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Main Variables and a Hypothetical Draft Instrument on the Return of Looted Cultural Objects in Connection to the Second World War

The legal experts invited to the European Parliament for the hearing on the 3rd December 2019 are expected to « provide opinions on the future actions required to ensure standard processes for making and pursuing claims, due diligence standards, and shared definitions of what constitutes loss both between and even within countries.»

In this spirit the following are submitted to the attention of the JURI Committee :

I) Main Variables to Consider in Case a Standard-Setting Instrument Will Be Negotiated

Some of the various legal variables that are open for discussion are the following: should an hypothetical EU instrument on the restitution of looted cultural property :

- 1) be a substantive law instrument (providing directly for the substantive rules applicable, as in the great majority of EU Regulations) or a private international law instrument (defining the « applicable law ») ?
 If the latter option is retained:
 - i) the existing EU Rome I and II Regulations (on the law applicable to contract or tort) are of no assistance : first, they do not apply to non-derivative acquisition of (looted cultural) property, second they apply (to contracts and tort) only for the future;
 - ii) a suitable forum for negotiation of such a private international instrument would be the EU or The Hague Conference of Private International Law if a global negotiation is sought;
- 2) be a hard or soft-law instrument ? A crucial and sensitive issue, self-evidently;
- 3) apply only to Nazi-looted cultural objects, or to any looted cultural objects, in connection to the Second World War ?

II) A Hypothetical Draft Instrument on the Return of Looted Cultural Objects in Connection to the Second World War

A Hypothetical Draft Uniform Substantive Law (Hard Law) Instrument for Further Discussion

(Not a Private International Law Instrument on the Applicable Law)

The draft text below is submitted for consideration and, possibly, further discussion and elaboration. Among the above-mentioned main options the text below is designed as a draft uniform substantive hard law instrument, covering the return of any looted cultural objects in connection to the Second World War (not only the « Nazi-looted » cultural objects, although they represent, by far, the main portion of looted property).

Many options may be discussed and elaborated as to the substantive and dispute resolution provisions of a future and hypothetical legal instrument on the legal complex and politically sensitive question of looted cultural property in connection to the Second World War and its return at present time.

Nevertheless, for the sake of simplicity and conciseness the draft text below is not particularly elaborated at this stage, adds some proposals and follows, in part, combining and amending as appropriate, some provisions from two texts that many Governments are already familiar with:

- i) The UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War. This Draft Declaration was negotiated by the majority of experts of the UNESCO Member States. It was not adopted as “Declaration of Principles” by the General Conference of UNESCO in 2009 because it lacked consensus, essentially for the opposition of three Member States to some of the Draft Declaration’s provisions;
- ii) The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995, 47 Contracting States);

Preamble : Various possibilities exist (the preamble below follows the UNESCO Draft Declaration)

Considering the tragic events that took place in relation to the Second World War, where many cultural objects were destroyed, lost or displaced,

Having in mind the relevant regulations of the Annex to the 1907 Fourth Hague Convention (Regulations Respecting the Laws and Customs of War on Land), the Convention for the Protection of Cultural Property in the Event of Armed Conflict adopted at The Hague in 1954 and its two Protocols (1954, 1999), the Convention on the Means of Prohibiting and Preventing the

Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris in 1970 (New);

Acknowledging the 1998 Washington Conference Principles on Nazi-Confiscated Art, the 2000 Vilnius Declaration to Facilitate the Restitution of Disputed Works, the 2019 European Parliament Resolution on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (new), and noting the essential role of non-governmental participants in successful practices and procedures based on those documents,

Noting with appreciation the growing number of returns of cultural objects displaced in relation to the Second World War, and that such returns should be further encouraged by the international community,

Acknowledging that to date only some countries have adopted national legislation or other measures to regulate or resolve such displacements (amended),

Inviting States to develop national processes (amended) to take into account this instrument (in case of a soft-law instrument),

(the Draft UNESCO Declaration's last paragraph is removed)

(..)

