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THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

First of all, I would like, on behalf of Professor Herbert Kronke, Secretary General of UNIDROIT, to thank the organisers for the convening of such a Regional Meeting on Illicit Trafficking in Cultural Goods.

Let me explain, for those not familiar with the organisation I represent, that UNIDROIT is the acronym for the International Institute for the Unification of Private Law. It is an intergovernmental organisation based in Rome, founded as long ago as 1926. It has 60 member States from all four corners of the world and its fundamental objective, in the word of the UNIDROIT Statute, is to "examine ways of harmonising and co-ordinating the private law of States ... and to prepare gradually for the adoption by various States of uniform rules of private law".

Illicit traffic in works of art is by no means a new phenomenon, nor is it confined to any particular part of the world. As a form of crime it is, however, expanding rapidly world-wide, and the emergence of new factors such as the opening-up of new outlets and the growing demand in the newly affluent States, greater ease of communication and indeed, the remarkable increase in the value of works of art as a consequence of the influx of capital into the market bodes ill for any attempt to stem the tide, still less turn it.

While the urgency of the situation is universally acknowledged, the response in terms of human and financial input and legal protection has fallen far short of what is needed. National laws in the matter differ widely and this diversity is put to good use by traffickers, as is the limited (strictly national) territorial scope of the export bans set in place by individual States: the steps taken by one State to protect its works of art not applied by other States, no more than are their fiscal, penal or administrative rules, unless inter-State agreements have been concluded to the contrary.

We are briefly going to see, first, the issue of international claims for the return of cultural objects outside the framework of international conventions.

With illicit art traffic growing increasingly international in scope, the panoply of legal instruments to combat this scourge has grown apace. A turning point was reached at the end of the 1960s when the international community agreed on the need for ethical and legal principles to protect cultural property world-wide. The last thirty-five years have seen the adoption of a range of international legal instruments of bilateral, regional or universal scope, most of them adopted by the United Nations Organisation for Education, Science and Culture (UNESCO), and in particular the 1954 and the 1970 Conventions, further supplemented by new

rules – mostly of a non-binding nature – for use by those connected with the art trade.

We will then, more in detail, see the issue of international claims for the return of cultural objects within the framework of existing international instruments and in particular the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

International conventions in this field do not come from nowhere, they were necessary because of deficiencies of the common law of States. By common law here, I mean the law in force in each State in the absence of international instruments which govern the matter.

Common law is deficient mainly because it does not give the legal certainty due to the diversity of the national substantive laws.

We will start with the claim by the owner, victim of the theft. Historically it was the first question raised and, in common, the solution is the same whether we deal with an ordinary good or a cultural object. We will then examine the claim of a State for the return of an object illegally exported from its territory and there, there is a specificity of the cultural object.

INTERNATIONAL CLAIMS FOR THE RETURN OF CULTURAL OBJECTS OUTSIDE THE FRAMEWORK OF INTERNATIONAL CONVENTIONS

CLAIMS BY THE OWNER, VICTIM OF THEFT

We talk about a claim against an acquirer who bought the object from someone else than the owner and who is in good faith (if it was a claim against an acquirer in bad faith, there would be no problem, all States condemning bad faith acquirers).

The conflict is then between the dispossessed owner and the good faith acquirer.

The conflict is a classic one in domestic law, but which is regulated differently in domestic civil law by the various States.

- There are States in which the interests of trade prevail over the interests of the owner. Those States protect the good faith acquirer and Italy is an example (when the object enters the market, the acquirer is protected).
- On the opposite side, there are systems, as the English one, which protect the owner by permitting it to claim the object which was stolen to him and acquired by a third party. This is expressed for example by the fact that the time limitation given to the owner to claim the object – 3 years in the United States of America – does not start on the day of theft, but on the day when the owner is able to identify the acquirer. Having all the elements, the owner can bring its claim for return.
- Between those systems, we have for example the French one where, in case of theft, gives a time limit for the owner to claim the object of 3 years but, contrary to the American system, starting on the day of theft.

The owner must compensate the possessor of the price paid if the object has been acquired in the trade.

Without entering into the details of those civil law regulations, we can see that **the fact that there are so many differences shows the interest of the problem of private international law of determining which is the applicable law to the owner's claim.** As you saw, depending on whether it will be a law protecting the acquirer or the owner, the result will be totally different.

The issue here as far as legal characterisation is concerned, is the problem of ownership: who should be considered as the owner of the object, the dispossessed one or the acquirer? **From a legal point of view, ownership issues depend on the law of the place where the object is situated.** This solution is generally accepted by all laws, but, precisely when we talk about cultural objects which have been stolen, those objects are, by assumption, movable objects.

