<sup>120</sup> Available at <http://www.culture.gouv.fr/documentation/mnr/MnR-accueil.htm>.

<sup>121</sup> “Rapport définitif du groupe de travail sur les provenances d’œuvres récupérées après la seconde guerre mondiale du 27 novembre 2014”, 9-10, available at: [http://lootedart.com/web\\_images/pdf2014/20141127\\_MCC-Rapport-MNR.pdf](http://lootedart.com/web_images/pdf2014/20141127_MCC-Rapport-MNR.pdf).

<sup>122</sup> See at <http://www.herkomstgezocht.nl/eng/nkcollectie/index.html>.

<sup>123</sup> See at <http://www.musealeverwervingen.nl/en/10/home/>.

<sup>124</sup> See at <http://www.collectionstrust.org.uk/2015-11-03-15-25-31/cultural-property-advice/cultural-property-and-provenance/provenance-research-for-1933-45>.

<sup>125</sup> See at <http://www.provenienzforschung.gv.at/?lang=en>.

<sup>126</sup> “Rapport du groupe de travail de l’Office fédéral de la culture Biens culturels de la Confédération Enquête sur la période de 1933 à 1945”, 1998, available at: <http://www.bak.admin.ch/kulturerbe/04402/04711/04756/index.html?lang=fr>

<sup>127</sup> See the Confederation’s 2011 Report on the state of research provenance in Swiss museums: “Rapport DFI/DFAE sur l’état des travaux dans le domaine de l’art spolié à l’époque du national-socialisme, notamment dans le domaine des recherches de provenance”, available at: <http://www.bak.admin.ch/kulturerbe/04402/04711/04757/index.html?lang=fr>

<sup>128</sup> Information material for museums available at:

<http://www.bak.admin.ch/kulturerbe/04402/04711/index.html?lang=en>.

<sup>129</sup> Geneva, Dossier de l’Art de l’Inventaire, 2013, no 61.

<sup>130</sup> See at <http://www.kulturgutverluste.de/en/>.

<sup>131</sup> See at <http://www.lostart.de/Webs/EN/Datenbank/Index.html>.

On a general note, the practice of provenance research certainly leads to a more transparent and responsible art market, and discourages looting. This is, notably because the ethical and legal constraints described above may reduce the market for looted materials, whether with or without false provenance.

### 3.3. Difficulties of Provenance Research

States' efforts mentioned above indicate certain limits of the provenance research. First, the research may cover only the artworks recuperated after the war and not the totality of public collections (such as in the French and Dutch cases). Second, private collections usually remain inaccessible. The well-known case of the Gurlitt collection, which was revealed to the public a few years ago, is a striking example.<sup>132</sup>

Establishing the ownership history of an artwork can be a challenging task. Researchers consult primarily documentary records such as archives, sales catalogues, dealer stock books and payments to artists (receipts).<sup>133</sup> Examining the object itself for labels, inscriptions or stamps is also essential.

Unfortunately, such materials often get lost in events like wars. In addition, private owners may have not saved them over the years. In certain cases, dealers and galleries may no longer be in business. Otherwise, accessibility to documents may be restricted or impossible. Nevertheless, the declassification of war records in the end of the 1990's facilitated the provenance research related to Nazi-looted art.<sup>134</sup>

So called "catalogues raisonnés" are also an important tool for researching the provenance. A catalogue raisonné is a "detailed compilation of an artist's work and often includes some provenance information, exhibition history, and other identifying features of the work such as dimensions, inscriptions and condition".<sup>135</sup> However, researchers should be careful not to interpret each gap in provenance as an indicator for looting.

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<sup>132</sup> See at <http://www.lostart.de/Webs/EN/Datenbank/KunstfundMuenchen.html>.

<sup>133</sup> See the chart showing the type of resources contained in Getty's Provenance Index Databases at <http://www.getty.edu/research/tools/provenance/charts.html#overview>.

<sup>134</sup> See at [https://www.ifar.org/provenance\\_guide.php](https://www.ifar.org/provenance_guide.php).

<sup>135</sup> See at [https://www.ifar.org/provenance\\_guide.php](https://www.ifar.org/provenance_guide.php).

## 4. RESOLUTION OF DISPUTES THROUGH COURTS AND ALTERNATIVE MEANS<sup>136</sup>

Dispossessed owners (or their heirs) can demand the restitution of their looted art before domestic courts. However, procedural hurdles and other shortcomings of court litigation (section 4.1.) make alternative means of dispute resolution and the possible associated solutions more appealing (sections 4.2.). In this respect, it is useful to note that the Washington Principles on Nazi-Confiscated Art (1998) recommend States to establish alternative dispute resolution mechanisms for resolving ownership issues, in order to reach "just and fair solutions" (section 4.3).<sup>137</sup>

### 4.1. Resolution through Courts

A certain number of reasons can guide a claimant to select court litigation. First, by going before courts, claimants will eventually dispose of a final decision proving their ownership over looted objects. This decision can subsequently be enforced through the ordinary judicial machinery if need be, since domestic courts have enforcement and sanctioning powers that are non-existent or weak in supranational legal systems and non-judicial means. Second, litigants may be unwilling to enter into a dialogue with their counterparts, thus preventing the access to negotiation, mediation, conciliation, and arbitration – the so-called ADR means – which are only available on a consensual basis. Third, recourse to litigation may exert pressure on the defendant, who may then become more willing to abandon an overly legalistic approach and to agree on a negotiated solution. This is proven by the fact that many lawsuits concerning cultural heritage have not been pursued further as the parties have reached an out of court settlement.

One European example of successful Holocaust-related court litigation<sup>138</sup> is the *Gentili di Giuseppe Heirs v. Musée du Louvre and France* case.<sup>139</sup> In 1998, the heirs of the renowned Jewish art collector Federico Gentili di Giuseppe sued the Louvre Museum seeking the restitution of five paintings. These paintings, which were part of Federico Gentili di Giuseppe's collection, were bought at auction by Herman Göring in 1941 and transferred to the Musée du Louvre at the end of the WWII. During litigation, the primary issue was whether the 1941 sale was valid and, consequently, whether the Museum was the legitimate owner of the five paintings. Although the Court of First Instance dismissed all the plaintiffs' claims, the Court of Appeal of Paris reversed, ruled in favor of the heirs and annulled the 1941 sale, the whole allowing for their restitution. This judgment had great importance for the Gentili di Giuseppe heirs' quest for restitution, since they subsequently used it as a basis for their negotiations with other museums that also held art objects of the Gentili di Giuseppe collection sold during the 1941 auction.<sup>140</sup>

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<sup>136</sup> This Section contains multiple excerpts from RENOLD Marc-André and CHECHI Alessandro, "Just and Fair Solutions: An Analysis of International Practice and Trends", in CAMPFENS E. (ed.), supra note 75, 187-200, and CHECHI Alessandro, *The Settlement of International Cultural Heritage Disputes*, Oxford, Oxford University Press, 2014.

<sup>137</sup> Principle 8 of the Washington Principles states: "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".

<sup>138</sup> For another example decided by American courts, see Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Two Dürer Paintings – Kunstsammlungen zu Weimar v. Elicofon", Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

<sup>139</sup> Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Five Italian Paintings – Gentili di Giuseppe Heirs v. Musée du Louvre and France", Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

<sup>140</sup> See Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Adoration of the Magi – Gentili di Giuseppe Heirs and Museum of Fine Arts Boston," Platform ArThemis (<http://unige.ch/art->

However, litigation usually remains a matter of last resort in the cultural heritage field; for instance, it has been reported that only ten Holocaust-related suits were filed in US courts in the period 1945-1995.<sup>141</sup> Individuals, institutions and/or States generally go before courts when extra-judicial methods have failed or are not available, since litigation presents certain flaws that can dissuade from bringing an action.

Access to the court system is the first problem. Although several constitutions guarantee the right to bring a claim for the protection of individual rights and legitimate interests, legal action is not always available. The legal hurdles discussed in Section 2, such as limitation periods or the lack of evidence to prove ownership reduce the likelihood of restitution.<sup>142</sup> One might also add to this the principle of non-retroactivity of international conventions.

The uncertainty of the outcome, the frequent necessity to have the judgment recognized and enforced in a foreign jurisdiction before it can be executed and the possible embarrassment an adverse ruling might represent considerations that can deter potential claimants from starting a lawsuit before a court.

In addition, resorting to litigation entails considerable economic and human expenses. Litigants may not only suffer the loss of time (in some jurisdictions, it may take years before a final judgment is rendered), but also the burden of paying the counsel fees and legal costs of lengthy proceedings as a consequence of the intricate issues of fact and law involved in transnational cases.

Finally, litigation may cause antagonism between the parties and victims. Indeed, courts of law are not equipped to achieve win-win solutions and resorting to litigation implies that the parties will have to live with a “black or white” decision based on the applicable legal principles: either the Court will recognize the initial owner’s title or it will give effect to the actual possessor’s claim. Unfortunately, rigid adherence to legalistic one-sided stances often hardens into inflexible positions, thus worsening relations. In contrast and as will be explained in more detail below, ADR allows the tailoring of an original solution founded on the parties’ reciprocal interests, thus increasing their chances of maintaining a good relationship.

