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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE PROTECTION OF CULTURAL PROPERTY

Study requested by UNESCO from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables of 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

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INTRODUCTION

I. Preliminary remarks

Contrary to what might be thought, the literature dealing with the legal aspects of the protection of cultural property is not very great; on the other hand caselaw is becoming ever more important.

This study, the elaboration of which was entrusted to the Secretariat of the International Institute for the Unification of Private Law (Unidroit) by the United Nations Economic, Scientific and Cultural Organization (UNESCO), is based on the one hand upon certain principles of the Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 (hereinafter referred to as "the 1970 UNESCO Convention") - Paris, and, on the other hand, upon the rule on good faith contained in the Unidroit draft Convention providing a uniform law on the acquisition in good faith of corporeal movables (LUAB, 1974)- Rome.

The international protection of cultural property covers a vast and complex area where two ideas are present: that of preserving the human cultural heritage at a universal level, and that which aims at allowing free international commerce in art subject to legal rules, above all by the application of the principle of acquisition in good faith. For these two aspects to be compatible, it is necessary to strike a balance between the rules of civil law and rules aiming at the protection of cultural property, as a sui generis institution which should bring about an equitable regulation of the interests of the two parties concerned, the "beati possidentes" and the peoples of the Third World who are setting up their museums and are indexing their cultural heritage.

At the legal level this recent institute of cultural property is combining civil law and public law aspects so as to form a multidisciplinary area at the crossroads of civil law, commercial law, private international law, international law, uniform law, public law, taxation law and, possibly, criminal law. It must further be indicated that other non-legal considerations have a very important incidence on the protection of cultural property: certain imperatives are derived from artistic disciplines such as history of art, the maintenance of monuments, restoration, archeology... .

This subject could, therefore, be regulated on the basis of a union of legal aspects of international commerce in art and certain aspects of the protection of cultural property.

As far as the form which the regulation of the subject dealt with in

this study could assume, the following may be indicated:

- an adaptation of the 1974 LUAB for the protection of cultural property. It must be noted that if such an adaptation were to be made relevant only to cultural property, it would give rise to very serious problems[1];
- a special protocol to the UNESCO Convention which would envisage the question of the acquisition in good faith of cultural property from the point of view of civil law;
- or, preferably, a new draft uniform law regulating the legal aspects in general of the protection of cultural property.

The scope and purpose of this study is to indicate the complex difficulties this subject raises, to draw conclusions as to some consequences, to set forth certain considerations and, lastly, to formulate recommendations.

II. Brief historical survey of the protection of cultural property

A subject is always better understood when its historical development is known: furthermore, progress may be measured in relation to past experience and to antecedents, and a brief review of the evolution of the protection of cultural property will, perhaps, permit a certain optimism for the future[2].

Reference will be made throughout this study to the technical term "cultural property": it must, however, be recalled that this concept appeared in this sense for the first time in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter referred to as "the 1954 Hague Convention"), and one of the great merits of this instrument was precisely that of recognizing this term by conferring a legal status upon it. For the purposes of simplification, reference is generally made to "cultural property", also in relation to periods when this concept did not as yet have its present connotation.

In the ancient world only property of a religious character enjoyed a certain privileged position in case of conflict and the fate reserved to cultural property was subject to the law of war. The situation was no different during the Middle Ages when the principle of the "just war" authorized

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(1) Cf. M. EVANS, The relevance of good faith to the trade in cultural property, Proceedings of the Thirteenth Colloquy on European Law, Delphi, 20-22 September 1983, Council of Europe, Strasbourg, 1984, p. 123.

(2) Cf. S.E. NAHLIK, La protection internationale des biens culturels en cas de conflit armé, Recueil des Cours, (120), 1967-1, p. 65.

the victor to have recourse to all means. The Renaissance, in the wake of the new humanist values, attributed an important place to art and therefore to the artist: Leonardo da Vinci among other contributed greatly to this revolutionary change (3). It was therefore at this time that cultural property began to enjoy a privileged status, and if the wars of religion constituted a regression in relation to medieval ideology, the following period - particularly through the Dutch school - saw a re-emergence of the values connected with cultural property.

It can be seen that, in a general way, the legal concept of the protection of cultural property was indissolubly linked to the law of war right up to the beginning of the twentieth century: sackings, destruction and pillage, to which must be added the right to plunder (4), were the customary privileges of the victor. As far as the legal treatment of cultural property is concerned, it is in the law of nations that one can find the first bases, but only in the framework of general considerations relating to the law of war. Thereafter one witnesses the emergence of the concept of the protection of cultural property, independently of that of the law of war, through clauses, particularly on restitution, included in armistices or peace-treaties.

However, one cannot really speak of a concept of the protection of cultural property until the first half of the twentieth century. The development of the museums and of an art market had attested to the spiritual and material value accorded at the end of the preceding century to cultural property which justified its protection. Practice and doctrine reflected an attitude which was resolutely favourable to this new idea even though, as the principle was contravened or questioned, it was still badly ensured. It was therefore necessary to wait for custom and ideas to be codified before speaking of a legal protection of cultural property: this occurred in two stages.

In the first place, the Convention respecting the Laws and Customs of War on Land adopted at the Hague in 1907 (HLKO Convention) was based upon a national approach: it established the principle of the responsibility of each State for the cultural property on its territory.

Thereafter, in 1954, the Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted at the Hague, together with a Regulation for its execution and an additional Protocol concerning restitution. This instrument introduces a protection of cultural property which is no longer national as under the 1907 Convention, but international

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(3) cf. S.E. NAHLIK, op.cit. p.69.

(4) cf. S.A. WILLIAMS, The International and National Protection of Movable Cultural Property - A Comparative Study, New York, 1978, p.5.

and for the first time the concept of "cultural property" was employed.

The 1954 Hague Convention, and more precisely the additional Protocol which deals with questions which are very close to those that interest us today, gives food for thought and could be used as a kind of model: in effect, the delicate problems of public and of private law associated with this subject already existed at that time, and one could find inspiration in the approach then adopted in the framework of a protection of cultural property which is not limited to cases of armed conflict(5).

UNESCO has, in answer to the preoccupations of States and peoples, recognized the importance of a complete regulation of the protection of cultural property. It is therefore urgent to find a solution which moves in the direction of a universal protection of cultural property, which enshrines the spiritual value of the universal cultural heritage.

CHAPTER I

I. The basis for the study

1. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property(6)

This Convention falls within the general framework of the efforts of UNESCO aimed at ensuring the preservation of the universal cultural heritage; in particular reference may here be made to the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, which dates back to 1964, and to the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

Unlike the 1954 Hague Convention which was limited to situations of armed conflict, the 1970 Convention is intended to apply both in time of war and in time of peace and furthermore contains principles governing international relations in respect of the subject-matter treated. Its purpose is the safeguard and respect of cultural property as part of the universal cultural heritage, i.e. independently of its origin or location. It can, however, be said that it lays down certain rules for protection which are

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(5) cf. R. MONACO, La contribution d'Unidroit à la protection internationale des biens culturels, Aspects juridiques du commerce international de l'art, Geneva, 1985, not yet published.

(6) 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, in Conventions and Recommendations of UNESCO concerning the protection of the cultural heritage, UNESCO 1983.

of interest more particularly to the so-called "exporting" States of cultural property.

While this instrument contains flexible provisions which leave a large measure of appreciation to the "importing" States, its application has none the less come up against problems such as the drawing up, by the national administrations, of complete lists of stolen cultural property (7), and it has not had the success its innovatory principles, however general they may be, deserve.

According to the commonly accepted opinion the principal obstacle to a more general acceptance of the 1970 UNESCO Convention is Article 7(b) (ii), which provides for the restitution of the property even if it is in the hands of a person in good faith, and which moreover sets no time limit for restitution. Article 7(b)(ii) of the UNESCO Convention states:

> "The States Parties to this Convention undertake:
> ....
> (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party."

It will later be seen that good faith is an essential principle of civil law which can certainly be adapted in its application, but which cannot be overlooked without seriously damaging that vital nerve of the continental systems which is the international trade in art.

Article 7 of the 1970 UNESCO Convention does, however, indicate a new position with regard to the protection of cultural property, and would without

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(7) Cf. E. ROUCOUNAS, General Report, Proceedings of the Thirteenth Colloquy on European Law, Delphi, 20-22 September 1983, Council of Europe, Strasbourg, 1984, p. 136.

doubt furnish the elements indispensable for a draft Convention providing a uniform law on the acquisition in good faith of cultural property, which draft should provide a legal solution to the problems associated with the international protection of cultural property, as well as with the freedom of the international art trade.

2. Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB,1974) (8)

In 1968 Unidroit published a draft Uniform Law on the protection of the bona fide purchaser of corporeal movables which represented the completion of work begun in 1962 by a Unidroit Working Committee set up for the preparation of the draft. It constituted an important contribution to the unification of international sales law. In view of the fact that the Uniform Law on the International Sale of Goods (ULIS) was under revision within the United Nations Commission for International Trade Law (UNCITRAL), Unidroit reconsidered the 1968 draft, which was itself amended in certain respects; this revision of the initial 1968 draft was concluded in 1974, the new text being cast in the form of a draft Convention providing a uniform law on the acquisition in good faith of corporeal movables (LUAB, 1974).