So the question arises of **at which moment in time** should the law be considered to be applicable? Should we examine the location of the object at the time of the claim and apply the law of this State? Or should we consider the time of acquisition of the object, or should we consider the time of theft? The object is moved from one country to another and there are various moments to consider. **The difficulty comes from the fact that national laws, in their private international law regulations, are not uniform as regards the moment to consider in terms of location of the object which will determine the applicable law.**

- First, there are States which mainly provide for the **law of the location of the object on the day of the claim.** It's a first system (ex. 1966 *Stroganoff-Sherbatov case* and 1968, *Koerfer v. Goldschmidt case*).

This link to the location of the object on the day when the claim is brought has been strongly criticised because, it was said, the sole transfer of an object from one country to another should not lead to a change of owner. This would in fact be too easy. It was said that as long as an object has been regularly acquired in a country, this right must subsist and must be recognised when the object is transferred in another country.

- This brings us to the second system which provide for the **law of the location of the object on the day of acquisition.** Those systems was applied by American and British courts in two well-known cases, *Elicofon* and *Winkworth*.

This second system lead to uncertain results even if, strictly legally speaking, it is absolutely logical. To ascertain whether an object has been regularly acquired, it is normal to consider the time of acquisition. But this system is very dangerous for cultural objects because it will be very easy for a thief to "wash" the stolen object by introducing it in a country where the trade is more protected than the owner.

- A third system has then been envisaged, that is to say the **law of the location of the object on the day of the theft.** This system has not really been applied by courts, but was supported by many authors.

This system has been proposed to give an international effect to the inalienability rules of certain cultural objects. If an object is considered as inalienable in a country and if the object is illegally exported or stolen and transferred in another country, if we apply the law of the location on the day of theft, we will have to recognise this inalienability rule (*Ciboire de Burgos case and the Joconde's theft case*).

CLAIMS BY A STATE IN THE EVENT OF AN ILLEGAL EXPORT

If the requesting State is the owner of the exported object, we go back to the situation just examined. The issue is interesting when the State is not the owner of the object but it claims the return on the basis of the export prohibition.

Here, in **common law**, there are obstacle to the claim for return. The **main obstacle** is a principle, largely admitted in comparative law, under which **a State cannot use its proper public law as the basis of an action it brings abroad when its claim amounts to exercise a state authority on a foreign territory**. This is not a private international rule, but a public international rule.

We have specific examples in the field of cultural objects, for example the famous case *Attorney General of New Zealand v. Ortiz et Sotheby* and in particular the *Danusso case*. In this latter case, the court of Turin (1982), Italy, has admitted a claim from the Republic of Ecuador. It concerned archaeological objects excavated in Ecuador, then illegally exported to Italy where they were bought by Mr Danusso. The Italian court said that even if the Republic of Ecuador was not the owner of the objects, it had, because of its legislation, a property right on the objects which could be recognised in Italy. But, to admit this solution which was contrary to the previous case law, the decision cited the 1970 UNESCO Convention.

This judgment gives me the conclusion of this first part, that is to say that common law does not give a satisfactory and uniform solution to the problem of the international return of cultural objects, whether the return is asked by the dispossessed owner or a State on the ground of the protection of its cultural heritage. **International conventions must therefore take over from common law.**

CLAIMS OF CULTURAL OBJECTS WITHIN THE FRAMEWORK OF THE UNIDROIT CONVENTION

Protecting its cultural heritage is one of the basic cultural policy interests of any country. This involves protection of one's own cultural heritage while respecting that of other States. **But the legal situation** in terms of international protection of national cultural heritage against illicit traffic has long been a restricted international co-operation because the "exporting" States were the only to participate. Countries which heritage suffers or has suffered from thefts and/or illicit exports have adopted radical legal solutions such as absolute export prohibitions, imprescriptibility, expropriation in case of illicit export, etc. But, at international level, for those national measures to apply, the States where those objects were brought must agree. And, for a long time, those countries, often to protect their art market, have co-operated only on specific conditions (principle of freedom of trade and circulation of goods, same statute for private and public

objects, protection of the good faith purchaser). They were not ready to sacrifice those principles if not for exceptional cases. This explains why international conventions in force have for a long time principally been adopted by "exporting" countries.

Things have changed over the years even if threats to the cultural heritage are far from diminishing. Thefts are considerably increasing from private houses, museums or churches, and States, even those who traditionally are market States, are ready to adopt more radical solutions, partly because of the problems due to the blurred borderline between licit trade and illicit traffic. As far as illicit export is concerned, the evolution of law permitted the recognition and application of some foreign legislation; market States are ready to apply prohibitions relating to categories of very important cultural objects (but not to all prohibitions). Finally, the adoption of legal instruments in particular at European level helped to consider the necessity of changing attitude.

Why this new Convention?

