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Unidroit Convention of 1995 and Unclaimed Cultural Property without Provenance

I The Unidroit Convention of 1995 and its Purpose

The Unidroit Convention of 24 June 1995 on Stolen or Illegally Exported Cultural Objects (the Convention) entered into force on 1 July 1998.¹ It has been ratified by 14 of the 27 Member States of the European Union,² including Hungary where the Convention has been in force since 1 November 1998.

1 Initiative of UNESCO

In the 1980s UNESCO asked the International Institute for the Unification of Private Law in Rome (Unidroit Institute) to prepare an international instrument on the return of illegally acquired cultural objects which should be more effective than the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 Convention).³ This 1970 Convention, drafted in the post-colonial era, has one major disadvantage: It can rarely be applied directly because it mainly formulates obligations of states parties and relies on national implementation statutes which have been enacted by very few of the 123 states parties.⁴ A diplomatic conference in June 1995 finally passed the Convention, which has two main parts on the restitution of stolen

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¹ Uniform Law Review N.S. 1 (1996) 110; International Journal of Cultural Property 5 (1996) 155. See also Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Acts and Proceedings, Rome 1996; Lyndel V. Pratt, *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects 1995*, (Institute of Art and Law 1997, Leicester); Explanatory Report: Uniform Law Review N.S. 6 (2001) 476.

² Croatia, Cyprus, Denmark, Finland, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

³ *UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970 823 UNTS 231. (entered into force 24 April 1972).

⁴ Some of these state parties with implementation statutes are the United States, Switzerland and Germany.

and the return of illegally exported cultural objects directly applicable in states parties which have ratified the Convention.

2 Two Parts of the Unidroit Convention

The Convention has two major parts: chapter II on the restitution of stolen cultural objects (Article 3–4) and chapter III on the return of illegally exported cultural objects (Articles 5–7).

a) Restitution of Stolen Cultural Objects

If cultural objects have been stolen, four questions have to be answered: What is theft? Should stolen objects be given back? Should a bona fide purchaser be compensated? Is there any time limitation within which the claim for restitution should be raised?

(1) The terms *theft* and *stolen* are not defined by the Convention. One exception, however, is made. Article 3 (2) states that ‘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’. This qualification of ‘patrimony laws’, known in many countries (including Hungary)⁵, is recognised in Europe as well as in the United States.⁶

(2) A stolen cultural object *has to be given back* if the owner or former owner asks for restitution [Article 3 (1)]. There is no in rem protection of a good faith purchaser. Even a bona fide purchaser has to give back the object and can claim compensation for his loss.

(3) A *good faith purchaser* may ask for ‘fair and reasonable compensation’ [Art. 4 (1)]. Whether there has been a bona fide purchase, has to be decided under the guidance of Article 4 (4) which, inter alia, provides that there is no protection if the possessor did not ‘consult any reasonably accessible register of stolen cultural objects’. This passage refers to registers such as the Art Loss Register in London or the Lost Art Register in Magdeburg, Germany.

(4) There are two different *time limitations* for the owner’s claim for restitution; a relative one and an absolute one. According to Article 3 (3), a claim for restitution has to be brought within a period of three years from the time when the claimant knew the location of the object and the identity of its possessor, and in any case within a period of fifty years (or even longer Article 3 (4 and 5) from the time of the theft.

b) Return of illegally exported cultural objects

Chapter III deals with the return of illegally exported cultural objects. Four questions also have to be answered here. (1) What is illegal export? (2) When must objects be returned? (3) Will

⁵ 2001. évi LXIV. törvény a kulturális örökség védelméről (Act LXIV of 2001 on the Protection of Cultural Heritage) s 8 para (1). This section 8 para (1) reads in English translation: ‘All archaeological finds on the ground, in the ground, in the beds of watercourses or hidden or recovered from elsewhere shall represent state property.’ Translation by the International Foundation for Art Research, New York.

⁶ Europe: e.g. Oberlandesgericht Schleswig 10.2.1989, published in (1989) Neue Juristische Wochenschrift 3105 (concerning Greece); USA: *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), certiorari denied 540 U.S. 1106 (2003) (concerning Egypt).

a bona fide possessor be compensated? (4) Is there any time limitation for bringing a claim for return?

(1) The *export* of the object must be forbidden by the requesting state of origin. There three types of export regulations with respect to cultural objects are no export prohibition (e.g. United States); export prohibition for some important listed objects (e.g. Germany); and export prohibition of all objects of cultural importance (e.g. France). Any of these prohibitions have to be respected and evaluated.