The 1974 LUAB seeks a fair balance between the interests of the parties: on the one hand, the principle of good faith is in general maintained although tempered as regards the question of proving the presence or absence of good faith; in effect, the relevant provisions of the draft LUAB state :

Article 7:

"1. Good faith consists in the reasonable belief that the transferor has the right to dispose of the movables in conformity with the contract.

2. The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case.

3. In determining whether the transferee acted in good faith, account shall, inter alia, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor's acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded."

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(8) LUAB, 1974 - Unidroit, 1975, Study XLV - Doc. 58.

Article 8:

"Good faith must exist either at the time the movables are handed over to the transferee or at the time the contract is concluded if it is concluded after the handing over of the movables."

On the other hand a rule restricting international trade in art has been introduced by way of Article 11. In effect, Article 11 provides that:

"The transferee of stolen movables cannot invoke his good faith."

It will therefore be seen that it is in Article 11 of the 1974 LUAB that a rule ensuring the global protection of cultural property may be found. Nevertheless Article 11 has not received a unanimous welcome. Since the majority of legal systems protect the purchaser of goods even when stolen, such a fundamental difference between the national and international regimes has not seemed to be acceptable.

At its 63rd session in May 1984 the Governing Council of Unidroit considered the possibility of revising the provisions of the draft LUAB of 1974, in particular in the light of the work carried out by UNESCO and especially of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; at the same time it also agreed that Unidroit should, in accordance with a request by UNESCO, proceed to a study centred on the "acquisition in good faith of cultural property". The present study, which was entrusted to the Unidroit Secretariat, will therefore be based on the one hand on the legal aspects of the 1974 LUAB and on the other on certain aspects of the 1970 UNESCO Convention, or, in more general terms, it will consider the problems raised by international trade law and those arising from the protection of cultural property.

It appears, however, that an adaptation of the 1974 LUAB, mainly in the form of a widening of its scope of application so as to include cultural property, would not be an appropriate solution; it must further be remarked that such an adaptation, were one to consider it exclusively from the angle of the protection of cultural property, would raise much greater problems than that simply of the scope of application. It is this which leads to the contemplation not of a mere adaptation of an existing text, but rather the elaboration of a new instrument which could, perhaps, borrow certain principles from the 1974 LUAB.

Thus, the provisions of Article 7 of the 1974 LUAB which defines good faith and states the principal elements which are to be taken into consideration in determining its existence could be retained, in view of their general and flexible character, for the subject in question; on the other hand these provisions could be completed by the following rule: the purchaser may not invoke his good faith where registered cultural property, or non-registered but widely-known important cultural property, is concerned.

As far as concerns the principle contained in Article 11 of the 1974 LUAB, according to which the purchaser of stolen goods may not invoke his good faith, it could be set aside in the specific case of cultural property: in effect, the validity of acquisition in good faith is an element of security in legal relationships as it results from appearance ("Vertrauen auf den äusseren Tatbestand") and ought therefore to remain a general principle. Security is an indispensable characteristic of international commercial operations, particularly where a long series of transactions is in question.

II. The 1985 European Convention on Offences relating to Cultural Property (9)

In the general context of the interest shown by intergovernmental organisations in the subject of the protection of cultural property, the work conducted within the framework of the Council of Europe, which led to the adoption by the Committee of Ministers on 17 January 1985 of the European Convention on Offences relating to Cultural Property, calls for consideration.

The origin of this work in the Council of Europe dates back to 1977: the European Committee on Crime Problems (CDPC) constituted a Select Committee of Experts on International Co-operation in the Field of Offences relating to Works of Art (PC-R-OA). The draft Convention which resulted from this work contained, as well as criminal law provisions, civil law rules on good faith inspired particularly by the provisions of Article 7 of the 1974 LUAB (Unidroit). The text was transmitted for opinion to the European Committee on Legal Co-operation (CDCJ), which declared itself opposed to the principle of including in one and the same text provisions dealing with criminal law, administrative law and civil law. Consequently a decision was taken to delete the civil law rule concerning good faith, and the new text of the draft Convention was submitted to the Committee of Ministers of the Council of Europe which adopted the European Convention on Offences relating to Cultural Property. The Convention was opened for signature by Member States on 23 June 1985 at Delphi.

With a view to situating the work contemplated in response to the

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(9) 1985 European Convention on Offences relating to Cultural Property, European Treaty Series No. 119, Council of Europe, Strasbourg, 1985.

request by UNESCO in relation to the instrument elaborated and adopted by the Council of Europe, the following remarks may be sufficient: in the first place the subject of the study requested by UNESCO from the Unidroit Secretariat relates to solutions to the problems of the international protection of cultural property, to the exclusion of solutions under the criminal law. On the other hand, unlike the instruments of the Council of Europe, which are destined to be applied in a limited geographic area and in a political context which is limited to a specific region, the solutions which are here being sought must be of a universal character. It can therefore be seen that while the initiative of UNESCO and Unidroit converges, as far as its ultimate purpose goes, with that of the Council of Europe, i.e. the protection of cultural property, it differs in approach.

It must here be indicated that the concern which came to light in the first phase of the work of the Council of Europe of tackling the protection of cultural property from the angle of private law in particular, has not completely disappeared: in effect, the Committee of Ministers called on the European Committee on Legal Co-operation "to study the possibility, in the light of the Convention on Offences relating to Cultural Property, of drafting an additional legal instrument dealing with the civil and administrative law aspects of the international protection of cultural property, including the problem of bona fide ownership and restitution of stolen objects to the country of origin ...". However, taking into account the work conducted within UNESCO and Unidroit on this subject, the CDCJ decided at its May 1985 session temporarily to suspend work on this matter within the Council of Europe.

The importance of the subject-matter of this study as it is intended to be approached can, therefore, be fully appreciated; furthermore, the interest it arouses brings to light the fact that it is a topical issue for which all consideration or work which might be undertaken on the elaboration of an international instrument will find useful elements in the results of the efforts deployed in the different organisations which take an interest in the international protection of cultural property or in the legal problems associated with it.

CHAPTER II

I. The concept of cultural property

As seen above, the term "cultural property" dates back to the 1954 Hague Convention, but it is generally used with reference to preceding periods. It must further be noted that it is now a term bearing the same connotation in all legal disciplines.

The concept of cultural property is extremely broad; it includes movable and immovable property wherever they come from and wherever they are, whether they have been discovered or are still under ground, at the bottom of the sea, in the possession of private individuals or of public collectives (10) As far as the distinction between movable and immovable cultural property is concerned, it of necessity exists in the domestic law of States by reason of the special legal regimes applicable to these two civil law categories; at the same time the literature, and certain international instruments, tend to offer a limited protection to one or another of these categories. It must, however, be noted that the distinction between movables and immovables is more and more difficult to draw in respect of cultural property. No further consideration will be given to this delicate problem which could, together with other questions, form the subject of in-depth research within the framework of a further study; the question may however be raised, as has been done by certain authors (11), of whether their designation is not of doubtful interest for the international protection of cultural property. Lastly, the difficulty of arriving at a characterization of "movable" or "immovable" property may be appreciated when considering changes in the use of certain property, made possible by modern techniques, particularly of the restoration of works of art: reference will later be made to the example of a case brought before the Court of Montpellier which concerned frescoes removed from the walls of a chapel where the problem was that of determining whether or not their character had in consequence been changed (see page 22).

II. Definition of cultural property

It goes without saying that each State has a definition of cultural property in its national legislation; it will further be seen that varying definitions are to be found in different international instruments: no fewer than six definitions contained in international texts currently in force have

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(10) See E. ROUCOUNAS, op. cit., p. 137.

(11) See D.E. DICKE, The Instruments and the Agencies of the International Protection of Cultural Property, Proceedings of the Thirteenth Colloquy on European Law, Delphi, 20-22 September 1983, Council of Europe, Strasbourg, 1984, p. 18.

been listed[12]; now the two-fold purpose of work such as that in the context of which the present study falls, i.e. to grant cultural property international protection but also to preserve the international trade in art, calls for a unified definition of international application which, in order to gather a broad consensus amongst States, would attempt to harmonise the existing definitions.

In relation to the question of definition, the literature is divided between those proposing a maximalist thesis according to which any object with a certain cultural value, whether existing, contingent or future, could be considered to be cultural property, and the partisans of a minimalist position which limits the qualification of cultural property to objects the great cultural value of which has been recognized by virtue of the importance they have for the countries concerned.

Generally speaking, and independently of the doctrinal debate to which reference has just been made, three methods aiming at the definition of cultural property can be envisaged: namely enumeration, classification and categorization.

Each method has advantages and disadvantages: as to enumeration, this would not seem to be a particularly suitable approach in this field, partly because it is not possible to produce a complete enumeration of works of art - except in respect of cultural property of the very first order which must be registered - and partly because the specificity of the origin of certain objects may make their identification difficult by a non-specialist. Enumeration is the method followed in the Common Law countries: by way of example reference may be made to the law of Gambia[13].

The method of classification, adopted mainly in France and in the countries influenced by the French Civil Code, consists in granting special protection to property which has been the subject of a specific decision by the competent authority. Non-classified objects on the contrary benefit from no protection, and the States which use this system of definition also have recourse to other methods so as to grant broader protection, particularly to objects which have not as yet been the subject of a decision concerning their classification, by way of certain additional conditions[14].