We already gave the answer, that is to say the *unsatisfactory answers given by the non conventional law*, but also because *the existing international instruments do not satisfactorily solve the private law aspects of the protection of cultural objects*. The protection of the good faith acquirer by certain States is the main obstacle to the international recognition of the rules in this field. We saw how national laws are different and we know that traffickers take advantage of those differences, and that the differences is source of legal uncertainty.

The starting point of the work of UNIDROIT is of the **UNESCO Convention of 1970**, which is in force today between more than a hundred States (all the countries of this region are Parties to it). This Convention represents a significant step forward in laying the foundations of a genuine international law of cultural property and in enunciating certain values and principles. But it raises, without solving, a number of important private law questions such as its impact on the existing rules of national law concerning the protection of the good faith purchaser (because it uses the traditional mechanism of conflict of laws or conflicts of jurisdictions). The 1970 Convention also contains for example a general obligation to respect the law of other States with regard to export controls (Article 3) but the specific provisions laid down obligations only in respect of cultural objects stolen from museums or similar institutions on condition that they had been inventoried (Article 7) and those of archaeological interest (Article 9). Finally, some States believed that the scope of application was not sufficiently clear and that a wide interpretation could seriously interfere with the conduct of the legal trade in cultural property.

Conscious of these problems and of the evolution of mentalities since 1970 in particular in the sense of a redefinition of certain traditional legal provisions ranging from those governing good faith to those governing prescription, UNESCO asked UNIDROIT to draft a new instrument. In fact, the adoption by States of a new line of approach could not be left solely to the goodwill of the individual States, nor was it sufficient simply to enforce existing international legal instruments. But such a development has of course never been understood as a reason for relaxing

efforts to encourage States to ratify or accede to the existing conventions elaborated under the auspices of UNESCO for example.

The UNIDROIT Convention merits your attention for at least three reasons:

(1) *it is a very good example of co-operation between international organisations*: we worked very closely with UNESCO of course, but also the Council of Europe – which drafted several conventions in this field but never touched the private law aspects – , The Haye Conference of private international law, but also organisations like INTERPOL or ICOM;

(2) *it has a great ambition*, that is to say the fight against illicit activities; and

(3) *it builds on existing laws* with an important element: it was already established that cultural objects as such deserved specific rules and that States were ready to adopt derogatory rules for this category of objects. This was the ground to which it must be added that we had the benefit of 25 years' thought and experience on the issue of illicit traffic. Different mentalities, less radicalism from both sides and a strong willingness to co-operate. On this basis, the Convention clearly says that it is intended to facilitate the restitution and return of cultural objects. To do so, a spirit of compromise is of course indispensable.

The UNIDROIT Convention: objective and rules

The aim of the UNIDROIT Convention, is twofold: in the first place it seeks to deal with the technical problems resulting from differences among national rules and to draw upon the progress that have been permitted by the evolution of ideas; in the second place, it is intended to contribute to the fight against the increase in the illicit traffic in cultural objects and to show how the national character of the protection of cultural heritage may be adapted to, or accompanied by, the growth of solidarity between States.

Unlike the 1970 UNESCO Convention, the UNIDROIT Convention addresses not only the return to the country of origin of illegally exported cultural objects but also that of the restitution of stolen cultural objects whose export may have been legal or illegal, for while it is true that stolen cultural objects are often subsequently exported illegally, a given object may well remain in the country in which it was stolen or be exported after the theft without breaching any national law governing its removal to another country. Equally, there are situations in which it is the legitimate owner of a cultural object who, knowingly or not, exports an object to another country in contravention of the law of the country in which it was originally located.

Definition of a "cultural object"

The Convention defines what is a cultural object (Article 2). It is important to stress that the categories covered by the 1970 Convention and the 1995 Convention are exactly the same and this has been done on purpose so that the two texts could work together and States could become Party to both. The definition in the Hague Protocol is expressed in more general terms but is basically similar.

There is however an important difference between the two instruments. The UNESCO Convention is basically founded on a philosophy of government action. It therefore requires cultural objects to have been "designated" by the State requesting return and this leaves a private owner without recourse if the State has not "designated" the object concerned or if the State did not wish to take action. The UNIDROIT Convention, being a scheme under private law is largely dependent on private action, and does not require such a "designation". Accordingly, cultural objects stolen from private homes, from all kinds of religious buildings, from private collections which are not registered with the State and from traditional communities can all be claimed back, even though the State has neither registered nor designated them.

The European Directive covers objects classified among the national treasures and which belong or form part of inventoried public collections or the inventories of ecclesiastical institutions.

RESTITUTION OF STOLEN CULTURAL OBJECTS

The principle "The possessor of a cultural object which has been stolen shall return it" (Article 3(1)). This is a clearly stated rule, beyond any possibility of misinterpretation.