(2) Unlike in Chapter 2, *not every violation* of an export prohibition obliges the possessor to return the object. The requesting state has to establish the interest of the state of origin in order to get back the object [Article 4 (3)]. Let us assume that I bought an old second hand book in Zürich and found a letter of Gottfried Keller (1819-1890), the author of the book 'Der grüne Heinrich', in this book. Let us further assume that the export of this letter is prohibited by Swiss law and the Swiss government asks for its return because 'the object is of significant cultural importance' for Switzerland. If Switzerland were a state party of the Convention, the request might be declined and a copy of the letter be given to the requesting government in order to complete the edition of Keller's letters,

(3) The *requesting state* is in a different position to the owner of a stolen object. The state is not asking for title but for the return of the object to the state of origin. If I bought an illegally exported Hungarian cultural object in Germany bona fide, I would be obliged under the Convention to return the object and place it on permanent loan to the National Gallery in Budapest. If I chose the transfer, I would have a claim for fair and reasonable compensation (Article 6).

(4) The two types of *limitations* for claims for return are also here [Article 5 (5)].

3 Common Problems

There are at least four common problems dealt with in some special provisions, provisions already mentioned and in no provision at all.

a) Cultural objects

For the definition of cultural objects, Article 2 of the Convention refers to the Annex of the Convention, which is very close to that of the EU Directive of 1993 and to the enumeration in Article 1 of the 1970 Convention. Archaeological finds are also mentioned.

b) Restitution and return to country of origin

Two arguments were raised against restitution and the return of cultural objects; the first concerns the long statute of limitations and the other refers to the non-retroactivity provided by many state parties to the Convention. In such countries, retroactive legislation is a problem of constitutional law and cannot be solved easily. Article 10 therefore deals with this problem and excludes retroactivity.

c) Reasonable compensation

Of course, the term 'fair and reasonable compensation' also found opposition as being insufficient to protect bona fide possessors.

d) Plaintiff: owner or state of origin

The last problem to be listed is the problem in my lecture today. The Convention is based on the assumption that somebody is going to claim for restitution or the return of cultural objects, the owner from whom the object was stolen or the state of origin from which the object was illegally exported. But what happens if nobody asks for restitution or the return of an object which has been stolen and illegally exported?

4 Intermediate Summary

The contents of the Unidroit Convention may be summarised as follows:

1. The Convention has three major *positive aspects*:
 - a) It deals with the restitution of stolen and the return of illegally exported cultural objects.
 - b) There is no in rem protection of a bona fide purchaser. He may get fair and reasonable compensation.
 - c) There must be somebody who asks for restitution or the return of the objects.
2. Three *negative features* may be added:
 - a) The Convention does not work retroactively (Article 10).
 - b) No reservations are permitted (Article 18),
 - c) The Convention does not exclude the application of any other more favourable remedy for restitution or the return of cultural objects (Articles 9 and 13).

II Problem of Unclaimed Cultural Objects

The problem which I want to discuss with you today concentrates on archaeological finds illegally excavated somewhere and surfacing in market states where they are offered to the public, to museums and to collectors. In many cases the state of origin is not aware of the loss and therefore does not want to spend a lot of money on a return claim in the market state. The result does not satisfy archaeologists in particular, who want to stop illegally executed excavations and who want to tell us where the object comes from. Even so, they are not allowed to keep the objects and were not permitted to return them to the state of origin.

Although not being a state party to the Convention, German courts have had to deal with some problems which the Convention does not solve either. Here, it is important to distinguish between three different remedies of the former owner or state for restitution or the return of stolen or illegally exported/removed objects:

- a) criminal remedies (international legal assistance or criminal proceedings) and seizure of the objects,
- b) administrative remedies for the return of illegally exported or removed objects (§ 13 I KultGüRückG),
- c) private law remedies for the restitution of stolen objects, i.e. rei vindicatio of ownership.