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(12) Cf. E. ROUCOUNAS, op. cit., p. 136.

(13) Cf. L.V. PROTT and P.J. O'KEEFE, National Legal Control of Illicit Traffic in Cultural Property, UNESCO 1983, pp. 6-7.

(14) Cf. L.V. PROTT and P.J. O'KEEFE, op. cit., p. 8.

The method of categorization consists in a general description of the object of the definition, and therefore permits the encompassing of a great number of objects. A number of legislations have recourse to this system, as also do several international texts, particularly the 1970 UNESCO Convention in its Articles 1 and 4:

Article 1

"For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaelogical discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments."

Article 4

"The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;

(b) cultural property found within the national territory;

(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property."

Considering the very wide acceptance of this instrument within the international community (fifty-four States have already ratified the Convention), this method could be adopted for the end in view, in the field of the international protection of cultural property, of arriving at a harmonisation of the legal concept of "cultural property".

Although the submission of proposals for an international definition does not fall within the terms of reference of the present study and could be examined in a further study which would of necessity consider in detail the definitions contained in the national legislations, at this stage a definition could be conceived as a simple working hypothesis, which would be constructed as follows:

- the provisions of Article 1 of the 1970 UNESCO Convention, to the exclusion of paragraph (a),
- the provisions of Article 4 of the 1970 UNESCO Convention,
- paragraph (a) of Article I/3 of the Recommendation on International Principles Applicable to Archaeological Excavations of 5 December 1956, the provisions of which read as follows:

"3. The criterion adopted for assessing the public interest of archaeological remains might vary according to whether it is a question of the preservation of such property, or of the excavator's or finder's obligation to declare his discoveries.

(a) In the former case, the criterion based on preserving all objects originating before a certain date should be abandoned, and replaced by one whereby protection is extended to all objects belonging to a given period or of a minimum age fixed by law."

Thus another aspect which any possible further research concerning a definition must necessarily take into consideration relates to the age required for given property to enjoy international protection; also in this connection national laws adopt contrasting solutions. Without going into the matter in detail it may be indicated that in the context of an international instrument a "mobile" date would appear to be preferable to a fixed date (e.g. "property ... of more than forty years of age is to be considered cultural property", instead of "property from before the year 1900 .... is to be considered cultural property").

It may here, however, be reiterated that the considerations relating to an international definition of cultural property cannot be completely separated from the general problem which is of interest here, but that their detailed examination can only follow a decision to seek a legal solution, based on civil law, private international law and public law, to the question of the international protection of cultural property in a universal sense.

III. The concept of the "protection" of cultural property

As was seen in regard to the concept of "cultural property", the notion of protection is likewise a recent one and its complexity derives from the fact that it encompasses all the problems associated with cultural property itself. As far as the extent of the protection is concerned, three levels may be distinguished: national, international and universal.

National protection is that which every State establishes by means of rules of public law with reference to its territory, by virtue of the origin of the cultural property, or again by virtue of the fact that the property is located within the national territory. The 1970 UNESCO Convention has given a new perspective to the protection of cultural property by harmonising the principles aiming at the national protection of this property: reference may be made to the Preamble of the Convention which declares in particular:

> "Considering that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,".

At the same time however the 1970 UNESCO Convention regulates international relations resulting from the circulation of cultural property and two other provisions of the Preamble highlight the concern of elevating the protection to an international level:

> "Considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations,
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> .....
>
> Considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation,".

The 1970 UNESCO Convention has created the basis for a universal conception of the protection of cultural property, particularly by introducing the idea of a common cultural heritage of mankind. This concept enjoys in our time increased recognition which attests to an awareness of the inherent value of cultural property as a testimonial of the culture of humanity, and has worked itself into the collective mentality. It is now possible to envisage the translation of this evolution into legal rules which would harmonise national and international regulations so as to arrive at a universal legal protection of cultural property. The present concern of UNESCO lies in that direction, and a specific instrument aiming at the protection, at universal level, of cultural property would seem to constitute a suitable vehicle for meeting that concern.

CHAPTER III

The case law concerning the problem of the acquisition in good faith of cultural property and its protection may be classified according to three groups of situations:

I. First group

Situations such as the following can be included in the first group: the owner of the property is dispossessed against his will (by loss or theft) and the property is exported to another country; following a second transfer of the property or its subsequent removal abroad, it comes into the hands of a purchaser in good faith. The problem then arises of whether, for the determination of the applicable law, recourse must be had to the connecting factor of the lex rei sitae: this question is essential for since an affirmative reply falls within a conception which is indisputably favourable to international trade in art, the protection actually offered to the dispossessed owner is debatable.

The following case, Winkworth v. Christie, Mason and Woods Ltd.(15) illustrates the situation we have described:

A collection of Japanese works of art belonging to an English private person was stolen in England and then exported to Italy. The collection was sold in Italy to an Italian who sent it back to London to put it up for sale at Christie's. The dispossessed owner, who recognized his collection, brought an action against Christie's and the Italian purchaser in order to establish his title to the collection and to obtain either restitution or reimbursement. The English court rejected the claim on the ground that the Italian had acquired the stolen works of art in good faith, thereby applying Articles 1153-1157 of the 1942 Italian Civil Code (since the new Italian law of 1942 acquisition in good faith also extends to stolen goods); thus, the English owner's claim was determined in accordance with Italian law by virtue of the solution given by the rule of private international law which considers the lex rei sitae to be the connecting factor: this means that the validity of a transfer of ownership of movable property is governed by the law of the country where the property is located at the time of the transfer. In this case, as the Japanese collection was in Italy at the time of the transfer, the validity of this transfer was determined in accordance with the application of Italian law.

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(15) Winkworth v. Christie, Mason and Woods Ltd., /1980/ 1 All ER 1121 (Chancery Division); /1980/ 2 WLR 937; comments by M. JEFFERSON in LQR 96 (1980) 508-511.

This example evidences fairly clearly a certain number of legal difficulties involved which merit consideration:

1. The distinction between public property and private ownership

This distinction is needed because a State will endeavour to obtain the recognition of its own law in relation to the protection of its cultural heritage by a foreign jurisdiction, where public property is concerned.

For example, the case may be cited of the Medici Archives (16):

This case concerned a set of documents of great value, about one half of which belonged to the Italian State, which had a right of preemption over the other half which was in private ownership, and which had forbidden its export. The whole collection was exported illegally with a view to its sale by auction at Christie's. The English judge seized of the case acceded to the claim by the Italian State only in respect of the documents in public ownership, while authorizing the sale of the other documents without prejudicing an action for damages being brought against the sellers and the buyers of the private collection.

In the case Winkworth v. Christie action was brought by a private person: private law actions instituted by individuals, which generally follow the public sale of stolen and illicitly exported (and sometimes sold) goods, relate to property which is not part of the public domain and which does not therefore enjoy the special protection which may be accorded by the court seized of the case.

By way of comparison reference may be made to another case in which cultural property belonged to a private person who had exported it in violation of national law, Attorney-General of New Zealand v. Ortiz (17):

A series of Maori carvings had been illegally exported from New Zealand in 1973 by an English art dealer who sold them to Ortiz in New York that same year; the latter brought the carvings to Switzerland where he kept them until 1978, when he sent them to London to Sotheby's for sale by auction. The New Zealand Government then brought a claim to recover the carvings on the basis of a law enacted before 1973 according to which cultural property exported illegally is to be forfeited to the State, and requested the postponement of the sale until the court had ruled on the question of title to the goods. In its judgment the Court of Appeal, reversing the decision of first instance, interpreted the expression "shall be forfeited" as meaning that the transfer of title in the property to the State was conditional upon a judicial ruling, and not that the transfer was automatic.

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(16) Cf. L.V. PROTT and P.J. O'KEEFE, op. cit., p. 100

(17) Attorney-General of New Zealand v. Ortiz and others, /1982/ 3 All ER 432

This decision was affirmed by the House of Lords[18].

2. Restitution

This is a remedy of public law which may be time-barred under national law but which concerns only cultural property within the public domain. It is contemplated at international level by Article 7 of the 1970 UNESCO Convention and ought therefore to be applied between the States Parties to this Convention. From a universal standpoint, restitution as a legal instrument for the protection of cultural property ought therefore to be contemplated among all countries as regards property within the public domain, but also as regards property owned by individuals when it is of great importance for the national heritage.

The cases so far referred to bring up, in relation to restitution, the preliminary problem of title. In certain cases title is not in doubt: see, for example, the case of the Medici Archives. On the contrary, in other situations, proof of title may be difficult to establish, as in the case of United States v. McClain[19].

In this case Rodriguez had offered to the Mexican Cultural Institute of San Antonio (USA), which was supported by the Mexican Government, a collection of pre-Columbian artifacts which he had exported illegally from Mexico. On the basis of a Mexican law of 1972 which declares all pre-Columbian objects not legally acquired before the enactment of the law to be State property, and considers those exported without authorization to be stolen goods, the Mexican Government requested restitution of the works of art from the American authorities. The American Court of Appeals reversed the judgment made at first instance which made a conviction under the United States National Stolen Property Act, holding that unless the objects were listed in an inventory of public property they were capable of ownership by a private person who had acquired them before the entry into force of the 1972 Mexican law[20].