From the outset, a realisation emerged that the essential difficulty was that of the reconciliation of two equally legitimate interests: that of the person (usually the owner) who has been dispossessed of a cultural object by theft and wants to get it back, and that of a purchaser in good faith of such an object who wants to keep it. The authors have sought to effect a just compromise between these competing interests.

This is not a question of making a moral choice between two rules: neither the original owner nor the purchaser in good faith should be penalised, but at the same time it is not possible fully to protect both of them. The solution chosen is therefore a pragmatic one: which rule would be the most effective in discouraging illicit trade? Subjecting the purchaser to the risk of having to return an object in the event of its failing to ascertain whether the object legally entered the art market. By so doing, the UNIDROIT Convention filled another gap in the protection of the European heritage, namely the omission of provisions concerning the good faith purchaser in the 1985 European Convention on Offences relating to Cultural Property (these were the most controversial point of the draft Convention which do not appear any more in the final text of the Convention).

The burden is put on the purchaser who has the ability to make a choice and, through this choice, to influence the market. The victim of theft had no choice but the purchaser could choose not to buy the object and has a greater power to influence the market to avoid trafficking in stolen cultural property.

Two accessory rules

- **The claimant** (who may be a private owner unlike in the UNESCO Convention which provides for action only between Contracting States through diplomatic offices) **must bring its action for restitution within a certain period**

of time, that is to say 3 years from the time the claimant knew the location of the object and the identity of the possessor; and 50 years from the time of the theft.

The authors have also recognised the *special treatment* given by many States to a specific category of objects (like public collections) which are granted a limitation period particularly long (75 years) or even imprescriptibility. Those are cultural objects forming an integral part of an identified (term "inventoried" avoided on purpose but importance of having inventories remains) monument or archaeological site, or belonging to a public collection (defined in the text), or a cultural or religious institution. The same special regime also applies to sacred or communally important cultural objects belonging to and used by a tribal or indigenous community.

Here we can add that the 1970 UNESCO Convention only provides for a diplomatic action, whereas in the UNIDROIT Convention, a private person or a State can bring its action before a court.

- The **possessor** has the burden to prove that he/she **exercised due diligence** when acquiring the object. If he so succeeds, he **shall be entitled to payment of a "fair and reasonable compensation"** (Article 4). It is only when considering whether it is appropriate to allow for compensation to the person acquiring the object that the question of good faith become decisive. This article is an important step forward in that it provides for an international due diligence standard for the acquisition of cultural property based on objective criteria which are not limited to value judgements alone. In fact, the notion of "due diligence" is clarified in the Convention (Article 4, paragraph 4). What is asked to the purchaser is to behave in an active way when acquiring an object.

Let us stop a minute on one element given in the Convention to define the "due diligence", that is to say the consultation of any reasonably accessible register of stolen cultural objects. When UNIDROIT started to draft the Convention, there were no such registers but today they are many, public and private. We can regret that they developed separately but the important element for the implementation of the Convention is that the possessor can prove that he/she consulted a well known register. Importance for all countries to report thefts so that the objects can be inserted on such registers or data bases.

To summarise, the rules on the restitution on stolen objects represent a compromise between the Anglo-American and continental European legal systems: both the absolute obligation to return a stolen object and the need for compensation of the good faith purchaser who acted with due diligence.

RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

While the principal problem arising in relation to the theft of cultural objects is that of the position of the bona fide purchaser, the main issue to be faced in connection with the illegal export of such objects is the extent to which States may be prepared to recognise rules of foreign public law and, more specifically, the rules of a foreign State of mandatory application. We have seen before that the attitude of States had already began to change and **the principle ultimately adopted** is that a Contracting State on whose territory an illegally exported cultural object is

located must return it to the country from which it was removed, subject to the **limitations** established by the Convention itself (there is no automatic return):

- *the object must have been removed from the territory of the requesting State **contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage.*** It is important to say that there has to be a national legislation of protection and it must have been violated for the Convention to apply. Importance of the UNESCO data base on legislation. The general principle on the return is extended to cultural objects illegally retained after having been temporarily exported for purposes such as exhibition, research or restoration. But the violation of the law is not sufficient.

- As it was difficult to know which prohibition would be recognised, the authors of the Convention have listed **situations which all States agreed to protect; the export must then impair one or more of these situations (interests).** This criteria (Article 5, paragraph 3) expressly prevent implementing and recognising excessive national export prohibitions. The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State "establishes" that the removal of the object from its territory "significantly impairs" one or more of the interests listed (the physical preservation of the object or of its context; the integrity of a complex object; the preservation of information; the traditional or ritual use of the object by a tribal or indigenous community) or that the object is "of significant cultural importance" for it.