1 Stolen Cultural Objects that are State Property

a) Stolen in Iraq

The first case to be mentioned is the dispute concerning a *golden bowl* which apparently had been illegally excavated in Iraq and sold at auction in Germany in 2004 as a product of Roman imperialism for € 1,400 or € 1,200. The sale took place under the condition that the Iraq does not claim to be the owner. Nobody cared for this transaction except the Iraqi ambassador and Michael Müller-Karpe, the curator of the Romano-Germanic Central Museum in Mainz.⁷ Müller-Karpe had the suspicion that the object may have been illegally excavated in Iraq, knew that all antiquities excavated in Iraq are state property of Iraq and that the object must have been illegally exported from the country of origin. Müller-Karpe asked the police in Munich to seize the bowl, which was still in the art dealer's shop. This was done and the bowl was transferred to the museum in Mainz in order to find out where the bowl came from. Müller-Karpe, as an archaeologist and an art expert in antiquities from the Middle East, after careful research and evaluation came to the conclusion that the bowl very likely originated in Iraq and refused to give it back to the police or the art dealer after having finished his research. He was afraid of receiving stolen property and of committing a crime under § 259 of the German Criminal Code.⁸ This fear was, however, unfounded because a person receiving the object to give their expertise does not do so 'in order to enrich himself or a third person [the Museum] [...] procure for himself or a third person' property which has been stolen from Iraq. Court proceedings were initiated against Müller-Karpe, asking him to return the bowl to the police. After some hesitation the bowl was given back and another expert confirmed Müller-Karpe's suspicions and came to the same conclusion of Iraqi provenance.⁹ Finally the buyer of the bowl, being a collector and not a fence, returned the bowl to Iraq and the Iraqi ambassador in Berlin.

This case is interesting because of several peculiarities.

⁷ Michael Müller-Karpe, 'Antikenhandel./ Kulturgüterschutz. Zur Missachtung des bestehenden Handelsverbots für archäologische Kulturgüter ungeklärter Provenienz am einem Beispiel' [2010] *Kunst und Recht*, 91-94..

⁸ § 259 (1) of the German Criminal Code provides: 'Whoever in order to enrich himself or a third person, buys, otherwise procures for himself or a third person, disposes of, or assists in disposing of property that another person has stolen or otherwise acquired by an unlawful act directed against the property of another shall be liable to imprisonment of not more than five years or a fine.' Translation of Michael Bohlander, *The German Criminal Code. A Modern English Translation* (Hart Publishing 2008, Oxford), 166..

⁹ As to this case see also Kurt Siehr, 'Prozesse über geschütztes Kulturgut in Deutschland' [2011] *Kunst und Recht* 3-9, 7-8.

(1) Neither party in these proceedings and disputes relied on illegal export or import. It was unnecessary to invoke the Council Regulation (EC) 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq¹⁰ or the 1970 UNESCO Convention implemented by Germany.

(2) They did not rely on any international instrument but relied on German law, which, as provided by Article 9 (1) of the Unidroit Convention, is not excluded if it is more favourable to restitution or return than the Convention.

(3) The parties simply relied on German private law which provides three principles.

(a) There is no bona fide purchase of stolen goods except by sale in public auction (§ 935 of the Civil Code).

(b) A bona fide purchaser can acquire ownership after expiration of ten years by acquisitive prescription (*Ersitzung*, according to § 937 (1) of the Civil Code).

(c) There is no bona fide purchase if the sale took place under the condition that Iraq does not prove its own title. If the buyer had declined to give back the bowl voluntarily, the Iraq government would have brought a lawsuit against him for the restitution of the bowl.

Very often the title holder does not commence court proceedings and then, of course, the question arises of what to do with the stolen objects.

b) Stolen outside the European Union except Iraq

ba) Antique Bowls

In 2009, an antiquities dealer from Frankfurt am Main offered three antique bowls and two Byzantine smoke vessels which, according to the dealer, may have originated in Turkey or any other part of the Near East. He had bought the objects for € 200 from a couple in Munich, who had been teachers in Turkey. This couple, according to the dealer, had acquired the objects in 1980 from an Armenian carpet dealer in Istanbul who had already passed away. On 16 December 2009 the Ministry of Science and Culture of the state of Hessen seized the objects in order to prevent any sale and disappearance of the objects, and deposited them also with the Romano-Germanic Central Museum in Mainz. When the seizure was lifted, the art dealer sued the Museum for the restitution of the objects. The dealer finally prevailed; he got back the objects¹¹ and was sued by the Republic of Turkey for restitution of state property illegally excavated in Turkey and illegally exported from Turkey. On 19 August 2011, the *Landgericht Frankfurt* gave a judgment for the defendant.¹²

The plaintiff could not convince the court that title is with the plaintiff. There was no evidence of a Turkish origin of the objects, of illegal excavation and their illegal export to Germany.

¹⁰ Council Regulation (EC) 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96 OJ L169/6.