## 4.2. Resolution through Alternative Means

The above shortcomings strengthen the appeal of ADR methods such as negotiation, mediation, conciliation and – to a certain extent – arbitration. In effect, a majority of the disputes concerning looted art objects which have arisen in the past four decades have been settled out of court.<sup>143</sup>

**Negotiation** is a voluntary, non-binding mechanism that allows the parties to retain control over the process without the intermediation of any neutral third party. As such, it allows like-minded disputants to create win-win solutions, where creative and mutually

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adr), Art-Law Centre, University of Geneva; and Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, “Case Bust of a Youth – Gentili di Giuseppe Heirs and Art Institute Chicago,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

<sup>141</sup> See BAZYLER Michael, “Nuremberg in America: Litigating the Holocaust in United States Courts”, University of Richmond Law Review, 2000, 1-283, 165.

<sup>142</sup> For several examples illustrating these issues, see RENOLD Marc-André and CHECHI Alessandro, *supra* note 135, 188-189.

<sup>143</sup> See BAZYLER, *supra* note 141, 165. See also BORODKIN J Lisa, “The Economics of Antiquities Looting and a Proposed Legal Alternative”, Columbia Law Review, 1995, 377-417, 403; and COGGINS C Clemency, “A Licit International Traffic in Ancient Art: Let There Be Light!”, International Journal of Cultural Property, 1995, 61-80, 75.

satisfactory outcomes are envisaged and existing legal obstacles are set aside. It is extensively used to settle looted art disputes.<sup>144</sup> It is also very common that during a lawsuit, parties would reach an agreement and eventually settle the dispute out of court.<sup>145</sup>

When the antagonism between the parties impedes direct negotiations, parties may need the intervention of a neutral third party, such as a **mediator**. The mediator has the limited purpose of assisting the litigants to reach a mutually satisfactory agreement, in a flexible, expeditious, confidential, and less costly manner. To this end, ICOM and WIPO have established in 2011 a special mediation process for art and cultural heritage disputes, the Art and Cultural Heritage Mediation Program.<sup>146</sup> There are not many publicized mediations due, *inter alia*, to the confidentiality that mediation guarantees to the parties; however, we can still find some examples where mediation has been used in looted art contexts.<sup>147</sup> In one case in particular, the Art Loss Register claims to have played the role of mediator in the settlement of a dispute between the current possessor of a Picasso painting and the heirs of its pre-WWII owner.<sup>148</sup>

A number of states established non-judicial bodies<sup>149</sup> to handle Nazi-looted art cases. The procedures put in place by these institutions resemble **conciliation**. Conciliation involves an independent commission or an individual acting as a third party. The task of the conciliator is to investigate the dispute and propose a non-binding solution to the parties. Hence, conciliation combines the basic features of mediation and inquiry, therefore requiring a more in-depth study of the dispute as compared to mediation.

The **Beneventan Missal dispute** between the Metropolitan Chapter of the Cathedral City of Benevento (Italy) and the British Library<sup>150</sup> illustrates the importance of such non-judicial bodies in helping resolve looted or “disappeared” art claims. The Missal disappeared in 1943 when the city of Benevento was occupied by the Allied forces during WWII, and was eventually acquired by the British Library in 1973. In 2002, following the refusal of the British Library to return the Missal, the Metropolitan Chapter brought the case before the

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<sup>144</sup> See for instance Raphael Contel, Anne Laure Bandle, Marc-André Renold, “Affaire Fresques de Casenoves – Musée d’Art et d’Histoire de la Ville de Genève et la France”, Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva. In this case the *Musée d’art et d’histoire* of Geneva returned the Casenoves murals to France in 1997, after more than 40 years of unsuccessful litigation to that effect.

<sup>145</sup> See for instance Raphael Contel, Giulia Soldan, Alessandro Chechi, “Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

<sup>146</sup> ICOM-WIPO Mediation Rules, see at <http://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/>.

<sup>147</sup> See for instance Anne Laure Bandle, Raphael Contel, Marc-André Renold, “Case Ancient Manuscripts and Globe – Saint-Gall and Zurich,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva. In this case the Swiss Confederation acted as a mediator to settle a case between two cantons involving objects that were looted during the religious wars of the 18th century. More recently, a Los Angeles court ordered that the Armenian Apostolic Church and J. Paul Getty Museum spend four months in mediation to resolve the dispute over a medieval manuscript which was in possession of the museum. The parties reached an agreement in 2014, see at: <http://www.latimes.com/entertainment/arts/culture/la-et-cm-armenian-church-settles-with-getty-museum-20150918-story.html>.

<sup>148</sup> Laetitia Nicolazzi, Alessandro Chechi, Marc-André Renold, « Affaire Nature morte au tableau de Picasso – Héritiers Schlesinger et Phillips », Plateforme ArThemis (<http://unige.ch/art-adr>), Centre du droit de l’art, Université de Genève.

<sup>149</sup> These are the Spoliation Advisory Panel (UK), Kommission für Provenienzforschung (Austria), Commission pour l’indemnisation des victimes de spoliations (France), De Restitutiecommissie (the Netherlands), Beratende Kommission (Germany). For an overview of such national bodies see MARCK Annemarie and MULLER Eelke, “National Panels Advising on Nazi-looted Art in Austria, France, the United Kingdom, the Netherlands and Germany”, in CAMPFENS E. (ed.), *supra* note 75, 41-89.

<sup>150</sup> Laetitia Nicolazzi, Alessandro Chechi, Marc-André Renold, “Case Beneventan Missal – Metropolitan Chapter of the Cathedral City of Benevento and British Library,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

UK Spoliation Advisory Panel. Since restitution was prohibited by the laws in force at the time, the Panel recommended the UK Secretary of State to amend the existing legislation in order to allow objects looted during the Nazi period and now housed in British collections to be returned to claimants. Thus, in 2006 the UK conducted a *Consultation on Restitution of Objects Spoliated in the Nazi-Era* and, in 2009, the *Holocaust (Return of Cultural Objects) Act*<sup>151</sup> was adopted by the Parliament of the UK.<sup>152</sup> The Metropolitan Chapter then renewed its claim to the Spoliation Advisory Panel for the return of the Missal. This time, the Panel was able to recommend the return of the Missal to the Metropolitan Chapter, and this recommendation was endorsed by the UK Government and accepted by the British Library. It should be noted that because of the applicable statute of limitation, the claimants in this case probably could not have won a judicial case. However, the Spoliation Advisory Panel, being an extra-judicial forum, was able to recommend the return of the Missal by recognizing the moral side of the claim and making it prevailing over the legal side.

All the alternative methods cited so far have a non-binding character. On this point, **arbitration** is different: once parties voluntarily refer a dispute to arbitration, they are bound by the final award. Arbitration is one of the principal non-forensic methods of settling international disputes very often used, as is well known, in the fields of international trade and investments. The primary benefit of arbitration resides in the parties' power to shape the process to fit their needs. Disputants can agree, *inter alia*, on the selection of one or more arbitrators, the applicable law and the rules of evidence to be applied. Litigants can also include clauses which allow arbitrators to decide according to "equity", "good conscience" as well as principles others than those embodied in the rules of the selected system of law.

Arbitration is however not yet commonly used to resolve looted art claims.<sup>153</sup> To our knowledge, only one Nazi-looted art case has been settled through arbitration, the well-known **Altmann case**, which involved several paintings by Gustav Klimt, which were confiscated by the Nazis in 1938 from Ferdinand Bloch-Bauer, the Jewish uncle of the claimant, Maria Altmann. Although Maria Altmann initially filed a judicial claim in the U.S. against the Republic of Austria and the Austrian National Gallery, the parties eventually reached an agreement to end the litigation and submit the dispute to arbitration in Austria. The arbitration panel ruled that Austria's National Gallery should return the five Klimt paintings which were confiscated by the Nazis from Ferdinand Bloch-Bauer, to his niece Maria Altmann as his sole descendant.<sup>154</sup>

In light of the foregoing analysis, there are grounds to affirm that ADR methods provide the necessary flexibility for handling Nazi-era art claims and facilitating consensual, mutually satisfactory settlements. This is so also because these techniques are available at any time, either together with, or as a part of, other processes. For instance, negotiations often run parallel to lawsuits. ADR methods also allow the parties to take into account ethical and moral principles in addition to – or in replacement of – purely legal principles (which, as previously explained, are generally unfavorable to claimants). In addition, and as will be

<sup>151</sup> Holocaust (Return of Cultural Objects) Act 2009 (2009 c. 16).

<sup>152</sup> This Act allows 17 cultural institutions, including the British Library Board, to transfer an item of their collections if this action was recommended by the Panel and approved by the Secretary of State.

<sup>153</sup> For an example of arbitration relating to the destruction of cultural heritage (the Stela of Matara in Eritrea), see DALY W. Brooks, "Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration", in HOFFMAN T. Barbara (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge, Cambridge University Press, 2009, 465-468.