If the object is a protected cultural object under the Convention, if its export is contrary to the law of the State of origin and if the removal significantly impaired one or more scientific or historical interests, the judge must order the return of the object. There are nevertheless **two conditions:**

- *The claimant* – in the case of illicit export only the State whose law has been violated – *must bring the action for return within a certain **limitation period*** (3 years and 50 years: the same as for the theft, except the special category);

[The Hague Protocol lays down no rule as to time limitations on claims, and at least one commentator has suggested that there is no such limitation. Theft and war losses are, however, seen by most as a special case. The 1970 UNESCO Convention includes no rule as to time limitation for claims. However, each State Party implements the Convention in its own way. For those States which have done so by establishing customs offences as to illegal import (Australia, Canada, the United States), their own national rules as to time limitations on actions for customs offences would normally apply.

The European Directive provides for 1 year after the requesting Member State became aware of the location of the object and of the identity of its possessor or holder, and 30 years after the object has been unlawfully removed from the territory of the requesting Member State (with an extension for public collection and ecclesiastical goods). It is interesting to note that for the Member States of the European Union, accepting the UNIDROIT Convention will ensure that the same rules apply to public collections subject to theft as to those subject to illicit removal under the Directive (Article 7(2)). It would seem anomalous to allow more generous limitation periods in the case of illegal export than for theft, but this will

be the case for States subject to the Directive which do not become party to the UNIDROIT Convention.]

- and the possessor who did not know that the object had been illegally exported is entitled to **payment of a "fair and reasonable compensation"** by the requesting State.

But as the objective of the UNIDROIT Convention is to facilitate the return, the claimant can also, in agreement with the requesting State, decide to retain ownership of the object or transfer the ownership to a person residing in the requesting State who provides the necessary guarantees. The requesting State could then avoid to pay a compensation.

Products of Clandestine Excavation

I would like to say a few words on a category of very important cultural objects for many countries, those taken from excavations. Those objects are covered by the 1970 UNESCO Convention only by the interpretation given to Article 9 by some States (a State whose cultural patrimony is in jeopardy from pillage or archaeological or ethnological materials may call on other States Parties). The UNIDROIT Convention states that a claim can be brought for the return of those objects on the basis either of the provisions dealing with theft or those dealing with illicit export. The Convention considers an unlawfully excavated cultural object as stolen, when consistent with the law of the State where the excavation took place. The interests listed before clearly apply to objects from archaeological sites. The choice of the procedure will depend on the proof which can be brought.

Museums

As far as museums are concerned, the UNIDROIT Convention does no more than what is already required by the *ICOM Code of Professional Ethics* which sets forth in no uncertain terms the rules that museums must respect with regard to acquisitions and restitutions. The Convention formalises what has long been taken for granted by serious collectors, museums and art dealers: the need to check the provenance of an object. On the other hand, it clearly creates an obstacle for international art dealers of a more dubious variety. UNESCO has established an *International Code of Ethics for Dealers in Cultural Property* which builds on the principles developed in the 1970 Convention and in the 1995 UNIDROIT Convention, and is close to the rules found in the ICOM Code. As museums and dealers do, why private collectors should not check the provenance of the object they want to acquire?

Retroactivity

Neither the European Directive, nor 1954 Hague Protocol, nor the UNESCO 1970 Convention, nor the UNIDROIT Convention are retroactive: i.e. they do not apply to cases which occurred before the entry into force of the legal instrument concerned. There had never been, at any time in the preparation of the procedures to draw up the UNIDROIT Convention, any prospect of starting negotiations for, let alone achieving, a convention which had retroactive effect.

The normal rule of international law is that treaties are not retroactive and an express provision to this effect is not necessary (there is none in the 1970 UNESCO Convention, which is clearly accepted as non-retroactive). But in order to avoid any misinterpretation of the Convention, this principle has been expressly stated in Article 10: Paragraphs 1 and 2 specify non-retroactivity and paragraph 3 makes it clear that the status of prior transactions has not been changed by the adoption of the new Convention. The Convention does not in any way legitimise illegal transactions which have taken place before its entry into force.

No reservations

The Convention provides for two different mechanisms for the return of stolen or illegally exported cultural objects but it is important to note that those two mechanisms are mandatory in the sense that no reservations are allowed (contrary to what some delegations would have liked).

CONCLUSION

In developing the rules of the UNIDROIT Convention it was determined that it should embody the **minimal protective rules** possible to achieve in 1995, but that States which already had more advantageous rules should retain them. This question had not been faced in either 1954 or 1970; but the UNIDROIT Convention clearly provides that a Contracting State may apply rules more favourable to the restitution or return of stolen or illegally exported cultural objects than provided for by the Convention.

Only international co-operation can stop illicit traffic in cultural objects.

There is no doubt about this and it means, among other things, that States should *become Parties to the existing international instruments* such as the 1954 UNESCO Convention and Protocol, the 1970 UNESCO Convention and the UNIDROIT Convention on a universal level, as well as regional instruments, if any. The countries of this region have well understood this need with the UNESCO Conventions.