¹¹ Verwaltungsgericht Frankfurt/Main 2. 6.2010. [2011] Kunst und Recht, 68. To this court decision see Michael Müller-Karpe, *Antikenhandel./Kulturgüterschutz – Fortsetzung von KUR 2010, 91ff. Zur Förderung der Antikenehlerlei in Deutschland an einem weiteren Beispiel.* [2011] Kunst und Recht 61–67.; Suzan Topal-Gökceli, 'Verfahren um Herausgabe fünf antiker, mutmaßlich aus der Türkei stammender Bronzegefäße, [2011] 1 Bulletin Kunst & Recht, 64-65. (misinterpreting German law); correct: Siehr (n 9), 7-8.

¹² LG Frankfurt/Main 19.8. 2011, file 2/13 O 212/10, unpublished.

Even if the objects originate in Turkey, they are not to be qualified as stolen because the Republic of Turkey never came into possession of them. As such, the defendant could acquire the object bona fide from the couple in Munich.

Handling of foreign cultural objects without knowing of their potential provenance and illegal export is not unconscionable.

This judgment was confirmed by the *Oberlandesgericht Frankfurt/Main* on 4 February 2013.¹³ Turkey did not get the objects.¹⁴

This case is remarkable because of three aspects:

(1) Turkey should have joined the trial with the Administrative Court in Frankfurt am Main by serving a summons to the defendant.

(2) The plaintiff in a civil law trial naturally has to present all facts and to prove his title.

(3) Illegally excavated objects are – contrary to the court decision – ‘stolen’ under German law.

bb) Ancient coins

In the East Balkans (perhaps Bulgaria or Serbia), more than 821 ancient coins had been illegally excavated, illegally exported to Germany and offered for sale on the internet auction and shopping site eBay before eBay agreed that, beginning on 1 July 2008, a certificate of provenance is needed for the sale of ancient coins via eBay. The coins were seized at the home of the potential seller and stored by the seizing public authority. Of course, the potential seller objected and asked the courts for the seizure to be lifted and the coins returned to him. The seller’s lawsuit was successful.¹⁵ The courts discussed first the competence of the seizing authority and finally came to the conclusion that there was no suspicion of dealing in stolen goods (*Hehlerei*, according to § 259 of the Criminal Code), that no owner has been discovered, asking for the return of the objects, and that the objects can also be held by the potential seller but with a prohibition on selling the objects.

c) Stolen in a Member State of the European Union

ca) Bronze helmet

An ancient bronze helmet (about 8th/7th century B.C.) was part of a German art collection. According to Italian authorities, including the special Italian police for cultural property (*Comando Carabinieri per la Tutela del Patrimonio Culturale*) and the Italian Ministry (*Ministero per i Beni e le Attività Culturali*), the helmet was illegally excavated in July/August 1993 in Southern Italy (Regione di Puglia, Provincia di Foggia, comune di Ortona), smuggled to Germany and sold to a German collector for more than a million German marks. After having asked Germany in 2003 for international assistance in criminal matters and after the helmet had been deposited with the *Stiftung Preussischer Kulturbesitz* (Prussian Cultural Heritage Foundation) in

¹³ OLG Frankfurt/Main 4.2.2013, file 16 U 16/11, unpublished.

¹⁴ Kind information by Dr. Michael Müller-Karpe, Römisch-Germanisches Zentralmuseum Mainz, of 27 February 2013.

¹⁵ Verwaltungsgericht Gießen 6.5.2010, [2011] Kunst und Recht, 125, confirmed by Hessischer Verwaltungsgerichtshof 4.7.2011, [2011] Kunst und Recht, 124.

Berlin, the Republic of Italy initiated a law suit against the Stiftung, the state of Berlin and the heirs of the deceased collector in 2008, asking for the recovery of the helmet according to the German statute implementing the European Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State [1993] OJ L74 of 27.3.1993.¹⁶ The claim failed because the plaintiff did not meet the intricate requirements of the German statute with respect to registration of cultural objects and to time limitations.¹⁷ Why did the plaintiff not rely on his title and start a recovery law suit based on replevin? This had also struck the *Verwaltungsgericht Berlin*, and the administrative court mentioned at the end of the judgment that the implementing statute does not exclude a replevin claim in civil law courts.¹⁸