Article 1. Scope of Application (Draft UNESCO Declaration, with an amended par.2 and a new par.3)

This instrument applies to claims of restitution of cultural objects (hereafter « cultural objects ») that

- (1) are listed in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and
- (2) have been looted (new) or removed from, or the possession of which has been involuntarily (new) lost within, a territory during or in connection with hostilities or occupation related to the Second World War, even if such occupation was total or partial or had met with no armed resistance ; and
- (3) have not been returned to the original owner or the current heirs (new).

Art.2 Definition of looting, removal or involuntary (new) loss of possession, State (Draft UNESCO Declaration, with amendments)

(1) This instrument applies to any looting (new), involuntary (new) loss of possession or removal, of cultural objects (as described in Art.1) where there are reasonable grounds to conclude that the cultural objects concerned:

- a) were looted or plundered; or

b) were appropriated in a manner contrary to the law in force in the territory where they were located at the time, or appropriated in a manner in conformity with a law or a judicial or administrative measure, the recognition of which would be offensive to the principles of humanity and dictates of public conscience; or

c) were transferred pursuant to a transaction apparently, but not actually legal, or vitiated for whatever reason, even when the transaction purports to have been voluntarily effected; or

d) had otherwise left the possession of a person or an entity involuntarily (new) in circumstances deemed offensive to the principles of humanity and dictates of public conscience.

(2) The “State” in this instrument is a Contracting State in case the instrument is a convention (treaty), or an EU Member State in case the instrument is an EU Regulation (or Directive)

Art.3 Duties of the responsible State: (Draft UNESCO Declaration, with amendments)

(1) The responsible State is the State having committed the acts described in the first paragraph of Article 2.

(2) Where more than one State is responsible for the same or successive acts described in the first paragraph of Article 2, each of these States shall be considered as a responsible State within the meaning of this instrument.

(3) The responsible State

- a. shall participate in the search and identification of the cultural properties (as defined in Articles 1 and 2), of the original owner (at the time of looting, removal or loss of possession) or the current heirs (form and extent of search and identification to be further elaborated); and
- b. shall take effective steps to facilitate the return of such objects to the original owner or current heirs (steps to be further elaborated and defined).
- c. Likely to be discussed can also be the question whether the responsible State has any responsibility, and if so to what extent, as to payment of compensation to the diligent possessor, when this is required, in conformity with Article 8 (a question to be considered in the context of Articles 3 and 8 as a whole)

Art.4 Duties of the State of location (Draft UNESCO Declaration, with amendments)

The State of the current location of the cultural objects that is not the responsible State shall take effective steps to return such objects to the national authorities of the State where the cultural objects concerned were looted, removed from or their possession was involuntarily lost, with a view to identifying the original owner or the current heirs, if the original owner or current heirs do not act as claimant for the return of such objects before its courts in the context of Art.10;

Art.5 Documentation : (Draft UNESCO Declaration)

Cultural objects being returned should be accompanied by the relevant scientific, technical and legal documentation available.

Art.6 Exclusion of war reparations : (Draft UNESCO Declaration)

Cultural objects that are subject to this instrument shall never be retained as war reparations.

Art.7 Duty to return : (UNIDROIT Convention, with amendments and excluding provisions on time limitation)

(1) The current possessor of a cultural object subject to this instrument shall return it to the original owner or his heirs.

(2) For the purposes of this instrument, a cultural object which has been unlawfully excavated or lawfully excavated from a territory (as defined in Art.1) of a State, but unlawfully retained shall be subject to return under this instrument, when consistent with the law of the State where the excavation took place.

(Note: Par.2 is useful if the EU authorities or States decide to extend « looting » to cultural objects unlawfully excavated or retained from territories in connection to the Second World War)

Art.8 Due diligence and compensation of diligent possessors (UNIDROIT Convention, with amendments)

(1) The possessor of a cultural object required to return it under this instrument shall be entitled, at the time of its return, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was looted, removed or its possession was involuntarily lost (as defined in Art.1), and can prove that it exercised due diligence when acquiring the object.