<sup>154</sup> Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 6 Klimt Paintings – Maria Altmann and Austria," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

explained in more detail under section 4.3., ADR methods allow parties to find original, “fair and just” solutions which are not limited to restitution or rejection of the demand.<sup>155</sup>

Nevertheless, ADR methods are characterized by some important shortcomings. The first is the voluntary essence of ADR mechanisms. Indeed, outside the realm of contractual disputes, litigants may be reluctant to resort to negotiation, mediation or arbitration in the absence of significant incentives. For instance, it can often be the case that a party has no interest in going into arbitration as long as they cannot be brought in via litigation. They would rather ignore the claim or rely on their rights under the general law of possession and ownership. This problem is illustrated by the *Altmann* case, where the Republic of Austria rejected the initial proposal of Maria Altmann to submit the dispute to arbitration. The same holds true as regards negotiation and mediation, as shown in the **case of the painting *Dedham from Landham*** by John Constable. In this case, the Musée des Beaux-Arts of the city La Chaux-de-Fonds in Switzerland received the painting through a donation in 1986. In 2006, city authorities were contacted by the representative of the heirs of John and Anna Jaffé, who claimed the restitution of the painting on the grounds that it had been the object of a forced sale by the Nazis in Nice in 1942. After a careful examination of the case on the basis of the information provided by the claimants, the city authorities refused restitution. Although they recognized that the painting had been unlawfully taken by the Nazis and acknowledged the importance of the ideals underlying the 1998 Washington Principles, they decided that the restitution claim was to be rejected on legal grounds. The city maintained that the success of a claim for restitution by the applicants relied primarily on evidence of bad faith. Yet, in the absence of such a demonstration, the city held that it had become the owner of the painting at the latest in 1991, i.e. five years after the 1986 donation, pursuant to Article 728(1) of the Swiss Civil Code on acquisitive prescription (*usucapio*).

Another shortcoming is that negotiation and mediation do not guarantee that a final accord is achieved and subsequently enforced given the lack of a mechanism by which parties can be compelled to honour the settlement.

Finally, it should be noted that ADR methods are not always less costly and less time-consuming than litigation. However, this benefit is not always attainable by resorting to arbitration. For example the entire arbitration process, including the recognition and enforcement of the award, is not always expeditious and may end up being more expensive than judicial litigation when taking into account the arbitrators' remuneration. In part, this explains the marked contrast between the rarity of arbitrated settlements and the abundance of negotiated agreements.

### 4.3. Fair and Just Solutions to Looted Art Disputes

As mentioned, ADR methods allow parties to find “fair and just solutions” which do not necessarily imply outright restitution or rejection of the claim.

The first solution to be considered is that of compensation. Indeed, in many Nazi-looted art cases the heirs of victims preferred to be compensated rather than obtaining the restitution of the disputed object. The dispute over **Egon Schiele's *Portrait of Wally*** is one of them.<sup>156</sup> This painting was loaned in 1997 by the Leopold Museum of Vienna to the Museum of Modern Art (MOMA) of New York. The descendants of Lea Bondi Jaray, from which

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<sup>155</sup> CORNU Marie and RENOLD Marc-André, “New Developments in the Restitution of Cultural Property: Alternative means of Dispute Resolution”, *International Journal of Cultural Property*, 2010, 1-31.

<sup>156</sup> Raphael Contel, Giulia Soldan, Alessandro Chechi, “Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

Portrait of Wally was illegally taken in 1939, demanded restitution. The MOMA refused, citing its contractual obligation with the Leopold Foundation, and a decade of litigation ensued. The case was eventually settled through negotiations in July 2010, the salient terms of the agreement being: (i) the Leopold Museum pays the Estate US\$19 million; (ii) the Estate releases its claim to the painting; (iii) the U.S. government dismisses the civil forfeiture action; and (iv) the Leopold Museum permanently displays signage next to the painting that sets forth its true provenance.

It is also interesting to note that the UK Spoliation Advisory Panel is empowered to recommend an “ex gratia payment” as a redress when the claimant does not have an enduring legal right to the object.<sup>157</sup> It notably did so in 2001, in a case concerning the painting *View of Hampton Court Palace* by Jan Griffier the Elder held by the Tate Gallery.<sup>158</sup>

Sale to a third party is another option. This solution entails that the parties agree to sell on the market the actual claimed work of art in order to divide the proceeds of the sale. This case can be illustrated by referring to a decision of another national body, the Dutch Restitution Commission. In 1935, Nazi authorities took the **painting Road to Calvary** by Brunswijker Monogrammist from Jakob and Rosa Oppenheimer. The painting resurfaced in 2006 when a Dutch citizen brought it to be auctioned at Sotheby's. Having finally discovered the location of the painting thanks to Sotheby's tipoff,<sup>159</sup> the Oppenheimers did not ask for the painting's restitution. Instead, they demanded a proportion of the prospected sale proceeds, the amount of which was, however, disputed. Therefore, the parties submitted a joint request to the Dutch Minister for Education, Culture and Science to have the dispute settled by the Restitutions Committee. In May 2010, the Committee issued its binding advice according to which the heirs would be entitled to 40% of the sale proceeds.<sup>160</sup>

In cases where the claimant wants its ownership title recognized without necessarily having possession of the artworks,<sup>161</sup> museums can consider repurchasing them or obtaining a long-term or temporary loan. The latter is a common solution achieved through ADR mechanisms in looted art disputes. It was notably adopted in the **Nok and Sokoto Sculptures case** between Nigeria and France.<sup>162</sup> In 1998, the French government bought three Nok and Sokoto sculptures from a private dealer in 1998. Soon after it obtained the consent of Nigeria on the acquisition, two of these sculptures were exhibited in the newly opened Pavillon des Sessions of the Louvre Museum. This agreement gave rise to strong criticism since the sculptures had most likely been illegally excavated and exported from Nigeria, and they were figuring on ICOM's Red List of African Archaeological Cultural Objects at Risk. Following the renegotiation between Nigeria and France, Nigeria's ownership was recognized and in return, the sculptures remained in France on a long-term loan.

In disputes where parties cannot agree on sole ownership of an artwork, notably where there have been several possessors for long periods of time, parties could also consider

<sup>157</sup> PALMER Norman, “The Spoliation Advisory Panel and Holocaust-Related Cultural Objects”, in WELLER Matthias et al. (eds.), *Raub – Beute – Diebstahl*, Baden-Baden, Nomos, 2013, 119-140, 119.

<sup>158</sup> PALMER, *ibid.*, 130.

<sup>159</sup> The Oppenheimer heirs had previously inscribed the painting in two public registers of looted art: the Art Loss Register and the Lost Art Register.

<sup>160</sup> Dutch Restitution Committee, Binding Advice Concerning the Dispute over the Painting Road to Calvary 3 May 2010, Case number: RC 3.95, available at:

[http://www.restitutiecommissie.nl/en/recommendations/recommendation\\_395.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_395.html).

<sup>161</sup> In many cases, the claimants are not opposed to leaving the artwork in a museum or another cultural institution to preserve public access.

<sup>162</sup> Ece Velioglu, Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, “Case Three Nok and Sokoto Sculptures – Nigeria and France,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

sharing its ownership (co-ownership).<sup>163</sup> One example is the **Searle/Gutmann litigation** relating to the Degas painting *Landscape with Smokestacks*. The painting originally belonged to Jewish art collector Friedrich Gutmann, but its trace was lost after Gutmann sent it in 1939 to a Parisian dealer for safekeeping. In 1995, the painting was displayed at the Art Institute of Chicago and two of Gutmann's heirs traced it to the collection of Daniel Searle, a Chicago collector. The Gutmann heirs instituted legal proceedings against Searle for the restitution of the painting. The case raised great public attention and was settled out of court on the eve of trial through a form of co-ownership agreement, where the Gutmann heirs and Searle agreed to equally divide the ownership of the painting, each having freedom to do what he wanted with his share. Searle then transferred his share to the Art Institute of Chicago, where he was a trustee. In turn, the Art Institute bought the heirs' interest at fair market value, as assessed by an independent expert. The Art Institute therefore ended up as the sole owner of the painting, but agreed to credit both families by placing a label commemorating the misappropriation next to the displayed painting.

Finally, one important solution which is often overlooked is the simple recognition of a dispossessed owner's original ownership title and the misappropriation suffered during the war. For obvious reasons, looted art cases are highly emotional for claimants and cases like the Searle/Gutmann litigation discussed above show that dispossessed owners' heirs are sometimes not so interested in keeping ownership of the artwork today, but rather look for some form of recognition for the blatant injustices their parents were subjected to.

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<sup>163</sup> On this innovative solution, see RENOLD Marc-André, "Cultural Co-Ownership: Preventing and Solving Cultural Property Claims", *International Journal of Cultural Property*, 2015, 163-176, 167.

## 5. POLICY RECOMMENDATIONS

### 5.1. General Considerations

This report shows that, if war and plunder are unfortunately closely interconnected, the reaction of States is very diverse in light of how the different interests are taken into consideration. A need for **uniformity** seems to be the most urgent matter and this uniformity can be reached either at the level of the determination of the applicable law (conflict of laws, section 5.2.) or at the level of the national standards and legislations (mainly through the implementation of the international conventions and their protocols, section 5.3.). In any event, it would be advisable to set up some form of body at the EU level in charge with proposing long term solutions and/or giving its advice in specific cases (section 5.4.).

### 5.2. Uniformity of Solutions with a Common New Conflict of Laws Rule, Valid both for Private and Public Law Claims

In **private law**, i.e. in what regards the acquisition of ownership of a cultural object, the long standing principle is that of the application of the *lex rei sitae*, i.e. the law of the place where the object is situated at the time of its acquisition (see section 2.3.). Regarding looted cultural objects this can lead to the loss of ownership of the person or the State whom it is was illegally taken from. It is submitted that such a principle should be revised in order to take into consideration the law of the place of origin, the *lex originis*. Admittedly it will not always be easy to determine the origin of the cultural object, especially if several States have some historical or cultural connection to it, but at least when the origin is clear, it will make the acquisition contrary to the law where the object comes from simply impossible.

