Cultural Property Displaced during the Second World War – The Situation with regard to Germany

Ladies and Gentlemen,

the following remarks only aim at giving, from a German viewpoint, the broad outlines of the very complex problem of restitution of cultural objects displaced during the Second World War and in the same time I would like to point out some basic lines of development.

During and immediately after the Second World War huge amounts of cultural property were taken away from their private or public owners and exported from the territory they were situated in at the outbreak of the war. Germany is at the centre of this immense movement of cultural objects. On the one side, Germany was responsible for an enormous art looting carried out in the occupied countries by authorities as the ERR, the Einsatzstab Reichsleiter Rosenberg, on the other side, Germany became itself victim of taking of cultural property performed by representatives of the then Soviet Union, the so called Trophy Commissions. Besides these official acts of art looting sanctioned by the belligerent states, there was a lot of private looting by individual soldiers committed by members of all the armies involved in the war.

All these facts give reason to contemplate the principle of restitution, its practical realization and the legal regulations forming the basis of the restitution efforts immediately after the war and of the solution of the contemporary problems. Until today, the restitution question with regard to the Second World War has not completely come to an end. On the contrary, the end of the Cold War and the breakdown of the Soviet Union has opened new possibilities to further the task of restitution, which since then has taken on a whole new dynamism. A fresh impetus came from the Holocaust debate which has become anew an important subject of
international and national affairs, and from the efforts to moralize the art market in connexion with the fight against art theft and illegal excavation.

At the same time, the problem of restitution with regard to Germany after the Second World War is both factually and legally extremely complex. Restitution applies for a multitude of different factual situations regulated by different legal norms. I would like to emphasize two aspects of this whole complex. Firstly, the sphere of interstate-relations regulated by Public International Law, secondly, the problems caused by the art market and the acquisition policy of collectors and museums and situated in the realm of Private and Private International Law.

As far as Public International Law is concerned, Germany plays two different roles. It is as a debtor nation obliged to restitute objects taken by itself during the Second World War and at the same time claims restitution of displaced objects of German origin.

With regard to the first aspect, the German obligation to restitution, it is to be noted, that the Allies took over the control over all cultural objects situated in Germany. Looted art objects of the countries occupied by Germany as well as German objects that could be used for eventual reparations or restitution in kind claims were seized and safeguarded. Partly, the objects were hidden in salt mines and castles. A great mass of objects, assembled in so called Central Collecting Points, had to be inventoried, identified and physically secured before they could be given back to the States of origin. As a consequence of the immense efforts of the Allies the greatest part of the Nazi art loot could be restituted immediately after the war.

The second aspect, the German claims to restitution, concerns on the one hand the relationship with Russia and the other successor States of the Soviet Union, on the other hand the relationship with Poland. Here the difficult problem of restitution in kind or compensatory restitution as it is called in Russia is of importance, with regard to Poland problems resulting form the state succession concerning former German territories and affecting especially, but not exclusively the archives of these territories are to be added. I don’t want to discuss here
again the problem of the legal consequences of the violation of rules of warfare concerning
cultural heritage and especially restitution in kind, but would like to confine myself to some
remarks concerning the situation as it now appears to be.

With regard to Russia the restitution process is on the whole blocked, with the exception of
some specific cases. This is due to the restrictions of the Russian Law of the Displaced
Objects. The situation is more favourable with regard to the other successor States of the
former Soviet Union, where restitution in greater extent could be realized, e.g. with regard to
Georgia and the Ukraine. Also in a stalemate are- as far as I know – the restitution
efforts with regard to Poland.

This political standstill of the restitution process has caused great dissatisfaction in some
circles and brought private initiatives in the arena. They promoted the idea of a foundation.
According to these plans the disputed objects should be brought into a foundation commonly
owned and administrated. But opposition against this idea raised immediately and I doubt
myself whether this can be a workable model for a solution of this thorny issue. I really fear
that the idea of a foundation is well-meant, but politically naïve, psychologically wrong and
legally questionable.

Whereas there has not been much development in the sphere of interstate relations, fare more
progress has been made in the area of the art market and museums exhibitions. The situation
that the owner of an art object looted during the war tries to achieve the return of the object by
laying claim against the possessor before the civil courts of the country of the object’s
location is gaining importance. This affects all the different categories of owners, the State
and private individuals, museums as well as collectors, if objects looted during the Second
World War appear on the art market or in museums exhibitions. This is the more so as today
the customs of the art market are undergoing changes due to the constraint to a more moral
behaviour.
Whereas until now we were in the realm of rules of Public International Law, here rules of Private and Private International Law become decisive and the same problems as generally caused by the international art market occur. The owner who lost his property in the war stands here besides the owner deprived of his artworks by theft and ensuing illegal exportation or the owner whose property was looted by the own State as in the revolutionary SU or in the Holocaust. It is an interesting, yet open question whether specific rules for the different categories of cases are being developed and in which extent they are desirable de lege ferenda.

From the point of view of private law, two main questions are to be discussed. Those are the issue of choice of law and the far more important substantive problem of eventual loss of ownership by a bona fide acquisition or statutes of limitation or prescription. The development of substantive private law in order to combat the illegal international art market is in part international – important examples are the Unidroit-Convention of 1995 and the EU-Directive of 1992, but it is also effective in national law, if for example statutes of limitation with regard to art objects are questioned in national private law. Interestingly, in the case City of Gotha v. Sotheby’s/Cobert Finance S.A., a limitation was held to be against English ordre public. If accepted at all, limitation periods in art restitution cases are very long and start only if the owner knew or should have known about the location of the object.

In consequence of this legal development, also the protection of good faith is diminished by introducing a higher standard of diligence and the use of means of publicity for stolen objects. Good faith must now be proven instead of being presumed and gives only the right to a just compensation.

The case law in this area is rapidly growing but the development has yet not come to an end. The decisions of courts are still contradictory. Especially a uniform treatment of holocaust cases with the exclusion of Statutes of limitation and bona fide acquisition is not yet generally accepted. However, the development of Private and Private International Law in the context
of Holocaust and art theft cases points in the same direction as and is in complete harmony with the rules of Public International Law.