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THE NICOSIA CONVENTION: A CRIMINAL JUSTICE RESPONSE TO OFFENCES RELATING TO CULTURAL PROPERTY

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SESSION II - SESSION II. CHALLENGES OF CULTURAL HERITAGE IN CONFLICTS

Register of damage caused by the aggression against Ukraine under the auspices of the Council of Europe

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It is a great honour to be a part of the participants of this Conference and I would like to welcome the experts, representatives of the authorities, academia, international organisations, NGOs and the organisers of this meeting. I would also like to **express gratitude** to the Latvian authorities for paying particular attention during its Presidency of the Committee of Ministers to the issue of the protection of cultural heritage and the prevention of illicit trafficking, damage, and destruction of cultural property, notably through the criminal justice dimension. It is sad that in view of ongoing full-scale war in Ukraine the Nicosia Convention is especially relevant and thus the topic and the discussions during this conference. In this respect it is important to note that the Council of Europe strongly condemned Russia's war of aggression against Ukraine in 2022. **In particular, on** 16 March 2022, the Committee of Ministers decided to exclude Russian Federation from the Council of Europe as a result of its aggression against Ukraine and as constituting a serious violation by the Russian Federation of its obligation under Article 3 of the Statute of the Council of Europe and under international law.

As a result of expulsion from the Council of Europe, Russia's participation in the European Convention on Human Rights also ended as from 16 September 2022. The expulsion from the Council of Europe and eventual lack of jurisdiction of the Strasbourg Court over Russia's liability for gross and serious human rights breaches underlined gaps in international accountability of Russia notably with respect to committing the crime of aggression itself as well as in responsibility for damage caused by such aggression. This issue had been underlined on many occasions by the Parliamentary Assembly of the Council of Europe and Committee of Ministers, which identified the need for reparations for injuries caused to Ukraine on several occasions and, most prominently on 14-15 September 2022, to establish the Register of damage caused by the Russian Federation aggression against Ukraine.

However, on 12 May 2023, by the Resolution Committee of Ministers /Res(2023)3 the Committee of Ministers established the *Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine*, and adopted a Statute of the Register of Damage. This Resolution and the Statute had been endorsed at the Summit of the Council of Europe Heads of State and Governments in Reykjavik, where it became public. **Essentially, the Resolution of the**

Committee of Ministers, in its preamble, condemns all violations of international law, including gross and serious breaches of international human rights law and international humanitarian law, **in particular attacks against civilians and civilian objects, including** civilian infrastructure, **cultural and religious heritage** and the environment of Ukraine, and convicted of the exigent necessity to ensure comprehensive accountability on the context of the Russian Federation aggression against Ukraine.

In this respect, the Secretary General of the Council of Europe on several occasions noted that the Council of Europe should play a prominent role in establishing the Register, bearing in mind its extensive legal ecosystem and based on the victim-centred approach, meaning that humanitarian claim of specific urgency and claims of persons with special vulnerability should be treated in priority.

It is to be recalled in respect of our discussion today that the Council of Europe legal framework includes notably:

- the treaties under its auspices and
- the "soft law" developed by the standards setting and monitoring bodes, but most essentially the legal framework developed under the auspices of the European Convention of Human Rights,
- the Strasbourg Court's extensive jurisprudence on reparations for human rights breaches and on remedies as well as redress offered via the process of execution of judgments, notably compensation schemes under the Council of Europe auspices,
- these are aimed at three most important components of responsibility of states for internationally wrongful acts: (1) *restitutio in integrum* (2) cessation (3) non-repetition as measures and consequences of state responsibility.

Nevertheless, in the speech today I would like to refer to the following elements:

1. outline some of the principles established in the case-law of the Court vis-à-vis the protection of cultural and religious heritage as well as note the practice of the Committee of Ministers with respect to execution of judgments on measures aimed at reparations and remedies.

2. I will then come to conclusions as to what kind of strategy could be potentially developed with a view to providing reparations for damage inflicted on cultural property and objects of arts and culture.