In **public law**, it appears, at least in some of the recent bilateral Conventions on illicit traffic, that more importance is nowadays given to the law of the state of origin. A good example of agreements where this principle is given an effect are some of the bilateral agreements recently signed between Switzerland and art-exporting States such as Greece, Italy, Egypt and a few others.<sup>164</sup> According to these agreements the import in Switzerland is illegal if it does not respect the rules of the State of export. This is clearly giving effect to the *lex originis*.

One could also imagine that States accept that in emergency situations, such as what is happening today with art looted in Iraq or Syria, the principle be the application of the *lex originis*, even if their general conflict of law rule is the *lex rei sitae*. And the UN Security Council, when it requests in its resolutions that States prevent the trade in looted art, could at the same time ask require that they take the laws of the States of origin into consideration.

There have been a few steps taken in the direction of applying the *lex originis*,<sup>165</sup> but these have very much remained academic until now. It is the opinion of the author of this report

<sup>164</sup> The bilateral agreements with Italy, Greece, Egypt, Peru, Colombia, Cyprus, and China are available at: <http://www.bak.admin.ch/kulturerbe/04371/04377/index.html?lang=fr>.

<sup>165</sup> See for example Institute of International Law, Basel Resolution of 1991 (International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage) and Wiesbaden Resolution of 1975 (The Application of Foreign Public Law).

that time has come to push ahead this solution in practice, both in private and in public law.<sup>166</sup>

### 5.3. Uniformity of Standards and Legislations

Another way to reach uniformity of decisions according to similar standards is for States to adopt uniform standards and rules. In this respect the author of the present report sees three avenues of reflection:

1. Seeing that many States have ratified the Hague Convention and its Protocols, there is no need to propose the adoption of a new international convention. Efforts on the international scene should be made
  - a. To encourage those states who have not yet ratified these Conventions to do so ;
  - b. To adopt preventive measures, such as the possibility to create safe havens proposed by Switzerland in its 2014 law (section 1.4.1.) ;
  - c. To make sure the rules of the First Protocol can be applied directly by Courts, eg by adopting rules similar to the Netherland's 2007 Act (section 1.4.2.).
2. The status of undiscovered cultural property (i.e. underground or underwater) should be made clear, i.e. States' laws should be made to reflect clearly what the UNESCO- UNIDROIT model rules provide, i.e. undisputable state ownership (section 2.4.1.).
3. As for claims, the legal context in which they ought to be made must be clearer from a legal perspective. I see two possible ways to improve matters:
  - a. Generalize the uniform due diligence standards adopted in the EU Directive of 2014 (Article 10.2) and the UNIDROIT Convention (Article 4.4) ;
  - b. Adopt specific statute of limitations such as the proposed recent U.S. federal law (see section 1.5.2.1.).

### 5.4. The Setting Up of an International Platform/Advisory Body

This report has shown, we believe, that the issues relating to claims for the restitution of looted art are complex and that it might not be the best solution to have them solved by national courts. We believe that they would be far better understood and adjudicated if they could be decided by, or with the help of, some form of platform/advisory body.

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<sup>166</sup> To our knowledge the only European States to have initiated a reflection on this issue are Belgium and Portugal. The Belgian Code of Private International Law of 2004 (English translation in Yearbook of Private International Law, 2004, 319), endorses the application of the *lex originis* for the resolution of transnational restitution claims. Article 90(1) reads: "If an item, which a State considers as being included in its cultural heritage, has left the territory of that State in a way, which is considered to be illegitimate at the time of the exportation by the law of that State, the revindication by the State is governed by the law of that State, as it is applicable at that time, or at the choice of the latter, by the law of the State on the territory of which the item is located at the time of revindication". Article 31 of the Portuguese Law No. 13 of 6 July 1985 declares void and deprived of legal effect any transaction occurring in Portugal and concerning cultural property imported in violation of a foreign country's legislation on export or transfer of ownership. This provision is limited in that it operates only under the condition of reciprocity. Outside Europe, one can cite the example of Canada: according to art. 37(2) of the *Cultural Property Export and Import Act*: "From and after the coming into force of a cultural property agreement [including the 1970 UNESCO Convention] in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State."

The tasks of this platform/body could be:

1. Advising States on their implementation of the international conventions and protocols and the setting up of the above-mentioned uniform standards (section 5.3);
2. Advising existing agencies or courts in the resolution of disputes relating to looted cultural property ;
3. Helping to solve conflicts by acting as a mediator or conciliator specialized in claims relating to looted cultural property.

Such a body should be as flexible and non-bureaucratic as possible, and should not take the form of an arbitral institution or an international court, but rather be a forum where States and individual victims could communicate, exchange and receive advice in light of the experience of others<sup>167</sup>.

It seems premature at this stage to propose detailed rules relating to the composition of this body or to its procedural functioning, but the undersigned would gladly take up this matter in a future additional report if so required.

Geneva, April 29, 2016

Prof. Marc-André RENOLD

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<sup>167</sup> RENOLD Marc-André and CHECHI Alessandro, "Just and Fair Solutions: An Analysis of International Practice and Trends" in: E. CAMPFENS (ed.), *Fair and Just Solutions?*

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## **ANNEXES**

1. Overview of the national implementation of the Hague Convention and the protocols
2. Guidelines for the Establishment and Conduct of Safe Havens for Cultural Materials (2008)
3. UNESCO-UNIDROIT Model Provisions on State's Ownership of Undiscovered Cultural Objects (2011)
4. U.S. DRAFT Holocaust Expropriated Art Recovery Act (2016)

**ANNEX 1"Overview of the national implementation of the Hague Convention and the protocols\***

	<b>Belgium</b>	<b>Cyprus</b>	<b>Czech Republic</b>	<b>Estonia</b>	<b>Finland</b>	<b>Georgia</b>	<b>Germany</b>	<b>Greece</b>	<b>Hungary</b>
<b>General implementing legislation</b>		-	-	-	Act on the implementation of certain provisions of the First Protocol (no. 1135/1994)	-	Act of 11 April 1967 on the Hague Convention (incorporating the Hague Convention and the First Protocol)	-	-
<b>First Protocol</b> (exportation from occupied territory and return)	No particular measures	Yes (no explanation provided)	Yes (peace time rules on export applicable)	No (no likelihood of participating in military occupation)	Yes	No	Yes (no explanation provided)	No	No
<b>Second Protocol Art. 9</b> (Protection in occupied territory)	No answer	Reported looting in the territory occupied by Turkey	No answer	N/A	No answer	Invoked the responsibility of Russia in the territory occupied by it	N/A	No answer	N/A
<b>Second Protocol Art. 15</b> (Serious violations)	Yes (specific reference to art. 15 of the Second Protocol)	Yes	Yes (specific provision on pillage in the area of military occupations)	Yes	Yes	Yes	Yes (Code of Crimes against International Law)	No (but under evaluation)	Yes (specific provisions on theft and pillage of cultural property in wartime)
<b>Second Protocol Art. 16</b> (Jurisdiction)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes

	Latvia	Lithuania	Netherlands	Norway	Poland	Romania	Slovakia	Slovenia	Switzerland
<b>General implementing legislation</b>	-		- Cultural Property Originating from Occupied Territory (Return) Act (2007) - International Crimes Act	-	-	-	-	-	Loi fédérale sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation de la guerre (2014)
<b>First Protocol</b> (exportation from occupied territory and return)	No	Yes (no explanation provided)	Yes (2007 Act)	Yes (no explanation provided)	Yes (no explanation provided)	Not engaged in any occupation of territory	No clear answer	Yes (peacetime rules applicable: Return of Unlawfully Removed Cultural-Heritage Objects Act)	Yes (safe havens for cultural objects)
<b>Second Protocol Art. 9</b> (Protection in occupied territory)	No answer	N/A (no likelihood of occupying any country)	N/A	No answer	No answer	No answer	No answer	No answer	No answer
<b>Second Protocol Art. 15</b> (Serious violations)	No answer	Yes (specific provisions for plunder and appropriation of cultural property in an occupied territory)	Yes (International Crimes Act, also implementing the Rome Statute of ICC)	Yes (criminal code under revision)	Yes (specific provision on appropriation of cultural property in wartime)	Yes (criminal code under revision)	Yes (reference to general criminal provisions)	Yes (general provisions on pillage and appropriation of property in wartime)	Yes (general criminal law provisions)
<b>Second Protocol Art. 16</b> (Jurisdiction)	No answer	Yes	Yes	Yes	No answer	Yes	Yes	No answer	No provisions (aside from those under the military penal code)

\* This table has been prepared on the basis of the information provided by states in their periodic reports (2011-2012) available at <http://www.unesco.org>.

## ANNEX 2

### **GUIDELINES FOR THE ESTABLISHMENT AND CONDUCT OF SAFE HAVENS AS ADOPTED BY THE INTERNATIONAL LAW ASSOCIATION AT ITS 73<sup>RD</sup> CONFERENCE HELD IN RIO DE JANEIRO, BRAZIL, 17-21 AUGUST 2008.**

#### Preamble

*Recognizing* the crucial need to rescue cultural material threatened by armed conflict, natural disaster, illegal excavation, or other insecurity;

*Noting* the uncertainty of standards and procedures for safekeeping and preserving cultural material that has been rescued by removal from the territory of one state to the territory of another state;

*Noting also* the uncertainty about requirements for returning cultural material after a threat necessitating its removal to the territory of another state has ended;

*Observing* the importance of engaging both governmental and nongovernmental bodies in safekeeping and preserving cultural material;

*Convinced* therefore of the need for and efficacy of international guidelines, engaging state authorities, for safekeeping, preserving, and returning cultural material within the source state and after it has been removed from the territory of one state to that of another state;

*Confirming therefore* the following Guidelines for the establishment and conduct of safe havens for cultural material; and

*Perceiving* the efficacy of a model contract to formalize essential terms of the relationship between a source state or entity and a safe haven;

Hereby states the following Guidelines:

#### **1. Definitions**

- a) “Cultural material” includes all objects defined as cultural property in Article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

##### *COMMENTS:*

*Instead of creating a new definition, the Guidelines adopt the most widely-accepted definition of “cultural property” in Article 1 of the 1970 UNESCO Convention. This definition has been only slightly modified in other instruments such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.*

- b) “Source state” is the state in which cultural material is in need of a safe haven, either in the state itself or in the territory of another state.