In cases such as the one described above, the problem of the proof of ownership can be avoided only by a detailed inventory of property belonging to the State. To come back to the case of Winkworth v. Christie, the possibility of restitution did not in any case arise as the property in question belonged neither to the British State nor to that country's cultural heritage.

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(18) Attorney-General of New Zealand v. Ortiz and others, /1983/ 2 All ER 93.

(19) United States Court of Appeals, Fifth Circuit, Jan 24, 1977, 545 Federal Reporter, 2d. 988, affirmed in part by United States Court of Appeals, Fifth Circuit, April 23, 1979, 593 Federal Reporter, 2d. 658.

(20) Cf. National Stolen Property Act, in 18 USCA §§ 2314, 2315.

3. Acquisition in good faith

What is the situation of a bona fide purchaser of stolen, lost or illicitly exported cultural property? This is a problem central to this study, which the case of Winkworth v. Christie highlights all the more as, in the context of an international situation, the solutions would differ radically according to the principle applied in the case.

It should be recalled that in this case the bona fide purchaser had acquired the property in Italy; the English court applied Italian law which recognizes the right of the bona fide purchaser to the property, including stolen property subsequent to 1942, unlike English law according to which, in such cases, title does not pass. The claim of the dispossessed owner was thus rejected and he obtained neither restitution, nor reimbursement nor damages.

National law regulates this question by rules of private law which ensure division of loss to a greater or lesser degree: thus, in Common Law countries such as the United Kingdom, bona fide purchase is not protected as such, but the legal rules which concern the limitation period and sales at market overt provide a certain security for the bona fide purchaser. On the contrary the bona fide purchaser is protected in other countries, but sometimes, as seen in the case referred to above, it is the dispossessed owner who finds himself at a disadvantage.

An attempt at international regulation of the protection of cultural property must undoubtedly aim at finding a solution between the extremes constituted by the alternatives of protecting acquisition in good faith or protecting the dispossessed owner of cultural property. A certain number of considerations should guide this research, but it appears to be quite clear that the institution of a system of protection of bona fide purchasers cannot be excluded without severely prejudicing a vital element of the international legal order, i.e. international commerce, and that the protection of cultural property calls for an urgent and novel solution.

4. The "lex rei sitae"

Reference has already been made to the problem of the variety of solutions which may be reached in a given case according to the law which is applied in an international context. The applicable law, in the field under study, is determined by the classic rule of private international law which has regard to the place where the property is situated at the time of the transfer. In effect, if Italian law was applied in the case of Winkworth v. Christie, this was because the Japanese collection was already in Italy at

the time it was acquired by the Italian purchaser.

This rule is applied in an absolute manner in private international law without regard to the consequences of its application for those involved in the particular case. This connecting factor evidently, however, gives rise to problems in cases, such as that cited above, where there has manifestly been an evasion of the law. Two ways of dealing with this problem of fraus legis may be envisaged: on the one hand the rules of private international law could be excluded from a possible uniform law instrument aiming at the protection of cultural property; on the other hand one could maintain the lex rei sitae as connecting factor but provide for an alternative connecting factor when a number of other criteria are present, in such a manner as to designate as the applicable law that of the State which has the closest link in relation to the case in question, which would permit the introduction of a connecting factor of a "substantial character" ("caractère substantiel").

II. Second group

The application of foreign "ordre public"

This category includes those cases where cultural property is exported from a country in violation of a law prohibiting export. The judgment of the Bundesgerichtshof of the Federal Republic of Germany, dated 22 June 1972(21), in the following Nigerian case will permit an understanding of the legal problem which is raised by illicit export from the standpoint of the international protection of cultural property.

The Bundesgerichtshof was seized of a case concerning the transport of cultural property from Nigeria to Hamburg in violation of a Nigerian law prohibiting the export of such property. At the end of the carriage operations, three pieces of luggage containing six bronze statues were found to be missing. Having to rule upon a claim for damages on the basis of an insurance contract the court rejected the plaintiff's claim on the ground that his interest did not deserve to be protected as the goods had been exported illicitly. So as to clarify the policy underlying its decision, the court further referred in its reasoning to the 1970 UNESCO Convention - to which the Federal Republic of Germany is not a Party - which provides in the first paragraph of Article 2 that: "The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the

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(21) Cf. Bundesgerichtshof 22.6.1972, Entscheidungen des Bundesgerichtshofes in Zivilsachen, Bd. 59 S. 82; Cf. A. BLECKMANN, Sittenwidrigkeit wegen Verstosses gegen den ordre public international, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 34 (1974) 112-132.

main causes of the impoverishment of the cultural heritage of the countries of origin of such property ...". Paragraph 2 continues: "To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations."

The problem posed by this decision which affirms the necessity of protecting the cultural heritage is the application of foreign "ordre public". This question, which is topical in the field of private international law, calls for an affirmative answer once private international law is understood as part of international law. It can be seen, in the light of the case cited above, that in order to ensure a truly international protection of cultural property it is indispensable to have recourse to the recognition of foreign "ordre public", through the mechanism of private international law, or to the recognition of foreign laws limiting or prohibiting the export of cultural property, on the basis of public law reciprocity agreements.

It may be noted that in the case referred to above of Attorney-General of New Zealand v. Ortiz (see p.17), where the goods had been exported illegally, the request for the recognition and application of the New Zealand law was based upon a request for restitution and the court applied this foreign law directly. In the case of the Nigerian goods on the other hand, the court referred to the 1970 UNESCO Convention even though the Federal Republic of Germany was not a Party to that legal instrument, thereby indirectly recognizing the Nigerian Law prohibiting export.

Although this is not the place for a doctrinal debate on the concept of "ordre public", it is undoubtedly not without interest to recall that "ordre public" assumes extremely varied forms and that it exists in each legal system, in all areas, even if it is not designated as such. Thus, one speaks of national or international "ordre public", of general or European, substantive or procedural "ordre public", etc.. So-called "negative" "ordre public" leads to the exclusion of the application of rules of foreign law for the purpose of guaranteeing general principles of national law; on the other hand, "positive" "ordre public" is that by virtue of which rules of national law are applied. Generally speaking, both legal writings and judicial decisions rarely have recourse to the concept of "ordre public". According to some authors, the concept of international "ordre public" would be an effective way of bringing closer together, or harmonising, the rules of law of the different legal systems. This opinion, however, remains a minority one, and the application of foreign "ordre public" constitutes an exception.

It must be recognized that the boundary-line between laws of immediate

application and foreign "ordre public" is at times difficult to draw; in the case referred to above, it may be asked whether the Nigerian law was not rather a law of immediate application. In any event, it would appear to be necessary, in relation to the subject under consideration, to institute a "special international "ordre public"" for the international protection of cultural property which would at the same time protect such property at national level.

Lastly, nothing runs counter to recommending the introduction of a single regulation by national public law of the export of national cultural property in the interest of an increased protection of such property.

III. Third group

The cases falling within this group combine the problems already described above in relation to the first and second groups: the case briefly illustrated below, that of the Casenoves frescoes,(22) raises a whole series of complex problems reference to only a few aspects of which will be made here: the determination of the legal nature of the property and the resulting degree of protection, the protection at national level of cultural property in relation to private and public interest, acquisition in good faith.

The Court of Montpellier was called upon to rule on the competence of the court seized of a suit for the recovery of property: this suit, initiated by two joint owners who had not consented to the sale, concerned frescoes removed from the walls of the chapel of Casenoves by the purchaser by means of a technical procedure which he had invented, and was brought against the City of Geneva and the Abegg Foundation in Switzerland which had acquired them several years later. The court had therefore to examine, in order to determine the question of jurisdiction, the legal nature of the property in question: it found it to be immovable property by way of an original form of reasoning and declared particularly in its judgment that: "considering that the protection resulting from the fiction of immobility is all the more necessary for these ensembles on account of the fact that natural immovables or sites of an artistic, historical or archaeological nature are more and more exposed to misappropriation, spoliation and even pillage". This characterization permitted the court later to uphold the jurisdiction of the place where the principal immovable property was located, even if the frescoes, held to be immovable property, had been separated from it ("in such circumstances that the

(22) Cour d'Appel, Montpellier, 18 December 1984, Recueil Dalloz Sirey 1985, p. 208, comments by Jean Maury.

separation did not entail any alteration in the latter's designation as immovable property").

1. Movable or immovable cultural property

This case illustrates in a particularly acute manner the problem of the degree of protection which results from the legal nature of the property: in national law the characterization of the property as movable or immovable (according to the varying criteria under the different laws) entails the application of different regimes; the international instruments for their part often limit protection to a certain category of goods, a position which receives support from the literature.

The development of modern techniques permits the removal of fixtures from immovable property and the possible modification of the nature of the property as a result thereof can be questioned. In the case referred to above, the issue of qualification determined jurisdiction: if the property had been declared to be movable property by the Court of Appeal in France, then the action for recovery of the property would have had to be submitted to the Swiss courts at the place of residence of the defendant.