The *Parliamentary Assembly of the Council of Europe*, in a Recommendation adopted in 1998, called on "all member, Observer and Special Guest States to become parties to the UNIDROIT Convention and incorporate it in their national law". The *General Assembly of the United Nations* adopted a Resolution in December 1999 in which it reaffirmed the importance of the major Conventions in this field, including the UNIDROIT Convention, and invited those Member States which have not already done so to consider becoming parties to them. It is my pleasure to note that Bulgaria and the Former Yugoslav Republic of Macedonia were amongst the States that proposed the Resolution. Such invitations have been issued several times usually in the form of Recommendations at meetings organised by UNESCO, INTERPOL, ICOM and others.

Finally, the need for *legal training* in this field has been strongly felt. UNIDROIT has set up a programme of legal co-operation with scholarships for high level lawyers to help them to get to know the existing legal instruments for the protection of the cultural heritage. We have had already at the Institute a few lawyers working on this specific subject.

Let me finish by a brief overview of the **status of the Convention** because it is one thing to adopt a Convention, but another one to guarantee its effective

application. The more countries that join the Convention, the more efficient it will be. As of today 27 countries (the latest being Nigeria) have either ratified or acceded to the Convention, one is about to deposit its instrument of accession (Greece) and New Zealand is about to terminate its internal procedure of accession. Two States of the region, Croatia and Romania are already Parties to the UNIDROIT Convention.

To be most effective, the struggle against illicit traffic of cultural property cannot be limited to the restitution of stolen or illicitly exported objects that have been recovered. Adequate measures to prevent such traffic must also be put into place: illegal excavations, for example, are common-place, and States should adopt legislation to prevent such activities, along with the illegal import and export of cultural goods. Thorough inventories also need to be established and efficient security systems installed, to facilitate the work of customs officers and police. We will examine those other measures later during this Meeting and I look forward to listening to all of you.

Thank you very much for your attention.

REGIONAL AND INTERNATIONAL INSTRUMENTS (OVERVIEW)

We all know that the phenomenon of illicit trafficking in cultural objects is still growing and the legal measures to combat it too. States have always more sophisticated national legislations but the traffic being international, they are not sufficient and regional and international instruments have been elaborated.

REGIONAL LEGISLATION

BILATERAL TREATIES

In Europe, only a few countries for the time being have concluded bilateral treaties on the protection of cultural property for example with the United States of America. Italy and Cyprus have done so as a way to implement the 1970 UNESCO Convention and restrict the return of illegally exported cultural objects to member States of that Convention that guarantee reciprocity in bilateral instruments.

SUPRANATIONAL AND MULTILATERAL LEGISLATION

We can briefly mention two international organisations currently involved in projects leading to uniform law for the protection of cultural heritage **at a regional level**: the Council of Europe and the European Union.

The Council of Europe

The Council of Europe deals with matters of cultural property in two respects. On the one hand, the Council of Europe prepares conventions on cultural property to be ratified by the Member States. On the other hand, the European Court of Human Rights may indirectly affect issues of cultural property by its decisions in disputes arising on matters of cultural property.

(i) As far as cultural property conventions are concerned, four instruments directly or indirectly touch on certain aspects of cultural property:

- The *European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters* has been applied several times in order to return as objects of criminal offences, cultural objects stolen or illegally excavated in the requesting foreign country.
- The *European Convention of 6 May 1969 on the Protection of the Archaeological Heritage* was revised in 1992. This Convention is not self-executing. It obliges the Contracting States, *inter alia*, to take protective measures with respect to archaeological sites and to consider the establishment of a national inventory of archaeological objects.
- The *European Convention of 23 June 1985 on Offences Relating to Cultural Property* seeks to define the term "cultural property" (Annex II), provides a list of offences relating to cultural objects and obliges the Contracting States to amend their criminal law accordingly and to return

cultural objects removed subsequent to an offence relating to these objects.

- The *European Convention of 3 October 1985 on the Protection of the Architectural Heritage in Europe*, as well as not being self-executing, obliges the State Parties to undertake the direct or indirect protection of their architectural heritage.

The most important of these instruments is the first one on legal assistance in criminal matters. It is extremely useful and is a very good tool to return stolen and illegally removed cultural property quickly and without the burden of expensive civil proceedings.

(ii) The European Court of Human Rights had the opportunity in two cases to deal with cultural property problems.