##### *COMMENTS:*

*For the purpose of these Guidelines, the source state is the state in which cultural material is in need of a safe haven, whether that is the state of origin of the material—*

*that is, where it was created—or a state to which the material has been later removed from the state of origin.*

## **2. Safe Havens for Cultural Material**

Safe havens are facilities created in order to care for cultural material that has been endangered by armed conflict, natural disasters, illegal excavation, or other insecurity and has therefore been removed for safekeeping and preservation from the territory of the source state to the territory of another state or to a place of safety in the source state.

### **COMMENTS:**

*There is often a critical need for safe havens when endangered cultural material is removed for safekeeping and protection from one state to another. There is also a need for safe havens to protect material within a source state—for example, material that is imperiled by calamities, has been seized as contraband, or is of unknown origin or suspect provenance. An example of international cooperation in establishing a safe haven involved the removal and temporary storage of Afghan cultural material at the privately owned Afghanistan Museum and Library in Bubendorf, Switzerland (1999-2007).*

## **3. Governmental Establishment and Supervision of Safe Havens**

State authorities shall establish safe havens or supervise such havens within their territories as governmental or nongovernmental institutions may otherwise create.

### **COMMENTS:**

*3.1. Under these Guidelines, safe havens are national and not international facilities that are established and managed under national law. The Guidelines provide for and help harmonize the obligations of these facilities (see Guideline 4).*

*3.2. Safe havens may be established as either nongovernmental or governmental facilities under national law.*

*3.3. Safe havens need not be specific organizations or institutions. They may be simply facilities within national museums or other institutions that receive cultural material for safekeeping, restoration, and preservation. One example involves the designation of facilities in national museums as trustees of material whose ownership is either unknown or disputed.*

## **4. Obligations of Safe Havens**

- a) A safe haven shall be responsible for safekeeping and preserving cultural material that has been entrusted to its care. This general responsibility shall extend to the exceptional case of an unknown source state. A safe haven shall take all reasonable measures to avoid deterioration or endangerment of cultural material by applying the highest standards of care.
- b) A safe haven is governed by the law of the state in which it is located, but shall accord due respect to the laws and traditions of the source state of cultural material.
- c) A safe haven shall accept no cultural material received from another state in violation of its export provisions, unless it is satisfied that the material has left that country under circumstances precluding the issuance of an export certificate.

- d) A safe haven shall take all possible measures to make an inventory of all cultural material entrusted to its care and guarantee public access to the information in the inventory.
- e) A safe haven may exhibit cultural material in its care unless to do so would be inappropriate under the laws and traditions of the source state. All such material on exhibit shall be identified as safe haven material.
- f) A safe haven may not lend safe haven material without the consent of the source state or entity.
- g) Any proceeds from exhibition or loans may be used only for safekeeping and preserving safe haven material.
- h) A safe haven shall not engage in any activity the result of which would be to stimulate illegal trafficking in cultural material or other threats to it.
- i) A safe haven must return cultural material items as soon as the established owner or other established source of the material so requests, provided that the safe haven is satisfied with the conditions for safekeeping and preserving the material by the requesting state or entity.
- j) Nothing in these Guidelines shall require the safe haven to do or refrain from doing anything inconsistent with an order of a court of competent jurisdiction.

*COMMENTS:*

*4.1. Under 4 a), safe havens are responsible for safekeeping and preserving cultural material even if the material is owned by a foreign state or citizen or there are no prospects for compensation of attendant expenses by the owner. In keeping with the highest standards of care, any necessary restorative work should be planned and its cost discussed with the source state or entity before the work is done.*

*4.2. Under 4 b), safe haven authorities, in fulfilling their responsibilities for safekeeping and preserving cultural material of foreign origin, must respect the laws and customs of the source state and of customary international law. This means, for example, that safe havens ordinarily must store human remains with dignity and, whenever possible, preserve and restore religious objects according to the religious and cultural traditions and practices in the source state. Otherwise, local or national law applicable in safe havens governs the standard of care for the pertinent cultural material.*

*4.3. Under 4 c), states to which material is to be removed for safekeeping must respect the export laws of source states unless, under the often difficult circumstances that give rise to the need for removal, the issuance of an export certificate is impossible.*

*4.4. Guideline 4 d) requires safe havens to apply the general principle of transparency. Safe havens must inventory cultural material and guarantee public access to it. Because safe havens are trustees or custodians of material for the benefit of legitimate owners, they must ensure the rights of those owners. It is also imperative that safe havens ensure public access to all records and inventories of cultural material and, in response to return claims, to the cultural material itself.*

*4.5. Under 4 e), safe havens may exhibit entrusted material, but they must ensure that the material is clearly described and identified as "cultural material entrusted to the exhibiting institution as safe haven," or other words to that effect. Such an exhibition has the added benefit of drawing public attention to the good offices of safe havens and the threats to cultural material in foreign countries. Cultural material should not be exhibited, however, when it would be inappropriate to do so under the legal rules or customs of the state or culture of origin.*

4.6. According to 4 f), loans of entrusted cultural material should be strictly limited to instances where source states, private owners, museums, or other institutions, as appropriate, give their consent in writing or when the purpose of the loan is to unite dismembered cultural material or to have it conserved in third countries for exhibition to the public. Such “functional” loans are compatible with the obligations and duties of conscientious trustees.

4.7. Guideline 4 g) makes clear that entrusted cultural material should not be used by safe havens to generate income. All proceeds from exhibitions, loans, and photographs must be used for safekeeping and preservation of the material.

4.8. Under 4 h), it is incompatible with the fiduciary duties of safe havens to engage in illicit trade in the cultural material for which they have assumed responsibility or to engage in any activity that might stimulate illegal trafficking, such as cooperating with thieves and smugglers in defiance of the very purposes and obligations of safe havens.

4.9. Guideline 4 i) makes clear that safe havens are only temporary homes for endangered cultural material. Therefore, they must return protected cultural material after the threat prompting its removal has come to an end and material can again be protected in the source state. It is expected that safe havens normally will agree to requests for the return of entrusted cultural material under applicable national law. Safe havens can also initiate an appropriate return in order, for example, to minimize the expenses of safekeeping and preservation.

4.10. Under 4 j), safe havens are generally bound by court decisions governing entrusted cultural material. Among courts with concurrent jurisdiction, courts in the territory of safe havens have the final word on what should be done or not done regarding safeguarded material.

## 5. Obligations of Source States or Entities

- a) A source state or entity of safe haven material shall give all information to the safe haven which is necessary to fulfill the safe haven’s obligations.
- b) A source state or entity shall be expected to compensate the safe haven for reasonable costs of safekeeping, preserving, and returning cultural material.
- c) A source state or entity shall ensure that requested cultural material whose return it has requested will be secured and preserved after its return to that state or entity.

### COMMENTS:

5.1. The obligation to give all information necessary to ensure the effectiveness of a safe haven includes facts concerning the material removed for safekeeping as, for example, the risk of its exposure to air, water, temperature, insects and other vermin. In addition, the required information should include such legal data as the identity of the titleholder or other interested parties so as to facilitate a return, if appropriate, to the correct person or entity and any relevant information concerning legal rules or customs of the source state or culture of origin that may affect how the cultural material is to be treated in the safe haven.

5.2. In principle, a source state is expected to compensate a safe haven for its reasonable expenses of safe-keeping and preservation. This principle is grounded in both fairness to the safe haven and the importance of overcoming any reluctance, for financial reasons, on the part of a prospective safe haven to safeguard endangered material. However, the parties may stipulate conditions more favourable for the source state (see Guideline 6 and Annex). Normally compensation is due after material has been returned and the costs of safekeeping can be calculated precisely.

*5.3. Parties may stipulate their own necessary special conditions regarding the security of safeguarded material, however difficult it may be to enforce those conditions (see Annex). If a safe haven has valid reason to believe that in case of return the objects will not be protected properly, it may decline to return material until the safe haven is satisfied that the requesting source state is able to protect it. The requirement of 5 c) may further encourage source states to take measures to protect their material. Conversely, the failure of a source state to preserve its own cultural material may discourage other states from returning material.*

## **6. Party Autonomy**

A safe haven and a source state or entity may stipulate conditions of care which are different from those in these Guidelines. Whenever possible, such conditions shall be expressed in the form of a written agreement.

### *COMMENTS:*

*These Guidelines are not legally binding. Parties to a contract for the establishment of a safe haven (see Annex) may therefore stipulate other conditions for safekeeping and return of cultural material besides those contained in these Guidelines. Such stipulations should be in writing.*

## **7. International Instruments**

Nothing in these Guidelines shall be interpreted so as to affect the application of any international agreement or other instrument.