c b) Golden coin

Another case also concerns a coin of allegedly French origin. The golden coin, 'Claudius II Gothicus', was, supposedly, part of a treasure transported in an ancient ship which was discovered and looted by coral fishers in the 19th century off the coast of Corsica.¹⁹ In numismatic circles the treasure trove is known as the 'treasure of Lava'. The bay of Lava is north of the Corsican capital Ajaccio. In 1958 the coins were described for the first time and in 1986 the French police seized some of them (63 coins), knowing that many more coins had been discovered and must have been sold illegally, because the treasure trove of Lava is a national monument, state property and as such unmerchantable (*domaine publique*). On 10 January 2007 the golden coin 'Claudius II Gothicus' was sold at a public auction in New York to a Swiss collector and, on 12 March 2010, the coin was to be sold at auction by the plaintiff (auction house) in Osnabrück in Germany for the Swiss collector as the commissioning owner. Before this happened, the *Tribunal de Grande Instance de Marseille* asked Germany for international assistance in criminal matters and for attachment of the coin to be returned to France as part of the national patrimony which should not be exported or removed from France. The coin was attached and deposited with the competent Central Authority in charge of the administration of European cultural objects, the Ministry for Science and Culture in Hannover Lower Saxony. On 12 March 2010 the plaintiff sold the coin for € 54,000 under the condition that the French claim would be turned down. After the attachment had been discharged, the plaintiff (coin dealer) brought a lawsuit against the Central Authority in Hannover asking for damages because of wrongful attachment. This claim was successful because the French claim for recovery of the coin could not be based on the German implementation statute.²⁰

This case is interesting because a French claim based on ownership of a stolen object might have been successful. In France no bona fide purchase is possible because of the unmerchantable quality of the coin; in New York there is no bona fide purchase under New York law at all; in

¹⁶ Kulturgüterrückgabegesetz (KultGüRückG) of 18 May 2007, Bundesgesetzblatt 2007 I, pp. 757, 2547.

¹⁷ Verwaltungsgericht Berlin 9.12.2010, [2011] Kunst und Recht, 155.

¹⁸ Verwaltungsgericht Berlin (n 17) 159.

¹⁹ Claudius II Gothicus was Roman Emperor from 268-270 A.D. He was the first of the 'soldier-emperors'.

²⁰ Verwaltungsgericht Osnabrück 17.5.2011, file I A 187/10, unpublished.

Switzerland the time of prescription (Ersitzung) had been extended in 2005 to thirty years (Article 728 1^{ter} ZGB) and in Germany time of prescription is ten years (§ 937 I BGB).

2 Privately Owned Cultural Objects Illegally Exported

One case may be mentioned; that of a painting by Tiepolo in the Niedersächsisches Landesmuseum in Hannover. A curator of the museum acquired the bozzetto 'Il miracolo di Sant'Antonio' under very dubious circumstances and finally the museum had to return the bozzetto to its French owner. The German court dismissed the defence of purchase in good faith.²¹

III Solutions

Most of the examples just mentioned deal with archaeological discoveries and archaeological objects. They were excavated by laymen or found by metal detector enthusiasts and never reported to the competent antiquities authority. Professional or amateur tomb robbers never excavate carefully or pay attention to the context and thereby lose the important data which this context and the provenance of the object can give us.²² The context is lost for ever. Archaeological objects are thus unique; tomb robbery should be fought and the trade in antiquities carefully supervised and regulated. Private parties, the dealer themselves and the state can also help to stop this very serious misbehaviour.

1 Criminal Proceedings

In many cases legal proceedings started with an attachment of the object and criminal investigations against the person in possession of the stolen or illegally excavated or obtained object.

a) Indictment of the person in possession

aa) Charge of handling stolen property

Lawyers generally try to press charges against the person in possession of the object of handling stolen goods (*Hehlerei*: § 259 of the German Criminal Code). So far no German art dealer has ever been accused of this crime because there was no evidence of anyone knowingly 'enriching

²¹ Oberlandesgericht Celle 17.9.2010, GRUR-RR 2011, 24, reversing LG Hannover 11.1.2008, *Kunstrechtsspiegel* 03/2010, 128. See also Kurt Siehr, 'Zur Rückgabe gestohlener Kunstwerke. Zur Entscheidung des OLG Celle vom 17.9.2010 und zum Grazer/Salzburger Vorentwurf für ein Europäisches Zivilgesetzbuch Buch VIII' [2012] 1 *Bulletin Kunst & Recht*, 6-15.