(2) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of cultural objects (as defined in Art.1), and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

(3) Without prejudice to the right of the possessor to compensation referred to in the first paragraph:

a) reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation to the extent that such person or prior transferor knew or ought reasonably to have known that the object was looted, removed or its possession was involuntarily lost (as defined in Art.1), and cannot prove that he exercised due diligence when acquiring the object in conformity with the second paragraph (amended);

b) the possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously; (a provision to be discussed)

c) payment of compensation to the possessor, when this is required, shall be performed
i) by the responsible State(s); or

ii) by claimant without prejudice to the right of the claimant to recover it from any other person or from the responsible State(s) (amended provision for consideration; the options i, ii, are to be discussed also in the context of Art.3 and the responsible State)

Art.9 Seeking an agreement by negotiation, mediation, conciliation

(1) For the purpose of this instrument claimant is the original owner, or his heirs, or any entity mandated in writing by either of them, to act for the return of the relevant cultural object;

(2) If the claimant and the current possessor so agree they may seek to reach an agreement concerning the claimant's return claim, by way of negotiation (directly between the parties), or mediation or conciliation with the assistance of a facilitating third party whose mandate (confidentiality, role, etc.) is to be defined by the parties;

(3) If an agreement is reached, it should/shall (an important issue for consideration) reflect the (spirit of the) provisions of this instrument.

Art.10 Dispute settlement by court litigation or arbitration

(1) If the parties do not reach an agreement as to the return claim within 6 months from the day the conciliation, mediation or conciliation process is requested in writing by one of the parties, the claimant may bring his return claim before:

- a) the courts or other competent authorities of the State where the cultural object is located; or
- b) the courts or other competent authorities of another State to the extent that they have jurisdiction under the rules in force in such State; or alternatively
- c) an independent arbitral tribunal if the claimant and the possessor agree in writing to submit the dispute to arbitration (ad hoc or institutional). Arbitrators should have an expertise in cultural property law.

(2) Courts or arbitral tribunals having jurisdiction on the restitution claim in conformity with the first paragraph are to settle the dispute according to this instrument and, for any additional disputed issue which is outside the scope of this instrument, according to the governing law that the parties may choose or, failing an agreement by the parties, that is determined by the relevant court under the private international law rules of its State (*lex fori*), or by the relevant arbitral tribunal under the applicable rules of arbitration.

Art.11 Provisional Measures (UNIDROIT Convention, with slight amendments):

Claimant may have resort to the provisional, including protective, measures available under the law of the State where the concerned cultural object is located, even when the claimant brings his claim for return before the courts or other competent authorities of another State.

Art.12 Time limit: (Draft UNESCO Declaration)

No time limits apply to this instrument.

Art.13 Relationship to international law: (Draft UNESCO Declaration, with amendments)

Nothing in this instrument shall be interpreted as amending, abrogating or replacing, relevant international law obligations of States

(A provision in case of a soft law instrument).

* * *

Any of the above draft provisions may be discussed, improved, and possibly maintained, amended or deleted, depending on the priorities and the decisions of the EU Authorities or States negotiating, perhaps one day, the instrument.

Some background publications (in French):

G.Carducci, *La restitution internationale des biens culturels et des objets d'art. Droit commun, Directive CEE, Convention de l'UNESCO et d'UNIDROIT*
Paris, LGDJ, 1997, 493 p.

G.Carducci, *Acquisition a non domino, prescription acquisitive, possession vaut titre, conflit mobile et circulation d'une res extra commercium (droit commun des biens et droit des biens culturels)*
Travaux du Comité français de droit international privé, 2012-2014 Pedone Paris 2015, p.137-182

G.Carducci, *L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé : droit coutumier et droit conventionnel, avant et après la Convention de La Haye de 1954. L'importance du facteur temporel dans les rapports entre les traités et la coutume*
Revue Générale de Droit International Public, 2000, p.288-357

G.Carducci, *Complémentarité entre les Conventions de l'UNESCO de 1970 et d'UNIDROIT de 1995 sur les biens culturels*
Uniform Law Review / Revue de droit uniforme, 11 (2006), pp. 93 - 102