All cultural property is qualified originally in the country in which it is located in accordance with the criteria laid down by national law. Its removal or its transportation to another country can result in a modification of the qualification of the property in conformity with the criteria of the legislation of the "importing" country. In certain cases immovable property may be transferred even while continuing to be considered an immovable. It must, however, be recognized that the qualification in the situation where the property comes from an archaeological ensemble often obeys other rules. Thus, when restitution is claimed the movable character of the property is implicit: in reality the property may retain its character of immovable property particularly when it has been incorporated in another immovable: is the Egyptian obelisk placed on Bernini's elephant in the Piazza della Minerva in Rome still a movable, for if so the problem could possibly be raised of its restitution. It is obvious that the qualification is in such cases related to the cultural value attached to property in a context which is no longer the original one, but which indisputably deserves to be protected.

It therefore appears quite clear that a genuine international protection of cultural property calls for the abandoning of the distinction, in respect of such property, between movables and immovables: cultural property ought not to be accorded greater or lesser protection depending on whether

it is an integral part of a whole or has been detached from it, or on whether it is qualified as movable or immovable property.

2. The regulation of the export of cultural property

The legal problem mentioned above arises in particular when the property has been appropriated and transferred to another country. It goes without saying that an effective protection begins at national level with the laws regulating export, and with a strict application of those laws. Thus, as D.C. Dicke (23) has stressed, the protection of the Parthenon frieze ought to have begun when it was still in situ. The recognition of these laws in foreign courts ought to allow them to give effect to such laws so as to extend the protection beyond the territory of the country of origin.

3. The question of good faith.

In the case of the Casenoves frescoes, as in that of Winkworth v. Christie also mentioned earlier (see p. 16), restitution was only possible on condition that the bad faith of the purchaser was proved. It is apparent from the facts of the Casenoves frescoes case that the defendants probably were in good faith, since it is doubtful whether at the time of the purchase they knew of the circumstances in which the first sale had taken place.

(23) Cf. D.C. DICKE, op. cit. p. 18.

CHAPTER IV

I. Some civil law aspects of the international protection of cultural property

1. Introduction

The legal problems related to acquisition in good faith are both ancient and modern. In the present context, namely the protection of cultural property, this concept is particularly important, and deserves therefore in-depth examination: here, however, only a general survey will be undertaken.

In all national laws the rules concerning the acquisition of movable property take into account two contradictory but equally legitimate interests: that of the dispossessed owner, and that of the bona fide purchaser: the protection of the bona fide purchaser meets more generally the concern of ensuring a certain security in commercial transactions (24).

The fact that we find ourselves faced with a new, particular, category of property defined as cultural property throws a different light upon the terms of the alternative illustrated above: it is quite clear that the solution cannot be found in a simple adaptation of traditional rules which would, for example, consist in a variation of limitation periods or in a readjustment of the respective rights of those concerned - dispossessed owner and bona fide purchaser - according to a different evaluation of their interests. The need to elaborate a series of completely new rules must, therefore, be recognized, and this opinion thus echoes the criticism of the legal treatment which has until now been reserved to this subject (25).

Respect for the fundamental rules of civil law is an absolute condition for a possible elaboration of international rules. It is primarily important to regulate the question of acquisition in good faith by a rule which would constitute a compromise, at the level of comparative law, between the different principles contained in the legal systems and which therefore could be widely accepted. In the absence of definite proposals at this stage, it may at least be noted that while the principle of the protection of the acquisition in good faith is evaluated differently depending on the interests of

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(24) Cf. Q. BYRNE-SUTTON, Qui est le propriétaire légitime d'un objet d'art volé? Une source de conflit dans le commerce international, Aspects juridiques du commerce international de l'art, Geneva, 1985, not yet published.

(25) Cf. S. RODOTA, The Civil Law Aspects of the International Protection of Cultural Property, Proceedings of the Thirteenth Colloquy on European Law, Delphi, 20-22 September 1983, Council of Europe, Strasbourg, 1984, p. 99.

commerce, the principle of the refusal to protect acquisition in bad faith is instead accepted unanimously. The objective of any attempt at international regulation on this point must therefore be a balance between the interests of the parties concerned.

2. Acquisition in good faith of cultural property

Given the considerable differences which are to be found among the various legal systems in regard to the question of acquisition in good faith, a certain number of difficulties exist from the viewpoint of comparative law. Each country offers an abundance of literature and treatises on the subject and for that reason this part of the study will be confined to a few remarks.

All legal systems must resolve the problem of the division of risk in cases where stolen goods are sold to a bona fide purchaser. Most continental systems protect the bona fide purchaser whereas the Common Law countries apply the rule nemo plus iuris transferre potest quam ipse habuit: the bona fide purchaser does not enjoy a special protection apart from that conferred by rules on limitation of action and rules related to sale in market overt.

This schematization of two opposed points of view does not, however, take account of the different facets of this complex question; from the standpoint of comparative law three groups may be distinguished[26]:

- the first group gives priority to the interests of the dispossessed owner, who may claim recovery of the property, subject to certain exceptions relating to the acquisition in good faith of, for example, securities, stocks and shares. This is the case in Norway and Denmark;
- the second group, which constitutes a less radical approach, composed of the continental and Common Law systems;
- the third adopts a solution whereby the purchaser acquires full title, as in Italy since 1942.

Another classification of the legal systems based on the same principles but made according to different criteria is that put forward by J.-G. Sauveplanne in his comparative law study[27], preliminary to the research which led to the adoption of LUAB in 1974, where he makes the following distinction:

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(26) Cf. K. ZWEIGERT, Rechtsvergleichend - Kritisches zum gutgläubigen Mobiliarerwerb : RabelsZ 23 (1958) 1-20.

(27) Cf. J.-G. SAUVEPLANNE, La protection de l'acquéreur de bonne foi d'objets mobiliers corporels, Unification of Law, Year-book 1961, Unidroit, 1962, p. 48 et seq.

The first group: French law and those systems based on it such as Belgian law: the maxim "en fait de meubles, la possession vaut titre", contained in Articles 2279 and 2280 of the French Civil Code, finds application. It is necessary for the purchaser to be in actual possession of the property and in addition to be in good faith. Good faith is presumed (Art. 1141 of the Civil Code). An action for recovery of the property is open to the bona fide purchaser for a period of three years.

In the law of the Federal Republic of Germany (§§ 932 to 936 BGB) and for the systems based on German law (Greek and Japanese law): the presumption in favour of the person in possession of the property exists independently of the protection of the purchaser a non domino. A person with title to the property is presumed to be the owner in the absence of proof to the contrary. This presumption cannot, however, be invoked against an owner dispossessed by theft, or when the property was lost in another manner (§ 1006 (2) (1) BGB).

In Swiss law, a person in possession of a movable is presumed to be the owner (Art. 930 of the Swiss Civil Code). Article 3, paragraph 1 of the Swiss Civil Code provides that "Good faith is presumed when the law makes the creation or the effects of a right dependent thereon". Paragraph 2 further lays down that "no-one may invoke his good faith if it is incompatible with the care which he should have taken in the circumstances". Article 3 of the Swiss Civil Code neither defines good faith nor does it provide that good faith is always protected. As in German law, greater weight is attached to the possession of the transferor than to the transfer of possession to the purchaser.

Netherlands law (Articles 2014 and 637 of the Netherlands Civil Code) was for a long time influenced by the French concept of the protection of the bona fide purchaser; at present it is the German approach which is prevalent. As J.-G. Sauveplanne has pointed out, the rule "en fait de meubles, la possession vaut titre" has a double function, namely a procedural role and a substantive one; the first is the presumption of ownership deriving from possession, the second the protection of the purchaser a non domino.

Austrian law (§367 ABGB): its originality lies in the restriction of the protection of the purchaser a non domino. It does not make distinctions according to the nature of the loss of possession by the owner, but according to the nature of the acquisition of the object.

The second group: J.-G. Sauveplanne includes Italian and Swedish law. A few remarks may be made concerning Italian law: there are two important innovations in Articles 1153 to 1157 of the Italian Civil Code of 1942, namely:

- the abandonment of the presumption of ownership deriving from possession;
- the elimination of the distinction between the ways in which the owner lost possession of the property, and the protection of the third party bona fide purchaser, even in the case of lost or stolen property.

The third group: This group comprises the Common Law countries where the fundamental principle in this regard is nemo plus iuris transferre potest quam ipse habuit; the rule is subject to several exceptions, in particular the sale of goods in market overt. The principle is further attenuated by the rules governing limitation of actions for recovery of the property or for damages available to the original owner.

The fourth group: This includes the Socialist States whose solution to the problem falls outside the scope of this study by reason of the different concept of property: there exists a presumption of ownership in favour of the State.

Some conclusions may be drawn from this general exposé of the regimes applied by different legal systems: most of them lay down certain distinctions on which the solutions to specific cases are based. These distinctions concern the legal nature of the property (for example, movable or immovable property), the cause of the loss of possession (loss, theft, or other), and the circumstances in which the acquisition took place (commercial transaction or otherwise, for example).

These different aspects which are treated more often than not in an original way by each national law call for harmonisation at international level. In-depth research in this connection has already been conducted, and the work carried out by Unidroit led to the provisions contained in Articles 7 and 8 of the 1974 LUAB.