- In *Beyeler v. Italy* (2000), the court had to decide whether the Italian authorities in charge of the protection of national treasures violated human rights (right to be heard, right to hold property and to be compensated if taken) when they qualified Vincent van Gogh's painting "Portrait of a Young Peasant" as an Italian national treasure to be retained on Italian territory.
- Similar problems had to be solved in *Prince Hans-Adam II of Liechtenstein v. Germany* (2001). In this situation the defendant did not violate the European Convention of Human Rights when Pieter van Laer's painting "Szene an einem römischen Kalkofen" was returned to the Czech gallery which had lent it for purposes of exhibition in Germany. The International Court of Justice had to decide whether Germany violated public international law by returning the painting to a Czech owner who might have been the wrong person since the painting was formerly owned by the Princes of Liechtenstein until it was confiscated after World War II under the incorrect assumption that the Princes of Liechtenstein were Germans.

The European Union

Article 36 of the Treaty of Rome made an exception to the rules on the free movement of goods by not precluding national prohibitions or restrictions on exports justified on grounds of "the protection of national treasures possessing artistic, historic or archaeological value". This provision has been literally transferred as Article 30 of the 1997 Treaty of Amsterdam. This provision, however, did not inspire the European legislators to draft instruments on the protection of cultural property. It was the European Single Market, starting on 1 January 1993, which led to two instruments designed to uphold national cultural policies within the Union without customs borders.

Council Directive 93/7/ECC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State to be implemented by the Member States fixes certain Community policies with respect to cultural objects:

- The Directive confirms the exception to the principle of free movement of goods with regard to cultural objects (Articles 2 and 8).

- The Directive defines those objects which qualify as national treasures to be returned to the requesting Member State of origin (Articles 1 and 14).
- The Directive does not rely on border control by national customs authorities in a Single European Market.
- The Directive obliges every Member State to return unlawfully removed cultural objects to the requesting Member State of origin (Articles 5 and 8).
- The Directive fixes certain details of return proceedings with respect to
 - time limits within which return proceedings should be initiated (Article 7),
 - compensation to be paid to good faith purchasers (Article 9),
 - co-operation between authorities of the Member States (Articles 4 and 6),
 - costs of return proceedings (Article 10).
- The Directive does not deal with problems of private international law. These matters are left to the Member State to which an unlawfully removed cultural object has been returned (Article 12).
- The Directive applies to cultural objects unlawfully removed on or after 1 January 1993 and hence does not work retroactively (Articles 13-14 sect. 2).
- The Directive does not exclude remedies against the person responsible for the unlawful removal (Article 11) and shall be without prejudice to any civil or criminal proceedings that may be brought under national laws of the Member States (Article 15).

The Directive has been implemented by all Member States and by members of the European Economic Area (EEA). According to these national implementations, Member States may ask the competent courts of any other Member State to return cultural objects unlawfully removed from the territory of the requesting Member State. In so doing, the requested Member State enforces foreign public law prohibiting the removal of national cultural objects. Taking the English case *Kingdom of Spain v. Christie, Manson & Woods Ltd.* (1986), the plaintiff (Kingdom of Spain) could today ask for the return of the unlawfully removed *Goya* painting under the British statutory instrument implementing the Directive and would not be restricted to ask only for a declaratory judgment that the painting was unlawfully removed from Spanish territory.

The Directive and implementing national legislation only apply between Member States of the European Union and the EEA. Return proceedings brought by a non-Member State, as in the British case *Attorney General of New Zealand v. Ortiz*, are not governed by the Directive and the implementing national legislation of the requested State. The general rules still apply and it is very likely that today the *Ortiz-case* would be decided with the same result as in 1984. It is up to every Member State of the European Union to extend the European policy to their

relations with non-Member States or to ratify international conventions providing the same or similar remedies for the recovery of illegally exported art objects.

Up to now, no court proceedings initiated under the Directive and the implementing national provisions have been reported. According to the report of the Commission of 25 May 2000 covering the period 1993-1999, in five cases the objects were voluntarily returned and in thirteen cases the potential Member States of origin were informed of the discovery of objects unlawfully removed from their territory. These situations were not subject to judicial proceedings either. The Member States involved settled any dispute, returned the object, granted a removal licence retroactively or declined to spend money for return proceedings concerning objects of minor importance. The Commission report is very interesting insofar as it shows that some regulations on cultural objects do not automatically lead to an incalculable burden for the law courts.

Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, although directly applicable. It deals with the export of cultural goods outside the customs territory of the Community but does not prohibit the export of European cultural treasures to non-European countries. The Regulation takes Member States' national export prohibitions for granted and seeks to ensure that every Member State pays respect to such rules of other Member States. In order to achieve these objectives, the Regulation fixes five basic rules:

- The export of cultural goods outside the customs territory of the Community is subject to presentation of an export licence (Article 2 sect. 1).
- The export licence shall be issued by the competent authorities of the Member State in whose territory the cultural object in question is lawfully and definitively located (Article 2 sect. 2).
- The export licence may be refused where the cultural object in question is covered by national legislation protecting national treasures in the Member State concerned (Article 2 sect. 2, sub-sect. 3).
- The export licence issued by the competent authority is valid throughout the Community (Article 2 sect 3).
- The Member States shall co-operate with the Commission (Article 3) and between themselves (Article 6).