### *COMMENTS:*

*These Guidelines do not abrogate binding international agreements or other instruments otherwise applicable and are not intended to affect mandatory national laws.*

## **8. Assistance of UNESCO and Other International Bodies**

- a) A safe haven state is encouraged to request the United Nations Educational, Scientific and Cultural Organization (UNESCO) for assistance in maintaining the safe haven.
- b) States in need of assistance are encouraged to request UNESCO to help coordinate their cooperation with states that are ready to provide such assistance for safekeeping and preserving cultural material.
- c) Safe havens of cultural material and source states are also encouraged to seek the assistance of other international and regional bodies that are engaged in the protection of cultural material.

### *COMMENTS:*

*As a specialized organization with an excellent international network, UNESCO is in a good position to facilitate communication between the source state and the state on whose territory a safe haven is or will be established. The parties are urged, therefore, to contact UNESCO and other international organizations such as the International Council of Museums (ICOM) and the International Council on Monuments and Sites (ICOMOS) to ask for assistance and help.*

## 9. Implementation

- a) These Guidelines are intended to be integrated into the rules and practices of museums, archaeologists, ethnologists, other professionals including state authorities, and pertinent professional organizations.
- b) Whenever possible, responsible states and entities are encouraged to call upon the International Council of Museums (ICOM) and other organizations and institutions for technical assistance in support and implementation of these Guidelines.
- c) These Guidelines are also intended to serve as a basis for the development of rules and policies of governmental and nongovernmental bodies.
- d) If a dispute arises between the source state or entity and the safe haven concerning a request for return of cultural material, the parties shall attempt to resolve it whenever possible by good-faith negotiations and consultations before proceeding to more formal means of dispute resolution such as those provided for by UNESCO.
- e) These Guidelines encourage the source state or entity and the safe haven to formalize their relationship within the terms of the annexed Safe Haven Model Contract

### *COMMENTS:*

*9.1. Museums and other institutional users of these Guidelines should incorporate them into their rules of ethics or practice and interpret them broadly and purposefully. The Guidelines also afford institutions a model for drafting their own guidelines or rules.*

*9.2. Users of the Guidelines should review them periodically and modify them as may be appropriate.*

*9.3. Users of these Guidelines should consider adopting the Safe Haven Model Contract and, in particular, provide for a method to resolve any dispute under the contract.*

Rio de Janeiro, 21 August 2008

### Safe Haven Model Contract

The Source State or Entity \_\_\_\_\_ and the  
Safe Haven \_\_\_\_\_ agree that  
the items

- 1) \_\_\_\_\_
- 2) \_\_\_\_\_

or the Collection \_\_\_\_\_, consisting of the items in the  
inventory or catalogue, as follows: \_\_\_\_\_ shall be  
removed for safekeeping and preservation to \_\_\_\_\_.

Special conditions for safekeeping:

- 1) \_\_\_\_\_
- 2) \_\_\_\_\_

The items may be exhibited, but may not be lent without the consent of the Source State  
or Entity.

The items will be returned at the request of the Source State or Entity provided that the  
Source State or Entity reasonably can ensure that the items will be kept safely and preserved  
properly after their return.

The Source State or Entity will compensate the Safe Haven for any reasonable expenses,  
including cost of restorative work done in order to preserve the entrusted objects.

This contract is governed by the law of the state in which the Safe Haven is located. The  
parties will seek to resolve any dispute under the contract or related to it by recourse to a court in  
the territory of the Safe Haven, UNESCO dispute resolution procedures, arbitration, or other  
dispute resolution procedures as the parties may so agree.

Signed \_\_\_\_\_ Date \_\_\_\_\_ Place \_\_\_\_\_

Signed \_\_\_\_\_ Date \_\_\_\_\_ Place \_\_\_\_\_



United Nations  
Educational, Scientific and  
Cultural Organization

Organisation  
des Nations Unies  
pour l'éducation,  
la science et la culture

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de las Naciones Unidas  
para la Educación,  
la Ciencia y la Cultura

Организация  
Объединенных Наций по  
вопросам образования,  
науки и культуры

منظمة الأمم المتحدة  
للتربية والعلم والثقافة

联合国教育、  
科学及文化组织



International Institute for the Unification of Private Law  
Institut international pour l'unification du droit privé

Expert Committee  
on State Ownership of Cultural Heritage

## **Model Provisions on State Ownership of Undiscovered Cultural Objects**

**Explanatory Report  
with model provisions and explanatory guidelines**

### **INTRODUCTION**

This document contains model legislative provisions (the "Model Provisions") established by a group of experts convened by the UNESCO and UNIDROIT Secretariats which are intended to assist domestic legislative bodies in the establishment of a legislative framework for heritage protection, to adopt effective legislation for the establishment and recognition of the State's ownership of undiscovered cultural objects with a view, inter alia, to facilitating restitution in case of unlawful removal. They are followed by guidelines aimed at better understanding the provisions.

The Model Provisions cannot answer all questions raised by the legal status of undiscovered cultural objects. They are designed to be applied, adapted and supplemented where necessary by the issuance of regulations providing further details. They can either supplement or replace the relevant existing provisions to strengthen enforcement or to fill a gap.

In the context of these Model Provisions, "national law" or "domestic law" are to be understood broadly, in the sense that they also include federal, regional or international law that is applicable to the State adopting the Model Provisions (hereafter the enacting State).

## BACKGROUND/CONTEXT

During the extraordinary session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation held in Seoul in November 2008 legislation on undiscovered antiquities was one of the major issues discussed. It was in particular noted that such national legislation is often too vague and that this lack of precision in legislation is often penalised by courts. States consequently encounter numerous legal obstacles when requesting restitution of such objects found in another country. A proposal was then put forward concerning the preparation of model provisions for protecting cultural property against illicit traffic to be submitted to States as a model that could be integrated into their own body of law or adapted nationally in accordance with specific legal traditions. The aim was to ensure that all States were equipped with sufficiently explicit legal principles to guarantee their ownership of cultural property.

On that occasion, Mr Patrick O'Keefe, Honorary Professor at the University of Queensland (Australia) presented the legal obstacles which many countries faced during the restitution process, particularly when dealing with archaeological artefacts from sites for which there were no inventories or documentation on provenance. He encouraged States to affirm their right to ownership of cultural heritage as an inalienable and imprescriptible right and to claim the ownership of all yet undiscovered archaeological and cultural property.

In this connection, it is worthwhile recalling that UNESCO looked at this issue as long ago as 1956 in its *Recommendation on the International Principles Applicable to Archaeological Excavations* which, after setting out the general principle that each State should ensure the protection of its archaeological heritage, it goes on to say that "[e]ach Member State should define legal status of the archaeological sub-soil and, where State ownership of the said sub-soil is recognized, specifically mention the fact in its legislation" (see Principle 5(e)).

Professor Jorge Sánchez Cordero, Director of the Mexican Center of Uniform Law and member of the Governing Council of UNIDROIT, presented a project for the effective promotion of ratification of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Describing these Conventions as "two sides of the same coin", he depicted the UNIDROIT Convention to the Intergovernmental Committee as the natural follow-up of the 1970 Convention. In the same vein of Professor O'Keefe, he defended the possibility of drafting a uniform law to fill the legal void at the international level. He also suggested the creation of a working group that could address the task of standardisation. Indeed those conventions were based partly on national legislation, but some States did not have sufficient legislation and needed assistance.

At the 15<sup>th</sup> session of the UNESCO Intergovernmental Committee (Paris, May 2009), the twenty-two members of the Committee came out in favour of pursuing this initiative and encouraged UNESCO and UNIDROIT to set up a committee of independent experts to draft model legislative provisions defining State ownership of cultural property, in particular the archaeological heritage. Such legal guidelines could, it was felt, form the basis for drafting national legislation and promote uniformity of the cultural terminology, the ultimate goal being for all States to adopt sufficiently explicit legal principles in this area.

At its 88<sup>th</sup> session (May 2009), the UNIDROIT Governing Council decided to agree in principle to work with UNESCO in drafting an instrument that would facilitate the application of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention as well as their ratification by as many States as possible. It was clear that the aim was not to question the principles laid down by those two instruments, but to facilitate their application.

At the 16<sup>th</sup> session of the UNESCO Intergovernmental Committee (Paris, September 2010), the Committee formally adopted a Recommendation in which it “encourages the establishment of a working group of independent experts chosen jointly by UNESCO and UNIDROIT .... [and] encourages the preparation of model provisions with explanatory guidelines to be made available to States to consider in the drafting or strengthening of national laws”. The General Assembly of UNIDROIT decided in December 2010 to include this item in the Work Programme 2011 – 2013, in close co-operation with UNESCO.

The UNESCO and UNIDROIT Secretariats accordingly set up an Expert Committee, using a criterion which would guarantee the most representative geographic participation. The members of the Committee were appointed in their personal capacity as independent experts and composed as follows: as Co-chairs, Dr. Jorge Sánchez Cordero (Mexico) and Prof. Marc-André Renold (Switzerland) and, as members, Thomas Adlercreutz (Sweden), James Ding (China), Manlio Frigo (Italy), Vincent Négri (France), Patrick O’Keefe (Australia), Norman Palmer (United Kingdom) and Folarin Shyllon (Nigeria). The UNIDROIT and UNESCO Secretariats were represented by Marina Schneider and Edouard Planche respectively.

At its 90<sup>th</sup> session in May 2011, the UNIDROIT Governing Council took note of the state of advancement of the work on drafting model legislative provisions and reiterated its support and involvement for the project.

The Expert Committee met formally on three occasions in Paris, on September 20, 2010, March 14, 2011 and June 29, 2011. Several exchanges among the members of the Committee also took place via e-mail.