Acquisition in good faith under Articles 7, 8 and 11 of the 1974 LUAB

Articles 7 and 8 (see pp. 6-7) contain flexible provisions which can serve as a point of departure for the elaboration of the proposed international rules. In effect, Article 7 does not aim at establishing a presumption of good faith in favour of the purchaser: it seeks rather to strike a balance between the elements of proof that the purchaser must adduce to justify his good faith, and those which the dispossessed owner must adduce to establish his rights. Throughout the whole draft, two kinds of criteria are stated which

permit a conclusion to be reached as to the good faith of the purchaser: objective criteria and subjective criteria. The latter are contained in Articles 7 and 8, the concern of balancing the interests of the parties concerned having led the authors of the draft Convention to leave the judge a large measure of discretion: he is thus guided by certain considerations, but he is not bound by provisions requiring their strict application.

It must further be recalled that the elements which the judge has to take into consideration are not exhaustively listed in Articles 7 and 8 of the 1974 LUAB ("...account shall, inter alia, be taken ..."): a greater latitude than an evaluation of the circumstances of the case with respect to the criteria mentioned is left to the judge who, if need be, may have recourse to supplementary criteria which may be required under national law. Lastly Article 8, concerning the time at which good faith must be assessed, is an example of a compromise solution between the contrasting positions of national laws, stating as it does the two generally accepted criteria (" ... either at the time the movables are handed over ... or at the time the contract is concluded....").

It might, therefore, be thought that the provisions of Articles 7 and 8 could be accepted by a large number of States as far as the general principles which they lay down are concerned, and on the strength of this they could be included in a new instrument aiming at the international protection of cultural property. They could be completed for this purpose in accordance with the three following principles:

- the abandonment of the distinction between civil law and commercial law;
- the admission of acquisition in good faith irrespective of whether the property has been stolen or lost;
- the admission of acquisition in good faith whatever the right of the person from whom the purchaser receives the property (owner or simple bailee).

The protection of acquisition in good faith, together with the recognition of its effects, is indispensable for international trade: the principle must therefore be maintained in relation to cultural property with, however, the rider that the purchaser can in no case invoke his good faith in respect of registered cultural property or of cultural property which, although it is not registered, is widely known.

The case of stolen cultural property calls for some additional remarks. Article 11 of the 1974 LUAB lays down the principle that the transferee of stolen movables cannot invoke his good faith. The reasons which led the authors of the draft to adopt this solution may be recalled (28) :

"a) Most national legal systems protect the owner in cases of theft. If this protection were refused him at an international level, there would be a distinction between the national and international régimes and the balance between the opposed interests of the persons involved would be upset.

b) In general, it is easier for the transferee to recover damages by going against his co-contractant than it is for the owner to search for the thief or receiver of stolen goods in order to bring an action against him for damages.

c) An effective protection of the owner is necessary in view of the recent enormous upsurge in criminal trafficking in works of art and antiques. At a private law level, the draft can contribute towards giving the best possible guarantee of the restitution of stolen goods to their owners."

The relevance of these arguments leaves no doubt as to the objective of an effective protection of cultural property: the solution contained in Article 11 is therefore indisputably favourable to the dispossessed owner (its application in Winkworth v. Christie would have entailed the restitution of the property to the owner).

It is, however, our opinion that this provision can find no place in an instrument which, while most certainly aiming at the protection of cultural property, also seeks to guarantee the freedom and security of international trade by respecting fundamental principles such as that of the effect given to acquisition in good faith. The proposal made above to abandon the distinction between stolen and lost property presupposes moreover that any special regime for the case of acquisition in good faith of stolen property be excluded. It is, therefore, by other legal means that a balance may be struck between the interests of the parties concerned.

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(28) Cf. J.-G. SAUVEPLANNE, Explanatory Report on the Draft Convention providing a uniform law on the acquisition in good faith of corporeal movables, Uniform Law Review, Unidroit, 1975-I, p. 113.

3. Acquisitive prescription

Acquisitive prescription plays an important role in relation to the acquisition of cultural property, as it protects the purchaser against whom the dispossessed owner can no longer, after the expiry of a certain period of time, bring an action for recovery of the property: it therefore constitutes an essential instrument for the security of commercial relations.

The periods of limitation vary to a great extent under the different national laws although they are generally short: thus, it is three years in Austria, five years in Switzerland and ten in Italy. It can easily be understood that short periods grant the bona fide purchaser a right to the property which is certain; on the other hand, in the absence of any specific rules governing stolen property, they tend to encourage theft and the receiving of stolen goods. It is with this in mind that J. Châtelain has argued in favour of a thirty-year period of limitation, at least as regards property belonging to the public domain (29).

In an international situation the divergencies between the solutions adopted at national level create a practical problem when the period of limitation is shorter than that during which an action for the recovery of the property can be brought: this situation results from the fact that the two legal questions are not always governed by the same law. The problem becomes even more complicated when the time necessary for the acquisitive prescription has been partly completed in one State and partly in another following the export of the cultural property (30).

By way of example reference will here be made to the case of Koerfer v. Goldschmidt (31).

In this case the Swiss Federal Tribunal was required to rule upon Koerfer's rights: the latter had bought, at an auction in the Federal Republic of Germany, two paintings by Toulouse-Lautrec which had been confiscated by

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(29) Cf. J. CHATELAIN, Means of combating the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC, Study prepared at the request of the Commission of the European Communities, 1976, p. 115.

(30) Cf. F. KNOEPFLER, Rapport suisse de droit international privé, Aspects juridiques du commerce international de l'art, Geneva 1985, not yet published.

(31) Cf. J.T. 1970 I 176; ATF 94 (1968) II 297.

the German State during the war. Koerfer had purchased the paintings in good faith and had sent them to Switzerland. The Swiss Federal Tribunal held that Koerfer had become their legitimate owner under Swiss Law, as he had them in his possession in Switzerland for more than five years. Acquisitive prescription was therefore an obstacle to the success of an action for the recovery of the paintings by Goldschmidt's son, acting as heir to the dispossessed owner.

In relation to the solution adopted in this case another case may be referred to: Kunstsammlung Weimar v. Elicofon (32):

The American Court was seized of a claim for the recovery of property filed by the Weimar Museum and the Grand Duke of Weimar against Elicofon: the latter had acquired in New York in 1946 two portraits by Dürer, stolen the year before from the depot of the Weimar Museum. Elicofon had in good faith enjoyed possession of the paintings for twenty years, and in 1966 the portraits were re-discovered. The court applied the law of the State of New York as the lex rei sitae - the acquisition having taken place in New York - which provides for a period of limitation of three years in respect of actions for the recovery of property, to be calculated as from the discovery of the property: this period had not yet elapsed when the plaintiffs brought their action; furthermore, the law of New York excludes acquisitive prescription when the property in question has been stolen. It was therefore held that Elicofon had not acquired valid title to the paintings.

The two cases referred to above clearly demonstrate that the divergencies between the national solutions urgently call for a unification of the legal aspects of acquisitive prescription in the field of cultural property: it may be noted that the application of German law in Kunstsammlung Weimar v. Elicofon would have led to a different solution in this case as ten years' possession in good faith would have been sufficient to defeat the claim of the dispossessed owner.

It cannot, therefore, be too strongly recommended that the international rules proposed provide for a unified period for acquisitive prescription in respect of cultural property: this period ought to be sufficiently long to ensure a balance between the protection of the interests of the bona fide purchaser and that of the interests of the dispossessed owner. The uniform rule ought, further, to specify the time from which the period of limitation begins to run, in order to provide protection at international level,

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(32) Eastern District Court of New York, 12 June 1981, ILM 20 (1981/5) p.1122; Court of Appeal, 5 May 1982, ILM 21 (1982/4), p. 773.

and ought to apply to all property, without any distinction as to whether it belongs to the State or to private individuals.

4. The right to the return of cultural property: a type of right to payment being, in effect, a right to recovery of the property.(33)

The reflections set forth hereto have demonstrated the importance of steering an intermediate course between the extremes constituted by the solution of Italian law, which offers the bona fide purchaser an absolute protection, and by that of the Common Law which instead ensures a minimum of protection by the application of the principle nemo plus iuris transferre potest quam ipse habuit. We have also seen that it is of fundamental importance to retain the principle of good faith, but to do so while searching for a compromise solution as regards the interests of the parties concerned.

Certain legal systems, such as the Swiss and the French, contain an ancient institution which has followed a very particular historical evolution, i.e. that of the "Lösungsrecht". For example, the solution in Swiss law is contained in Article 934 of the Civil Code:

> (paragraph 1) "The possessor who has had a movable object stolen from him, or who has lost it, or who is dispossessed of it in some other manner independently of his will, may reclaim it during a period of five years".
>
> (paragraph 2) "When the object has been acquired at a public auction, at a market or from a merchant dealing in objects of the same kind, it may be reclaimed neither from the first purchaser, nor from any other bona fide purchaser, unless the purchaser is reimbursed for the price he has paid".(34)

In some modern laws, such as that of Portugal (1966) and in several draft laws, such as those of Quebec and of the Netherlands, it is also possible to find compromise solutions as regards the interests of the purchaser and those of the dispossessed owner, which provide for the return of the property subject to a right to compensation.(35)

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(33) Cf. F. GUISAN, La protection de l'acquéreur de bonne foi en matière mobilière, Lausanne, 1970, p. 126.

(34) Cf. K. SIEHR, Lösungsrecht des gutgläubigen Käufers im Internationalen Privatrecht, ZfVglRwiss 1984 (83), pp. 100-118.

(35) Cf. K. SIEHR, Der gutgläubige Erwerb beweglicher Sachen - Neue Entwicklung zu einem alten Problem ZfVglRwiss, 1980 (81) p. 275.