Through these rules the Regulation seeks to co-ordinate the different national policies with respect to the export of national treasures of artistic, historical or archaeological value. Taking the English case *Kingdom of Spain v. Christie, Manson & Woods Ltd.* as an example and assuming that the owner of the Goya painting wishes to export the painting to the United States of America, the Regulation requires an export licence. If the British authorities were competent and had to apply their own export policies, it is very likely that a licence would be issued since a painting temporarily located in England with a local auction house does not qualify as a British national treasure. The Regulation, however, seeks to prevent, within the Community, any unlawful removal of cultural objects to liberal "export paradises" and therefore provides that the authorities of that Member State are competent to issue the required export licence in whose territory the relevant cultural object is lawfully and definitively located. In my example, it is the Spanish

authorities, not the British, that are competent to decide whether the Goya painting unlawfully removed to England can be exported to the United States.

The special regime for cultural objects in Europe does not consist of European instruments defining and enforcing European policies for the protection of national and European national treasures. The European Union confirms national policies and seeks to co-ordinate their different approaches with respect to the preservation of national treasures within national boundaries. The Council of Europe, with its Convention on Mutual Assistance in Criminal Matters, provides a very useful scheme for the speedy return of stolen and illegally excavated art objects.

But illicit traffic is a global problem and therefore regional laws run the danger of being circumvented by transactions made via third-party States. In this sense the 1970 UNESCO Convention and the UNIDROIT Convention complement the EU's legal regulations because they approach the problem of illicit trade from a global perspective. It is interesting to note that an increasing number of EU members are ratifying both the UNESCO and UNIDROIT Conventions, further emphasising the growing interaction between these instruments.

GLOBAL INSTRUMENTS

The World Customs Organization

This organisation adopted in 1977 an *International Convention on Mutual Assistance for the Prevention, Investigation and repression of Customs Offences* with a specific Annex XI on Assistance in action against the smuggling of works of art, antiques and other cultural property.

The UNESCO instruments

The most notable examples of universal instruments are the major Conventions adopted by UNESCO and in particular the 1954 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

The **UNESCO Convention of 1970**, which is in force today between more than a hundred States, represents a significant step forward in laying the foundations of a genuine international law of cultural property and in enunciating certain values and principles. But it raises, without solving, a number of important private law questions such as its impact on the existing rules of national law concerning the protection of the good faith purchaser. In fact, the traditional mechanism of conflict of laws or conflicts of jurisdictions cannot satisfactorily solve the problems brought about by illicit traffic in cultural objects, whether theft or illicit export. The use of the conflict rule will not, in many cases, prevent the "laundering" of illegally transferred objects of art. In fact, there are significant differences in the way in which the law protects the dispossessed owner or the good faith purchaser. The 1970 Convention also contains for example a general obligation to respect the law of other States with regard to export controls (Article 3) but the specific provisions laid down obligations only in respect of cultural objects stolen from museums or similar institutions on condition that they had been inventoried (Article 7) and those

of archaeological interest (Article 9). Finally, some States believed that the scope of application was not sufficiently clear and that a wide interpretation could seriously interfere with the conduct of the legal trade in cultural property.

Conscious of these problems and of the evolution of mentalities since 1970 in particular in the sense of a redefinition of certain traditional legal provisions ranging from those governing good faith to those governing prescription, UNESCO asked UNIDROIT – which had, in the nineteen-sixties and seventies, been responsible for the drawing up of a Uniform Law on the acquisition in good faith of corporeal movables (LUAB) – to draft a new instrument. In fact, the adoption by States of a new line of approach could not be left solely to the goodwill of the individual States, nor was it sufficient simply to enforce existing international legal instruments. But such a development has of course never been understood as a reason for relaxing efforts to encourage States to ratify or accede to the existing conventions elaborated under the auspices of UNESCO for example.

SUMMARY

1. **National law** gives remedies to recover objects stolen abroad unless the objects have been sold to a *bona fide* purchaser.
2. National **law** does not enforce foreign public law (export prohibitions) and foreign law on inalienable movables.
3. The **European Union** does not establish a European policy on cultural objects. It rather obliges the Member States to enforce the policies of sister Member States with respect to unlawful removals of cultural objects within the European Union.
4. The **Council of Europe** drafted the very effective *Convention of 1959 on Mutual Assistance in Criminal Matters*.
5. The 1970 **UNESCO** Convention has not been a great success in the past but now market States are Parties. It will be very effective if properly implemented by national legislation.
6. The **Unidroit Convention of 1995 on Stolen or Illegally Exported Cultural Objects** may improve the international protection of cultural property considerably.