At its 17<sup>th</sup> session (Paris, July 2011), the UNESCO Intergovernmental Committee examined the draft Model Provisions accompanied by explanatory guidelines and adopted a recommendation in which it “takes note of the finalization of model provisions, [...] invite the Expert committee to incorporate in its explanatory guidelines the observations made [...] and] request to widely disseminate those model provisions [...]” (see Attachment I).

The UNIDROIT Governing Council then also took note of the finalisation of the model provisions and welcomed the close collaboration with UNESCO. The Council also requested the Secretariat to continue this joint effort by calling for the wide dissemination of the work.

## **STATUS OF THE MODEL PROVISIONS**

As stated in the Recommendations adopted by the UNESCO Intergovernmental Committee at its 16<sup>th</sup> and 17<sup>th</sup> sessions, those provisions are made available to States to consider in the drafting or strengthening of their national legislations.

It is by no means a binding legal text or a normative instrument as it has not been submitted to States for formal approval. The provisions constitute a model offered to States which might need it, among other legal tools of which the UNESCO and UNIDROIT Secretariats have the mission to encourage the implementation.

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It is important at this stage to note that the Expert Committee made great efforts to come to a short text – so as to be more incisive -, with only six provisions, which aims, in line with both the 1970 UNESCO and the 1995 UNIDROIT Conventions, both to encourage the protection of archeological objects and to favor their restitution to the State where illicit excavations took place.

The drafting of clear provisions also aims at avoiding the time and efforts that would be needed to develop comprehensive interpretations of the law of the State bringing an action for return of an object that falls within the scope of these provisions.

Simplicity further avoids that ambiguity could be exploited before foreign courts. Moreover, the provisions have to be understandable by foreigners engaged in the trade in cultural heritage as it should be recalled that the Court of Appeal (United States of America) in *United States v. McClain* 593 F2d 658 at 670 held that the Mexican claim of ownership was not expressed “with sufficient clarity to survive translation into terms understandable and binding upon American citizens.”

**Model Provisions on State Ownership of  
Undiscovered Cultural Objects  
accompanied by explanatory guidelines**

**Provision 1 – General Duty**

**The State shall take all necessary and appropriate measures to protect  
undiscovered cultural objects and to preserve them for present and  
future generations.**

*Guidelines:*

It is felt that the first provision should be a general clause that recalls the general duty of the State regarding cultural objects that have not yet been discovered.

The duty relates both to the *protection* and *preservation* of such objects. These terms are to be found also in the Preambles of the UNESCO Convention on the Protection of Underwater Cultural Heritage of 2001 and of the UNIDROIT Convention on Stolen or Illegally exported Cultural Objects of 1995.

An earlier version of the text indicated some measures to be taken: for example, a State should encourage, through financial and other means, persons who find archaeological objects to disclose their finding to the competent authorities, or encourage the national and international circulation of such archaeological objects, for example through loans to museums and other cultural institutions. It was finally decided to allow each State to take the measures it deemed necessary and appropriate in accordance with the national and international practice and standards and, among others, the 1976 UNESCO Recommendation concerning the International Exchange of Cultural Property or the Preambles of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention.

The State's duty applies both in the present times (i.e. on the date the model provisions are adopted by a State) and for the future (i.e. after they have been adopted). The obligation of preservation for future generations is indeed now a significant factor for sustainable development of all communities. The model provisions will not affect past situations as they are not intended to be retroactive. It should be recalled that the 1970 and 1995 Conventions also have no retroactive application, following the general principle stated in Article 28 of the 1969 Vienna Convention on the Law of Treaties.

This provision imposes a general obligation and indicates the intent of the law which may be adopted according to the legislative tradition of the enacting State, such as being the first clause of a national statute, or incorporated in the statute's preamble.

### **Provision 2 – Definition**

**Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater.**

#### *Guidelines:*

The model provisions definition is based on the general definition given by the 1970 UNESCO Convention (art.1) and the 1995 UNIDROIT Convention (art. 2). This is to stress that these provisions must facilitate the implementation of the two instruments and that the definition is applied among the 120 States bound by the 1970 UNESCO Convention. As it is a model of a national legislation a reference to the national law is appropriate.

The definition incorporates both types of Undiscovered Cultural Objects, i.e. those found in the *soil* and those found *underwater*. The ownership regime under the Convention on the Protection of the Underwater Cultural Heritage of 2001 – which is different from that of these Model Provisions – will apply to States Parties to that Convention.

It should be stressed that the list of categories is not exhaustive and the enacting State is free to add what it wants (for example, also covered are anthropological objects, human remains, etc.). Similarly, the location of the object should be understood broadly (for example, an undiscovered object could be located in a building or in ice). The enacting State can of course choose on the contrary to limit the definition in its internal law.

### **Provision 3 – State Ownership**

**Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership.**

#### *Guidelines:*

This provision is the central rule of the model provisions. The principle adopted - State ownership - follows that of many existing national legislations, but in the most clear and simple terms. As drafted, the text clearly indicates that such objects are owned by the State *before* being discovered, thus avoiding the problem of interpretation of vague legislations.

The terms "*are owned by the State*" were chosen as opposed to "*are the property of the State*", for the nature of the right of ownership to be absolutely clear. It is also evident that such a right does not aim at the enrichment of the State (institutions or representatives) but allows it to fulfil its role as custodian of the heritage.

A restriction should be made in case prior ownership by a third party can be established. It could be a person who buries a cultural object belonging to him/her in order to protect it during a conflict, intending to retrieve it later so that he/she has not abandoned ownership. Some existing statutes go in the same direction when they provide for State ownership if the discovered object "belong to no one".

Given the general and abstract nature of a model law, it does not appear necessary for it to provide in detail what the precise circumstances are in which "prior existing ownership" is to be considered as established. The national legislator might wish to provide an (illustrative or exhaustive) list of such circumstances, based on local understandings or traditions.

The enacting State may wish to consider the effect of national and international human rights laws on the validity of an extended ownership of the State (see for example the 1948 Universal Declaration of Human Rights, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms – and amendments –, the national implementing legislations).

#### **Provision 4 – Illicit excavation or retention**

##### **Cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects.**

###### *Guidelines:*

Once the principle of the State's ownership of undiscovered cultural objects is clearly established, the effects of it once the objects are illicitly discovered must be clearly set forth. Illicitly discovered means either illicit excavation or retention. This provision considers such objects as stolen.

It should be recalled in this connection that art. 3(2) of the 1995 UNIDROIT Convention provides that "[f]or the purpose of this Convention a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen when consistent with the law of the State where the excavation took place".

Among the several possible definitions of what "illicit excavation or retention" of a cultural object can be, the definition given by art. 3(2) of the 1995 UNIDROIT Convention should be followed, since one of the purposes of the model provisions is to facilitate the enforcement by national courts of the Unidroit Convention. Model provision 4 (and 6 as well) follow that purpose, although they also have an autonomous existence.

This is an indirect reference to the 1995 UNIDROIT Convention which will assist States not yet Parties to it to have the legal basis in their own legislation to become Party and benefit in particular from article 3(2) ("when consistent with the law of the State where the excavation took place"), having a perfect harmony between the Convention and the national legislation. If the enacting State is not

Party to the 1995 Convention, the normal rules of private law will apply such as, for example, the fact that under certain legal systems title of a stolen object cannot be acquired.

The fact that this provision considers such objects as stolen has certain legal effects in domestic law (see Provision 5). This characterisation of theft triggers for example the application of the *National Stolen Property Act* in the United States of America.

The provision follows the wording of the 1995 Convention "are deemed to be stolen" and not "are stolen" to answer a problem which some States could have because as long as it is not in a possession of the object, such object cannot be stolen. A retention for the purposes of this provision would not then be a theft. This is why a broader formula has been chosen.

The licit or illicit nature of an excavation ("object excavated contrary to the law") will be determined by additional national legislation which very often already exists. For example, many national legislations require excavations to be authorised with an administrative process being followed.

The other effect concerns criminal law as the provision is dealing with theft. This criminal activity involves the setting into force of the criminal law procedures at national level, but also international co-operation in criminal law matters when international aspects are concerned (see Provision 6).

In case an object is lawfully excavated and lawfully exported on a temporary basis, but not returned after the expiry of the term, and thus illicitly retained, it should be deemed stolen.

### **Provision 5 – Inalienability**

**The transfer of ownership of a cultural object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.**

#### *Guidelines:*

Provision 5 is the private law complement of Provision 4. An undiscovered cultural object is a thing which may not be the object of private rights and remains such once it has been discovered. It can therefore not be validly acquired by a subsequent acquirer (by purchase, donation, succession, etc.).

A reservation should, however, be made if the transferor has a valid title, for example a State archeological museum that decides, validly according to its national law, to sell an item in its collection (for example by *deaccessioning*) or a private person who validly acquired the object prior to the entering into force of the model provision in the State concerned. If this is the case, the museum or the private person are the actual owners of the object and they may as such dispose of it.

The enacting State should be conscious of the limited scope of the provision: if the object is transferred abroad, the nullity of the transfer of ownership will be effective only if the foreign State has adopted Provision 5 or a similar rule.

### **Provision 6 – International enforcement**

**For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or illicitly excavated but illicitly retained, such objects shall be deemed stolen objects.**

*Guidelines:*

Model provision 6 aims to facilitate the return or the restitution of a cultural object that has been exported after having been discovered and unlawfully removed. If the object is considered stolen, international judicial cooperation in criminal matters will generally enable its return to the country where it was discovered.