Consequently, one could envisage the introduction into possible uniform international rules aiming at the protection of cultural property, a principle, drawn from the Swiss model, which would take into consideration not so much the persons concerned as the protection, at international level, of stolen or lost cultural property. On the basis of the functional method of comparative law, this principle would consist in a right to the return of the cultural property within a specified period of time, coupled with reimbursment of the price paid for it, which could be considered as related, in fact, to the right to recovery of the property. It would then be necessary to reflect upon the conditions, the effects, the nature and the time-limits of such a right to the return of the property: an in-depth study of the problems which the choice of this approach would raise at international level could profitably be conducted within the context of a further study.

II. Some international private law aspects of the international protection of cultural property

I. Introduction

Rules aiming at the protection of cultural property being above all public law rules, the classic theory of conflict of laws was opposed to the application of such rules as applicable foreign law. An evolution of this theory now admits rules of foreign public law to be capable of being applicable internationally (36). There has also been a recent tendency which sees a certain blurring of the borderline between public law and private law (37) and which gives the judge the possibility of applying imperative rules of a foreign law which has a reasonable connection with the legal relationship, even if this foreign law is not the law primarily applicable to the said legal relationship. A good example of this new tendency is to be found in Article 7 of the Convention of the European Communities concluded in Rome on 19 June 1980 on the Law applicable to Contractual Obligations which, under the title "Mandatory rules", provides:

"...effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law

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(36) Cf. G. DROZ, La protection internationale des biens culturels et des objets d'art vue sous l'angle d'une Convention de droit international privé, Aspects juridiques du commerce international de l'art, Geneva 1985, not yet published.

(37) Cf. G. REICHELT, Kulturgüterschutz und Internationales Privatrecht, Praxis des Internationalen Privat-und Verfahrensrechts, 1986-2, pp. 73-75.

applicable to the contract".

Another illustration of this tendency is to be found in the provisions of Article 18 of the draft law on private international law, currently before the Swiss parliament:

"When legitimate and manifestly preponderant interests so require, effect may be given to a provision of a law other than that designated by this law which claims mandatory application, if the situation has a close enough connection with that other law."

In the event of it not proving possible to elaborate, in the text of a uniform law aiming at the international protection of cultural property, substantive rules which could command the support of a large number of States, recourse to conflicts rules which take due account of the principles of both private and public law could, to a certain extent, reduce the effect of the divergencies between the solutions contained in national law.

2. The application of the lex rei sitae

It has already been seen above that the lex rei sitae, i.e. the law of the country to which the cultural property has been transferred, constitutes a classic connecting factor in the subject under consideration, and that it is applied without exception by the courts. This principle must without doubt be maintained: in effect, its application does not mean that either the bona fide purchaser or the dispossessed owner is favoured a priori; the protection of the one or the other depends solely on the rule contained in the law designated by the lex rei sitae in each specific case. Thus, in Weimar v. Elicofon (see p. 32), it was the dispossessed owner who was protected, but in Winkworth v. Christie it was the bona fide purchaser who won the case: it must, however, be noted that in this last case the judge already had "a certain feeling of solidarity" with the dispossessed owner, even though he applied the classic connecting factor (38).

The case of Winkworth v. Christie calls for an additional observation in relation to the application of the lex rei sitae: it can be seen that in this case it is not the connecting factor which is open to criticism but rather the total absence of any close link with the lex rei sitae. It is this fact which militates in favour of the argument, supported by part of the literature, which seeks, as regards stolen or lost cultural property, to introduce a "substantial characteristic" for the purpose of determining the applicable law in each case.

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(38) Cf. A. BYRNE-SUTTON, op. cit.

The solutions may be summarised as follows:

- the lex rei sitae is the classic connecting factor in this regard and must therefore be maintained as a general principle;

- in the context of international commercial relations relating to works of art it would be possible to accept as a connecting factor the autonomy of the will of the parties to the contract by which ownership of the property is transferred;

- as far as stolen or lost cultural property is concerned, i.e. situations which are outside the control of the dispossessed owner, the conflicts rule of the lex rei sitae could be applied, but only in the absence of a "substantial characteristic" leading to the application of the law which has the closest connection with the case in question. The introduction of an "exception clause" could therefore be envisaged, modelled on Article 14 of the Swiss draft law on private international law which provides:

"1. The law designated by the present law is, by way of exception, not applicable if, having regard to all the circumstances, it is manifest that the provision has only a very weak link with that law, and that it has a much closer connection with another law.

2. This provision is not applicable if the parties have chosen the law".

3. The application of foreign "ordre public".

It has been recalled above that all legal systems recognize the concept of "ordre public"; it is, moreover, mentioned in several international instruments, such as the provision contained in certain conventions prepared by the Hague Conference on Private International Law, which provides that a norm is not applicable when it is manifestly contrary to "ordre public".

In national legal systems recourse is had to the concept of national "ordre public" when the matter concerns a foreign legal rule which is contrary to the general principles of national law and incompatible with it. In connection with the subject under discussion, "ordre public" is invoked only exceptionally so as not to interfere with the law of the contract determined by the parties.

As far as the recognition and the application of foreign "ordre public" is concerned, judicial decisions and legal writing manifest, in general, a certain reticence, particularly because of the fact that one is here confronted with a problem situated at the crossroads between public law and private law; as seen above, the international protection of cultural property is also on the border-line between public and private law and it would therefore appear to be justified to make use of this concept in order to reach a certain measure of harmonisation between the different laws. It goes without saying that the greatest reserves should be formulated against a generalised application of foreign "ordre public", but the specificity of the subject treated here in most cases justifies both the recognition of foreign "ordre public" and its being given effect.

Over and above the recognition of foreign "ordre public" thought might be given to the possibility of considering the protection of cultural property as a question of international "ordre public" in its own right. In this connection it is useful to recall the reasoning of the German Bundesgerichtshof in the Nigerian case (see p. 20) which, referring to the 1970 UNESCO Convention, declared that this instrument expressed a new "international concept of the public interest" in this field. The concept of an international "ordre public" would answer a certain need to reduce the fundamental contradictions existing between the various aspects of the protection of cultural property as they are viewed in national systems. In conclusion it should be noted in connection with this last proposal that the application of international "ordre public" could be left to the discretion of the judge.

The foregoing considerations may be summarised as follows: an effective protection of cultural property necessarily calls for recourse to the concept of "ordre public";

- in the national legal systems increased recourse to this concept would constitute a supplementary instrument in the battle against the illicit traffic in cultural property;
- the multidisciplinary character of this subject justifies and facilitates the application of foreign "ordre public" with a view to the international protection of cultural property;
- the international protection of cultural property could be conceived at universal level by means of the concept of international "ordre public".

III. Some public law aspects of the international protection of cultural property

1. Introduction

The new way of looking at cultural property no longer stresses so much the material character of an object which may be acquired by private persons as the spiritual value of a specific type of property which is a "witness of civilisations": the protection of the ownership of the property therefore takes second place behind the concept of safeguarding the property itself and the context within which it was created. It is this conception which justifies the State's laying down, in certain exceptional cases, a number of restrictions on the right of ownership, or imposing obligations on owners of works of art. It is also the basis of the interest to act justly for the State, as well as for private conservation associations: this interest of the State manifests itself as a symbol of its cultural identity and the capacity to act is linked to the public interest attached to a cultural good (39).

It is evident that certain, at times marked, differences exist between the positions of States with respect to the protection of cultural property. The difference is particularly noticeable between developed countries and the countries of the Third World whose riches are still being brought to light and who are cataloguing their cultural property; these latter countries have not always drawn up regulations with a view to the protection of cultural property, and more often than not they would have few possibilities for ensuring their observance. These last considerations show that the universal protection of cultural property involves a multiplicity of aspects, both legal and non-legal.

2. Illicit export

A distinction is usually drawn between property illicilty exported which belongs to individuals and that belonging to States. The case of the Medici Archives (see p.17) is an example illustrating the possible effects of such a distinction. It was thus possible to reach a conclusion as to the importance of a generalised protection, independently of the owner of the property, where cultural property of the first importance to the national heritage is concerned. The public interest ought, consequently, to justify the restitution of cultural property of an indisputable national value, whether the property is privately or publicly owned: the purpose of the restitution being the return to the country of origin.

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(39) Cf. S. RODOTA, op. cit., p. 110.

The question of restitution could, however, be accompanied by a possibility of pre-emption by the State of origin of the illicitly exported cultural property: in this case restitution would most often be linked to the registration of the property in an inventory, which would thus be a guarantee of the protection of the property. "If museums and similar institutions have well-documented inventories of their holdings this will greatly improve their chances of identifying stolen property (...), proving ownership (...), publicizing thefts (...) and seeking international aid in the return of stolen goods (...)"(40). On the other hand it must be recalled that the 1970 UNESCO Convention provides in its Article 5, para. (b): "(... the States Parties to this Convention undertake, ...) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage".

Certain legal systems provide for the confiscation by the State of cultural property which has certain characteristics. Depending on the legal system, confiscation is either automatic or must be pronounced by a court of the State concerned, either as the main penalty or as an accessory or even additional penalty. The example given above of United States v. McClain (see p. 18) raised the question of confiscation as the Mexican Government invoked a law which pronounced all cultural property illicitly exported to be stolen property and therefore as belonging to the State: the American court, however, considered the question of the ownership of the property and held that the goods could have been acquired legally before the entry into force of the law. This case demonstrates that confiscation, while certainly a measure which definitely does protect cultural property, is also extremely harsh as it derogates from the principle of the respect for private property and therefore encounters difficulties with regard to its recognition abroad.