²² Wolf-Dieter Heilmeyer, 'Schutz archäologischer Kulturgüter aus der Sicht der Archäologie' [1996] 95 *Zeitschrift für Vergleichende Rechtswissenschaft* 117-126, 117-120. Berliner Erklärung zu Leihgaben und Neuerwerbungen von archäologischen Objekten durch Museen (1988) Präambel Nr. 2, in Wolf-Dieter Heilmeyer, J. Cordelia Eule (Hrsg.), *Illegale Archäologie?* (Weißensee Verlag 2004, Berlin) 227.

himself or anybody else' by handling stolen objects. In the United States it is easier to be convicted of handling stolen property²³ because the National Stolen Property Act is violated by possessing stolen goods 'knowing the same to have been stolen'.²⁴

ab) Confiscation of stolen object/safe haven

If a person in possession of stolen goods cannot be convicted because of absence of guilt, the stolen goods might be seized and taken according to § 73 of the German Criminal Code. This paragraph provides that 'anything obtained in order to commit' the crime can be seized and confiscated.²⁵ Can the stolen object also be seized if the person in possession of it has been acquitted? Two questions have to be answered: is the confiscation a sort of punishment, which presupposes guilt of the person acquitted; and does the owner of the stolen objects, even if still unknown, take priority under § 73 (1) sentence 2 of the German Criminal Code?

(1) Without going into details, the confiscation of the stolen object is not part of a punishment and therefore does not need any guilt. It is a preventive measure and can be ordered without the person in possession being found guilty.²⁶

(2) The other problem pertains to the third party who may have a private claim against the person in possession for restitution of the stolen object. If it is clear that the object has been illegally acquired and neither any state nor private person raises a claim for restitution, the object should be seized and confiscated²⁷ and deposited with a museum classified as a safe haven. The confiscation, according to § 73e (1) sentence 2 of the German Criminal Code, does not affect 'the rights of third parties'.

(3) Such procedure is only possible if 'safe havens' for cultural property of unknown or endangered property are established in Germany. A scheme for such institutions has been drawn up by the International Law Association Committee on Cultural Property²⁸ and may be copied or varied by national institutions. I am sure that many German museums will be happy to hold such items in trust for the unknown owner and preserve them under optimal conditions.

²³ *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), cert. denied 540 U.S. 1106 (2003).

²⁴ National Stolen Property Act, 18 United States Code Annotated § 2315 (1) (2000 with Cumulative Annual Pocket Part 2012).

²⁵ § 73 (1) German Criminal Code reads in English translation: 'If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the confiscation of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.' Translation of Michael Bohlander, *The German Criminal Code. A Modern English Translation* (n 8) 75-76.

²⁶ See case law mentioned by Thomas Fischer, *Strafgesetzbuch und Nebengesetze*, (57th edn, CH Beck 2010, Munich) § 73 StGB, marginal note 4.

²⁷ Fischer (n 26) § 73 StGB, marginal note 19.

²⁸ Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material, in *The International Law Association (ed), Report of the Seventy-Third Conference held in Rio de Janeiro 17-21 August 2008*, (International Law Association 2010, London) 380-388.

b) Request for international assistance

In some of the cases mentioned above, international assistance in criminal matters has been requested by the state in which the objects had been stolen. This assistance is granted by application of international conventions such as the European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,²⁹ and of national law on international legal assistance. In such proceedings, based on theft, the person in possession of the stolen object has to prove his bona fide purchase and if he does not succeed, the object is returned to the person, victim of theft or illegal excavation.³⁰ If the request is based on the crime of illegal export only, the same may happen in these assistance proceedings as in the administrative law proceedings (infra C II).

2 Proceedings for Return of Illegally Removed Objects

a) Administrative proceedings

In German law the claim for return of illegally removed or exported cultural property has to be brought in administrative law courts [§ 13 (1) KultGüRückG]. The proceedings are limited to these claims and the administrative law courts have no jurisdiction to decide matters of private law claims based on the restitution of stolen objects based on ownership. There are several other disadvantages often not appreciated by attorneys engaged in return proceedings. A return claim because of illegal export and import has to fulfil several strictly interpreted preconditions of registration as cultural objects at home and in Germany and rigid time limitations. It is often better to rely on lawsuits in courts of civil jurisdiction and to rely on them for claims of restitution based on replevin and similar remedies.

b) Summoned persons

Even in administrative law proceedings, third parties with an interest in the proceedings may be summoned and take part as *'Beigeladener'* in the proceedings.³¹ In the proceedings concerning the three bowls of allegedly Turkish origin, the defendant could have asked the court to summon the Turkish government to join him in his defence.

²⁹ *European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* opened for signature 8 November 1990, ETS No 141 (entered into force 1 September 1993) German BGBl. 1998 II 520; Austrian BGBl. 1997 III Nr. 153; Swiss SR 0.311.53.