Also, from a private international law point of view, a foreign court having to deal with a claim for restitution, seeing that the country where the object was discovered considers it as stolen on the basis this provision, will have little difficulty in returning it on the basis of that state's law. This will even more so be the case if the States involved have ratified the 1995 Unidroit Convention (see its art. 3(1)).

It should also be noted that the model provisions cannot and do not intend to answer all questions linked to the legal status of excavations and discoveries of cultural objects. For example, the model provisions do not deal with the issue of "treasure trove", i.e. to what extent the discoverer should be rewarded for his or her discovery. If the national legislator deems it to be relevant, this will have to be dealt with separately in accordance with its legal system. The Provisions also do not purport to solve the vexed issue of the protection of the good faith acquirer and his or her duty of diligence. It should be recalled that UNESCO specifically asked UNIDROIT to deal with this fundamental issue and the 1995 UNIDROIT Convention provides an answer in Articles 3 and 4. In particular Article 4(4) indicates the criteria to determine due diligence at the time of acquisition of an object, which will be of great assistance to the potential buyer who will know in advance how to behave, but also to the judge called to decide in case of dispute. Such criteria have inspired several national legislations adopted since.

114<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 2763

To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

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## IN THE SENATE OF THE UNITED STATES

APRIL 7, 2016

Mr. CORNYN (for himself, Mr. CRUZ, Mr. SCHUMER, and Mr. BLUMENTHAL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Holocaust Expropri-  
5 ated Art Recovery Act of 2016”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) It is estimated that the Nazis confiscated or  
9 otherwise misappropriated as many as 650,000

1 works of art throughout Europe as part of their gen-  
2 ocidal campaign against the Jewish people and other  
3 persecuted groups. This has been described as the  
4 “greatest displacement of art in human history”.

5 (2) Following World War II, the United States  
6 and its allies attempted to return the stolen  
7 artworks to their countries of origin. Despite these  
8 efforts, many works of art were never reunited with  
9 their owners. Some of the art has since been discov-  
10 ered in the United States.

11 (3) In 1998, the United States convened a con-  
12 ference with 44 nations in Washington, DC, known  
13 as the Washington Conference, which produced  
14 Principles on Nazi-Confiscated Art. One of these  
15 principles is that “steps should be taken expedi-  
16 tiously to achieve a just and fair solution” to claims  
17 involving such art that has not been restituted if the  
18 owners or their heirs can be identified.

19 (4) The same year, Congress enacted the Holo-  
20 caust Victims Redress Act (Public Law 105–158,  
21 112 Stat. 15), which expressed the sense of Con-  
22 gress that “all governments should undertake good  
23 faith efforts to facilitate the return of private and  
24 public property, such as works of art, to the rightful  
25 owners in cases where assets were confiscated from

1 the claimant during the period of Nazi rule and  
2 there is reasonable proof that the claimant is the  
3 rightful owner.”.

4 (5) In 2009, the United States participated in  
5 a Holocaust Era Assets Conference in Prague,  
6 Czech Republic, with 45 other nations. At the con-  
7 clusion of this conference, the participating nations  
8 issued the Terezin Declaration, which reaffirmed the  
9 1998 Washington Conference Principles on Nazi-  
10 Confiscated Art and urged all participants “to en-  
11 sure that their legal systems or alternative processes,  
12 while taking into account the different legal tradi-  
13 tions, facilitate just and fair solutions with regard to  
14 Nazi-confiscated and looted art, and to make certain  
15 that claims to recover such art are resolved expedi-  
16 tiously and based on the facts and merits of the  
17 claims and all the relevant documents submitted by  
18 all parties.”. The Declaration also urged participants  
19 to “consider all relevant issues when applying var-  
20 ious legal provisions that may impede the restitution  
21 of art and cultural property, in order to achieve just  
22 and fair solutions, as well as alternative dispute res-  
23 olution, where appropriate under law.”.

24 (6) Numerous victims of Nazi persecution and  
25 their heirs have taken legal action to recover Nazi-

1       confiscated art. These lawsuits face significant pro-  
2       cedural obstacles partly due to State statutes of lim-  
3       itations, which typically bar claims within some lim-  
4       ited number of years from either the date of the loss  
5       or the date that the claim should have been discov-  
6       ered. In some cases, this means that the claims ex-  
7       pired before World War II even ended. (See, e.g.,  
8       The Detroit Institute of Arts v. Ullin, No. 06–  
9       10333, 2007 WL 1016996 (E.D. Mich. Mar. 31,  
10      2007).) The unique and horrific circumstances of  
11      World War II and the Holocaust make statutes of  
12      limitations and other time-based procedural defenses  
13      especially burdensome to the victims and their heirs.  
14      Those seeking recovery of Nazi-confiscated art must  
15      painstakingly piece together their cases from a frag-  
16      mentary historical record ravaged by persecution,  
17      war, and genocide. This costly process often cannot  
18      be done within the time constraints imposed by ex-  
19      isting law.

20           (7) Federal legislation is needed because the  
21      only court that has considered the question held that  
22      the Constitution prohibits States from making ex-  
23      ceptions to their statutes of limitations to accommo-  
24      date claims involving the recovery of Nazi-con-  
25      fiscated art. In *Von Saher v. Norton Simon Museum*

1 of Art, 592 F.3d 954 (9th Cir. 2009), the United  
2 States Court of Appeals for the Ninth Circuit invali-  
3 dated a California law that extended the State stat-  
4 ute of limitations for claims seeking recovery of Hol-  
5 ocaust-era artwork. The Court held that the law was  
6 an unconstitutional infringement of the Federal Gov-  
7 ernment’s exclusive authority over foreign affairs,  
8 which includes the resolution of war-related disputes.  
9 In light of this precedent, the enactment of a Fed-  
10 eral law is the best way to ensure that claims to  
11 Nazi-confiscated art are adjudicated on their merits.

12 **SEC. 3. PURPOSES.**

13 The purposes of this Act are the following:

14 (1) To ensure that laws governing claims to  
15 Nazi-confiscated art further United States policy as  
16 set forth in the Washington Conference Principles  
17 on Nazi-Confiscated Art, the Holocaust Victims Re-  
18 dress Act, and the Terezin Declaration.

19 (2) To ensure that claims to artwork stolen or  
20 misappropriated by the Nazis are not barred by stat-  
21 utes of limitations and other similar legal doctrines  
22 but are resolved in a just and fair manner on the  
23 merits.

24 **SEC. 4. DEFINITIONS.**

25 In this Act—

1           (1) the term “actual discovery” does not in-  
2           clude any constructive knowledge imputed by law;

3           (2) the term “artwork or other cultural prop-  
4           erty” includes any painting, sculpture, drawing,  
5           work of graphic art, print, multiples, book, manu-  
6           script, archive, or sacred or ceremonial object;

7           (3) the term “persecution during the Nazi era”  
8           means any persecution by the Nazis or their allies  
9           during the period from January 1, 1933, to Decem-  
10          ber 31, 1945, that was based on race, ethnicity, or  
11          religion; and

12          (4) the term “unlawfully lost” includes any  
13          theft, seizure, forced sale, sale under duress, or any  
14          other loss of an artwork or cultural property that  
15          would not have occurred absent persecution during  
16          the Nazi era.

17 **SEC. 5. STATUTE OF LIMITATIONS.**

18          (a) IN GENERAL.—Notwithstanding any other provi-  
19          sion of Federal law, any provision of State law, or any  
20          defense at law or equity relating to the passage of time  
21          (including the doctrine of laches), a civil claim or cause  
22          of action against a defendant to recover any artwork or  
23          other cultural property unlawfully lost because of persecu-  
24          tion during the Nazi era or for damages for the taking  
25          or detaining of any artwork or other cultural property un-

1 lawfully lost because of persecution during the Nazi era  
2 may be commenced not later than 6 years after the actual  
3 discovery by the claimant or the agent of the claimant of—

4           (1) the identity and location of the artwork or  
5           cultural property; and

6           (2) information or facts sufficient to indicate  
7           that the claimant has a claim for a possessory inter-  
8           est in the artwork or cultural property that was un-  
9           lawfully lost.

10          (b) POSSIBLE MISIDENTIFICATION.—For purposes of  
11 subsection (a)(1), in a case in which there is a possibility  
12 of misidentification of the artwork or cultural property,  
13 the identification of the artwork or cultural property shall  
14 occur on the date on which there are facts sufficient to  
15 determine that the artwork or cultural property is likely  
16 to be the artwork or cultural property that was unlawfully  
17 lost.

18          (c) APPLICABILITY.—

19           (1) IN GENERAL.—Subsection (a) shall apply to  
20 any civil claim or cause of action (including a civil  
21 claim or cause of action described in paragraph (2))  
22 that is—

23           (A) pending on the date of enactment of  
24           this Act; or

1 (B) filed during the period beginning on  
2 the date of enactment of this Act and ending on  
3 December 31, 2026.

4 (2) INCLUSION OF PREVIOUSLY DISMISSED  
5 CLAIMS.—A civil claim or cause of action described  
6 in this paragraph is a civil claim or cause of ac-  
7 tion—

8 (A) that was dismissed before the date of  
9 enactment of this Act based on the expiration  
10 of a Federal or State statute of limitations or  
11 any other defense at law or equity relating to  
12 the passage of time (including the doctrine of  
13 laches); and

14 (B) in which final judgment has not been  
15 entered.

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