At the outset, I would like to note that the **PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS** regarding the issue of the protection of cultural heritage is not very extensive.

In most of the cases the Court looked at this issue through the prism of liability for interference with property rights, of essentially private nature, i.e. it looked into the balance of general interests of the State against the issues of private ownership, applying the proportionality and balancing test with respect to various forms of interference with privately owned cultural property and objects. [The cases with inter-state elements do not provide sufficient basis for this discussion either].

For instance, it looked into the instances of expropriation of property and stated that:

- Cultural property or cultural heritage could be expropriated only in the general or public interest, for instance in the interests of **preservation of the historical, cultural and artistic roots** of a country, region and its inhabitants.[1]

- There are specific categories of cultural property, which are addressed in the case-law of the Court – notably **public monuments** were **frequently physically unique** and **formed part of a society's cultural heritage** (e.g. *Handzhiyski v. Bulgaria* (no. 10783/14, judgment of 6 April 2021)).

- However, any expropriation or any interference with the right to the peaceful enjoyment of possessions must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

- Compensation terms are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicant.

- **Legitimate "public interest" aims**, such as those pursued by measures for the conservation of a country's historical or cultural heritage, **may call for less than reimbursement of the full market value of the expropriated properties**.

- **In context of requests for restitution of property**, the claimants would need to show that such property existed and that it was confiscated indeed (see, *Kopecky*

[1]. see, Kozacioglu v. Turkey (2335/03, §§53-54), *Beyeler v. Italy (GC) (33202/96*, § 112); *SCEA Ferme de Fresnoy v. France* (dec.), no. 61093/00, ECHR 2005-XIII ; and *Debelianovi v. Bulgaria*, no. 61951/00, § 54.

v. Slovakia (GC), no. *44912/98*, judgment of 28/09/2004) **and the authorities would need to show that confiscation measures had lawful basis, their unlawfulness results in damages of pecuniary and non-pecuniary nature** (as discussed, for instance, in the case of *Vasilescu v. Romania* (no. 27053/95, judgment of 25 May 1998).

- **Similarly, in the case of *Beyeler v Italy (GC)* (no. 33202/96, judgment of 5 January 2000),** concerning the Vincent Van Gogh, "Portrait of a Young Peasant", which Mr Beyeler bought in 1977 for 600 million lire (EUR 310,000) through an intermediary without, however, disclosing to the vendor that the painting was being purchased on his behalf.

- In this interesting case, the Italian authorities, using their pre-emptive rights, five years after the purchase, declared that applicant could not claim right to possession, because his purchase was void, notably due to failure to declare the purchase of a work of art to the Italian authorities.

➢ The European Court of Human Rights declared that *even though the control by the State of the market in works of art was a legitimate aim for the purpose of protecting a country's cultural and artistic heritage*,

  • applicant had been owner for length of time
  • in national proceedings Italian authorities had treated and declared the applicant as owner of painting
  • applicant was owner between time of purchase and date of exercise of pre-emption (applicant had substantive interested that was protected under the convention).

➢ The Court awarded EUR 1,300,000 in compensation for the damage, including ancillary costs and costs incurred before the domestic courts.

The experience above will be useful in defining circumstances of lawful taking of objects of cultural property that would reappear through the black market on the worldwide markets, with the aim of returning these objects back to Ukraine.

It would also allow building a clear framework for legality of work on reparations for destroyed, appropriated, stolen or looted objects of cultural property.

As regards execution of judgments and cultural objects and property.

It is suggested that the measures [of implementation / execution of judgments] suggested above are: *restitutio in integrum*, cessation and non-repetition. They are useful to guide the operation of the Register.

In many instances we cannot compensate for the value of the destroyed object of culture or heritage, either movable or immovable, thus more measures than just compensation, if restitution especially is impossible, would be required.

Also, measures aimed at reparations for the community, either a wider nation-wide community or local communities or social / ethnic groups would have to be taken to restore, compensate or substitute, at least to the possible extent, for the losses caused to the cultural objects and heritage.