³⁰ OLG Schleswig 10.2.1989, NJW 1989, 3105 = IPRspr. 1989 Nr. 75 (Greek coins illegally excavated in Greece and smuggled to Germany); Swiss Federal Court 1.4.1997, BGE 123 II 134 = Praxis 1997, 899 (theft of a painting in France and sold to a Swiss collector of Geneva who was held mala fide).

³¹ See § 65 of the German Code of Administrative Law Proceedings (Verwaltungsgerichtsordnung). See also Konrad Redeker, Hans-Joachim von Oertzen (Hrsg.), *Verwaltungsgerichtsordnung* (15th edn, Kohlhammer 2010, Stuttgart) § 64 VwGO marginal note 11.

3 Proceedings for Restitution of the Object

On very many occasions, a civil law procedure is the best remedy to be pursued by the owner of a cultural object. This remedy is neither excluded by the request of international legal assistance nor by the European Directive 93/7/EEC and the national implementation statutes [see, e.g. § 13 (6) German KultGüRückG], nor by the Unidroit Convention [Article 9 (1) Unidroit Convention].

a) Bases of claim

In civil law countries, the basis of the claim is the so-called *rei vindicatio*, i.e. the claim in rem of the owner of an object against a person in possession without title for restitution of the object. In cultural property trials, the plaintiff has to prove and give evidence that:

- (1) the object originates in the county of the plaintiff,
- (2) it has been stolen or – what is the same – illegally excavated without government approval,
- (3) the excavation took place after entry into force of the patrimony law of the county where the object originates.

In common law countries the basis of the claim for restitution is the tort claim of *replevin*.

b) Illegal excavated objects are stolen objects or objects which 'became missing'

According to German property law, a person not entitled to transfer property may however transfer ownership of certain goods. Two kinds of movable objects have to be distinguished: entrusted goods (*anvertraute Sachen*) and objects which became missing ('...*Sache, die [dem Eigentümer] gestohlen worden, verlorengegangen oder sonst abhanden gekommen war*' § 935 I BGB). As in Switzerland, which basically follows the same system, there is no third possibility or category.³² Illegally excavated objects in a country where all archaeological objects are state property, are to be qualified as missing (*abhanden gekommen*) because they have not been 'entrusted' to the looters by the state as owner, but the state is going to punish the looters because of unlawful appropriation (*Unterschlagung* according to § 246 of the German Criminal Code).³³ In order to be covered by the prohibition of § 935 I BGB, objects need not be 'stolen' and, as can

³² *Berner Kommentar zum Schweizerischen Privatrecht* (- Emil Stark), Sachenrecht IV/3, Teilband 1: Der Besitz Artikel 919-941 ZGB (3rd edn, Stämpfli 2001, Bern) Artikel 934 ZGB, marginal note 2: 'es gibt keine dritte Möglichkeit'; *Basler Kommentar Zivilgesetzbuch II* (- Wolfgang Ernst), (4th edn, Helbing Lichtenhahn Verlag 2011 Basel) Artikel 934 ZGB, marginal note 4: 'Eine dritte Möglichkeit besteht nicht'

³³ Kurt Siehr bei: Klaus Ebling, Marcel Schulze (Hrsg.), *Kunstrecht* (2nd edn, CH Beck 2012, Munich), 226 marginal note 136; id, *Rechtliche Probleme der Archäologie: Archäologisches Nachrichtenblatt* 12 (2007) 326-341 (329). The comprehensive commentaries of the BGB and the treatises of German Sachenrecht do not mention this case expressly: *Münchener Kommentar zum BGB* (- Oechsler), (5th edn, CH Beck 2009, Munich) § 935 BGB, marginal notes 3 – 8, *Staudinger* (- *Wiegand*), *Kommentar zum BGB mit Einführungsgesetz und Nebengesetzen, Neubearbeitung* (CH Beck 2004, Munich) § 932 BGB, marginal notes 132-133; § 935 BGB, marginal note 18; Baur, *Stürner, Sachenrecht* (18th edn, CH Beck 2009 Munich) § 52 E; Westermann, Gursky, Eickmann, *Sachenrecht*, (8th edn, C. F. Müller 2011 Heidelberg) § 49; Wieling

be seen with 'lost' objects, possession of the owner at the time of 'Abhandenkommen' is unnecessary. As soon as it has been shown that the objects have become missing, the presumption of title provided by § 1006 I 2 BGB no longer works in favour of the person in possession of the object.