3. Restitution

Restitution of cultural property, which is a controversial principle in the field of the protection of cultural property, cannot always be carried out even when the cultural property has not left the national territory, and is even more difficult when the property has been exported. In this last case the success of claims for the return of stolen or illicitly exported cultural property which is in the hands of a bona fide possessor is uncertain, because of the international character of the crime, and is submitted to different rules depending on the State(41). It is to come to terms with this situation that G. Droz has indicated the usefulness of a convention for the return of cultural property which might take as a model the Convention on the Civil

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(40) Cf. L.V. PROTT and P.J. O'KEEFE, op. cit., p. 29.

(41) Cf. J. CHATELAIN, op. cit., p. 87.

Aspects of International Child Abduction, concluded on 25 October 1980; such a text could ensure the return of the cultural property to the country from which it was illegally exported, so that the question of restitution would be settled by the courts of that State (42).

It is evident that the effective restitution of cultural property is in the interest of developing countries. The basis of requests for restitution is the existence of a "territorial link" ("territoriale Bindung"), which is a principle of public international law to which effect must be given in view of the protection of the cultural heritage of the developing countries (43). This doctrine is oriented towards the protection and the development of the States concerned, and proposes maintaining the status quo ante as far as their national cultural heritage is concerned. It is this new concept of public international law and the uncertainties connected with the restitution of cultural property which are at the origin of the international agreements which have attempted to solve, at least partially, this sensitive question.

In this context the Recommendation adopted by UNESCO on 19 November 1964 concerning the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property in particular must be referred to. It is stated in the introduction that: "The purpose of the Recommendation is to protect the national cultural heritage of States by countering the illicit operations which threaten it." As this is a field which requires close collaboration between Governments, the Recommendation provides that States must conclude bilateral or multilateral agreements in order to solve the numerous problems encountered, particularly those which are brought about by the restitution of such property to its country of origin (44).

The other international instrument which provides for the return of cultural property is the 1970 UNESCO Convention. This point is amongst the most delicate ones dealt with in Article 7(b) (ii). It may be noted that while this provision certainly does state an obligation essential for the international protection of cultural property, it does not provide a legal basis for restitution, such as could, in particular, the territorial link of public international law. In addition to the question of restitution, Article 7 (b)(ii) regulates the situation of the bona fide purchaser who is deprived

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(42) Cf. G. DROZ, op. cit.

(43) Cf. D. SCHULZE, Die Restitution von Kunstwerken, (Veröffentlichungen aus dem Übersee - Museum Bremen, Reihe D, Band 12), Bremen, 1983, p. 36.

(44) Recommendation of 1964 on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, and the Introduction thereto by UNESCO in Conventions and Recommendations of UNESCO concerning the protection of the cultural heritage, UNESCO 1983.

of the property by reason of its restitution. Even though the Convention provides for the payment of an indemnity to the bona fide purchaser or to the person who legally has the ownership of the property, this solution has been judged to be insufficient by the majority of States which have not ratified the Convention, the principle of the protection of the bona fide purchaser having, according to those States, been severely infringed. Other arguments against the formula adopted by the 1970 UNESCO Convention have been advanced:

> "(..) the increase in price to the final purchaser may make an application for restitution prohibitive thus sacrificing the interest of the owner who has been despoiled;
> (..) the possibility of obtaining damages only against the vendor does not interfere with the action for restitution and may cause purchasers to exercise more caution."(45)

Another important factor permits the explanation of the limited success of this Convention with so-called "importing" countries. In fact, Article 7(b) (ii) does not provide for any time bar for the filing of claims for attachment and restitution, and it is apparent from these provisions, especially when read in conjunction with Article 13(46), that the drafters wished to

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(45) Cf. S. RODOTA, op. cit., p. 110.

(46) Article 13 of the 1970 UNESCO Convention:
"The States Parties to this Convention also undertake, consistent with the laws of each State:
(a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
(b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported".

create an action which is not subject to limitation. It is however easy to understand that even for cultural property of great value, and in the name of the protection of the cultural heritage of mankind, it is impossible not to provide for a limitation period at all as this would infringe fundamental principles and lead to the rejection of the efforts made towards the unification of rules for the protection of cultural property as a whole.

It is therefore fundamental to provide for a period of limitation: however, for an effective protection of the owner, including the State, long limitation periods could be contemplated, for example thirty years, either for all cultural property or for certain categories.

Lastly in this context the need to establish an international and a national inventory for the purposes of restitution procedures such as the one provided for in Article 7 of the 1970 UNESCO Convention, may be recalled. Article 7 (b)(i), to which sub-paragraph (ii) concerning restitution refers, specifies in fact that the property in question must appertain to the inventory of the institution (museum, religious or secular public monument or similar institution)(47).

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(47) J. CHATELAIN, op. cit., p. 99.

CHAPTER V

I. Final considerations

The protection of cultural property is at the present time topical because of the urgent need to remedy - albeit late, but efficiently - a situation which has considerably deteriorated, and because of the progressive recognition of the sui generis nature of cultural property which would give rise to a new kind of property[48] characterized by its spiritual value. This feeling is shared by a large number of States which, for the most part, seek the same objective though by different means: all measures prohibiting the export of, or illicit trafficking in, cultural property aim at protecting cultural property or at granting it greater guarantees than in the past. Consequently efforts in this direction should be encouraged and developed.

The novelty of the present study consists in its proposal to cover the different aspects, with their contradictions, of cultural property which is, on the one hand, the protection of such property and of its original owner (including, in the broad sense, a people or a nation as its spiritual creator), and on the other the need to permit the maintenance of the necessary security and flexibility of the international art trade by recognizing the legal mechanisms which are its guarantors.

By reason of the complexity of the problem, the nature of the desired goal suggests the need for an original legal solution by elaborating a separate instrument designed specifically for the protection of cultural property from an international standpoint, by unifying rules deriving from different disciplines in this field. The proposed initiative is certainly ambitious, but it appears to be the only one capable of resolving the paradox existing in the field of the protection of cultural property between the intentions of, and often the actual measures taken by, States, and international realities. The will to remedy this state of affairs and the implementation of coherent and realistic solutions are prerequisites for the avoidance of "an inflationistic anarchy in the international circulation of cultural property"[49].

In this spirit, the search for a harmonisation on a minimalist basis can be recommended, that is, to aim at a compromise between the principles which the majority of States would not be willing to abandon, in order to obtain as wide as possible a support for the elaboration of rules and a gene-

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(48) Cf. R. CREWDSON, Cultural Property, a Fourth Estate? The Law Society's Gazette, 1984, p. 128, which considers a fourth category of property.

(49) G. DROZ, op. cit.

ral acceptance of the final instrument. Such an initiative could meet the call of the international movement which has emerged in recent years in favour of the creation of special rules relating to the protection of cultural property.

Before introducing the final recommendations which may be formulated at this first stage of consideration, it must be made clear that such an international instrument would only be intended to regulate cases with a foreign element. Such a project would thus leave the national rules of each State intact, and could therefore be more generally accepted. Lastly, it will be seen that the instrument proposed would, of course, contain substantive rules derived both from private law and from public law - but also conflict rules so as to arrive at as flexible a set of rules as possible.

II. Final Recommendations

A. Recommendations from a civil law standpoint

It would be suitable in the first place to envisage the preparation of a draft uniform law concerning the international protection of cultural property, having due regard to the considerations formulated hereafter. Such a draft should in the first place contain an international definition of cultural property, to be worked out on the basis of comparative law, which would affirm the new concept of cultural property.

1. The principle of the recognition of the effects of acquisition in good faith should be maintained, and could be envisaged along the lines of Articles 7 and 8 of the 1974 LUAB;

2. however, a balance would need to be struck between the above-mentioned principle and the position of those systems which do not give effect to acquisition in good faith. This could be attained by the institution of a rule such as a right to the return of the property. In-depth research is therefore recommended as to the conditions for the exercise of such a right, including limitation periods, and as to its different aspects, on the basis of comparative private law and of private international law;

3. lastly, the question of acquistive prescription in the case of cultural property ought to be examined; it is already possible as from now to suggest that a reasonably long period be envisaged.

B. Recommendations from an international private law standpoint

1. It is a prerequisite of an international protection of cultural pro-

perty that foreign public law be recognized and effect given to it;

2. the possibility of taking into account laws of immediate application could be considered;

3. the classic connecting factor of the lex rei sitae must be retained; for lost and stolen goods, however, a search should be made for a substantial factor which would, where appropriate, entail the application of the law with the closest connection with the case in question. The principle of a right to the return of the property envisaged above would have to be examined in the light of these two conflict rules. Finally, when the situation in question is based upon a contract, the connecting factor should be determined in accordance with the will of the parties.

C. Recommendations from a public law standpoint

1. The draft uniform law must provide for the establishment of national inventories and of an international inventory;

2. national laws prohibiting export should be recognized as far as registered cultural property is concerned;

3. restitution should be provided for in respect of property registered in such an inventory.

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