Thus, cessation of on-going destruction of cultural objects, based on legal demands, coherent preventive measures appear to be important, just like measures aimed at non-repetition of such acts, notably through extensive practical measures.

And now, finally some concluding remarks.

At the outset, one has to note that the criteria referred to above, as regards the basis for interference, its legitimacy and lawfulness, the necessity to be guided to act in the public interest or general interest with respect to cultural objects and property could be applied not only to those objects looted and stolen and eventually found by the law enforcement or other authorities with a view to their return, but also these can be applied by analogy to the cultural possessions, in a wider sense, owned or administered by the State, state-owned institutions or entities.

Similarly, these standards could be applied to the private persons, as human rights law envisages enforcement of same rules and principles via its horizontal or *drittwirkung effect*.

However, in a situation of the aggression of Russia against Ukraine, we cannot find any legal basis or any justification for interference with cultural objects and property, cultural and religious heritage, objects of arts, movable and immovable art objects.

They essentially and inarguably belong to the non-military infrastructure and objects that are not military targets during the armed conflicts, neither they are legitimate targets for any acts amounting to taking of such objects, not even mentioning clearly illegal acts of their damage or destruction.

Thus, even though it might seem that we are essentially, in an area of legal chaos and arbitrariness, this is not totally true as international law provides avenues for reparation and redress, even for such serious damage and losses incurred to the victim state from the aggressor state. In this sense, the Register of damage serves as useful tool and first step in establishing full fledged international compensation mechanism for Ukraine, which could aim to resolve some of the issues we discuss today.

Firstly**,** case-law of the Court as to legitimacy, lawfulness and proportionality of interference with private property is useful and gives an indication for framework of legitimacy and lawfulness in operation of the Register and potentially the future compensation commission.

Secondly**,** evaluation methods for damages and losses, from the point of view of Article 1 of Protocol No. 1 – it is difficult to repair the damage caused by expropriation of cultural objects, their destruction or disappearance, especially for those having historical and cultural value, via their close connection to history, culture, identity of Ukraine and the Ukrainians, by means of financial compensation only.

Reparation in form of compensation would mean that we would have to know the [economic/financial/pecuniary and non-pecuniary] standing of cultural objects at the moment of their illegal taking, destruction, etc.

This approach would most possibly require some form of their evaluation, their cost on the arts or culture market, whenever it would be possible to establish such cost, could be an indicator for some and for some it would be impossible to establish that value unless the object is returned, restored or renewed in its “foundational status”.

Also, measures of reparations should be made to communities, ethnic or religious groups, to which these cultural objects are of value, so we are largely speaking about some forms of restorative reparations – aimed at lessening the suffering and losses caused to the communities as a whole.

It does appear that restitution should be a primary method of reparation, whenever possible. However, other damages relating to the restoration, upkeep, related damages for transportation, re-installation, etc. should be also foreseen.
Additionally, the obligation of cessation and non-repetition are important requirements stemming from the responsibility of states for internationally wrongful acts, clearly established as a foundation for work of the Register of damage.

Thirdly**,** it appears that the Register could provide a platform for registration of cultural property claims, again for the purposes of full reparations.

The next steps to ensure such registration of damage to objects of cultural value and heritage, would require decisions as to what kind of objects are we speaking about primarily, their categories, etc. – elements to be still established, in cooperation with the Ukrainian authorities and with assistance and expertise of international community, other stakeholders, including possibly a Committee of the Nicosia Convention.

In conclusion, it is important to underline that the Register is the first step in the setting up of the International Compensation Mechanism.

This mechanism should, thereafter, establish procedures and rules for examination and adjudication of claims concerning damage, for establishing procedures of redress and for providing funds / assets / objects restitution. This work should definitely cover the issues we discuss today.

Looking forward to closely collaborating with the Ukrainian authorities, the Latvian Chairmanship and the Nicosia Convention Committee in this respect.

Thank you.