c) Longer time limitations

In claims based on ownership there are fewer strict time limitations than in claims for return of unlawfully removed objects. Claims of restitution expire rather late if at all,³⁴ and the period for bona fide *usucapio* (*Ersitzung*) is also quite long.³⁵

d) No listing in registers

Ownership is protected in all countries without the necessity of being registered in the country of origin or elsewhere. The strict rule on documentation of national objects which need an export licence in their home country is not necessary if the claim is brought in civil law courts based on ownership of the removed object.

e) Interpleader (§§ 75, 76 ZPO)

In civil proceedings brought by the art dealer against the person in possession of the cultural object, the defendant may interplead the owner of the object to join the proceedings and take over the position as defendant.³⁶ In this way the interested country may join the fight for illegally taken cultural property rather early.

4 Where there is no complaint there can be no plaintiff

The result is that, in all proceedings, there has to be a plaintiff asking for the protection of cultural objects. If the country of origin is unknown and no steps were taken by criminal courts to attach

(Springer 1990, Berlin) § 10 V; Jan Wilhelm, *Sachenrecht*, (4th edn, De Gruyter Rechtswissenschaften Verlags 2010, Berlin) marginal note 960 et seq. - Also, in the United States, objects illegally excavated in a country with patrimony laws have been qualified as 'stolen' within the National Stolen Property Act: *United States v. Schultz* (n 6).

³⁴ They expire according to the German Statute of limitations in 30 years (§ 197 I No. 1 BGB) and in Swiss law they do not expire at all: Federal Court 15 2.1922, BGE 48 II 38 (Quadri c. Hôtel Brissago).

³⁵ In Germany ten years (§ 937 I BGB) and in Switzerland thirty years (Article 728 § 1^{ter} ZGB).

³⁶ § 76 I German Code of Civil Procedure (ZPO) reads in English translation: 'A person sued as possessor of property, the possession of which such person asserts on the basis of a legal relationship of the nature designated in § 868 of the Civil Code, may, prior to the hearing in the principal proceedings, move, by filing a pleading in which he or she names the mesne possessor and by joining such mesne possessor, move for the subpoena of such mesne possessor for the purpose of a declaration. Until such declaration is made or until the expiration of the session at which the person named is to make such declaration, the defendant may refuse to participate in the principal proceedings.' Translation by Charles E. Stewart, *German Commercial Code & Code of Civil Procedure* (Dobbs Ferry 2001, New York) 206-207.

and store the objects in a safe haven, the objects will be left with the dealer and enter into the market of stolen, looted and illegally exported cultural treasures.³⁷

IV Summary

1. In former times, foreign public law (including foreign export prohibitions), were not enforced in local courts of private law jurisdiction. This has been changed by several international instruments: the 1970 UNESCO Convention, the EU Directive of 1993 and chapter 3 of the Unidroit Convention. The state parties to these instruments have to enforce the export/removal prohibitions of other state parties.

2. International instruments are often compromises between state parties with very different interests, and provide obstacles and conditions for return proceedings, such as listing requirements and time limitations. Even so, plaintiffs rely on these instruments and pursue their return claims by invoking these instruments and their national implementations.

3. As these return claims of states are of public law nature, the return claims have to be lodged with administrative courts in some countries (e.g. in Germany), but the jurisdiction of these courts is limited and does not extend to claims of restitution of stolen property.

4. As many illegally exported/removed cultural objects are also stolen objects, plaintiffs are better off by filing their claim for restitution in civil law courts and ask for the restitution of their property. With respect to property there are no listing requirements and suits may be brought within much longer time periods, sometimes with no time limitation at all. These normal claims based on *rei vindicatio* of ownership are not excluded by international instruments for the return of illegally exported/removed cultural objects. This remedy seems to be the best in many cases.

5. The interested country has to be active and should not rely on any proceedings by the requested state. In civil proceedings this state may be impleaded if not a party to the proceedings.

6. Criminal law remedies, either requests for international assistance or criminal law proceedings, should only be instituted if the objects can still be seized in the possession of the thief or the prosecuted person.

7. With regard to cultural objects of unknown provenance, there is no country of origin which could ask for restitution or the return of the object. States should provide a 'safe haven' for these cases, where the objects may be held in trust for the still unknown owner.

³⁷ This happened with the SEVSO treasure: *Republic of Croatia v. Trustees of Marquess of Northampton 1987 Settlement*, 648 N.Y.S.2d 25 (Sup. Ct. 1996).