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Outlines for a private law Convention on  
the International Protection of Cultural Property

(submitted by Mr Riccardo Monaco, President of Unidroit)

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## INTRODUCTION

Following the decision of the Governing Council of Unidroit at its 65<sup>th</sup> session in April 1986 to introduce into the Institute's Work Programme for the triennial period 1987-1989 the subject of the international protection of cultural property, and in the light in particular of the first study on the subject commissioned by UNESCO from Unidroit and prepared by Ms Gerte Reichelt, the President of Unidroit engaged in consultations with a small number of experts in the field, including Ms Reichelt, with a view to examining the possibility of preparing uniform rules relating to certain private law aspects of the international protection of cultural property.

These consultations were carried out on a purely informal basis over a number of months and the outlines for a private law Convention on the international protection of cultural property set out hereafter constitute a number of personal considerations of the President of Unidroit for the attention of the Governing Council rather than the outcome of the deliberations of a group.

OUTLINES FOR A PRIVATE LAW CONVENTION ON  
THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

I. Background considerations

1. The 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property may be seen essentially as a public law Convention aimed in particular at the protection of each nation's own cultural heritage.

2. Its principal departure into the field of private law is to be found in Article 7 (b)(ii) which provides that:

"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<sup>(1)</sup> 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 ..."

3. This provision has given rise to difficulties which led Unesco to commission from Unidroit a study concerning the international protection of cultural property in the light in particular of the above-mentioned Unesco Convention and of the 1974 Unidroit draft Convention providing a Uniform law on the acquisition in good faith of corporeal movables. The ensuing study prepared by Dr Gerthe Reichelt at the request of the Unidroit Secretariat was duly submitted to Unesco. That organisation has now commissioned a second study from Unidroit on the international protection of cultural property, with particular reference to the rules of private law affecting the transfer of title to cultural property, focusing especially on the definition of good faith in connection with the acquisition of cultural property.

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(1) This property is that referred to in Article 7 (b)(i) as "cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution".

## II. The prospects for a new international Convention

4. The wide acceptance of the 1970 Convention by the so-called "exporting States" of cultural property and the reticence of many "importing States" to ratify or accede to it illustrate the tension between what has been described by Professor John Merryman as, on the one hand, "cultural nationalism" and on the other "cultural internationalism", the former seeking the retention in, or return to, the country of origin of cultural property, the latter seeking the widest possible availability to all nations of the cultural heritage of mankind.

5. To a certain extent these different concepts may be seen as reflecting conflicting approaches to the role of the international commerce in what may be broadly described as "cultural property", although to leave the matter there would be a gross simplification of the questions at issue. It is one thing to seek to preserve the cultural history of mankind in readily accessible museums which legally acquire works of art, artifacts etc. and another to encourage, or at least condone, the illicit traffic in such objects.

6. Here again, however, distinctions must be drawn. The major preoccupation of developing countries and some others which, while belonging to the group of developed countries, wish to preserve a particularly rich cultural tradition or the evidence of indigenous cultures may, although not always necessarily, differ from that of developed countries which see the growing commerce in stolen works of art as one of the principal concerns of law enforcement in our time.

7. If, therefore, the preparation of a new international instrument is to be contemplated, its widespread acceptance can only be won if a satisfactory balance is struck between the various interests involved.

## III. Possible content of a new international Convention

8. While it is surely premature at this stage to envisage the exact content of a new international Convention aimed at the international protection of cultural property, some preliminary thoughts may be offered for consideration:

(1) Even if the instrument is to be concerned essentially with private law aspects of the problem, it will not be possible to concentrate exclusively on civil law and private international law to the exclusion of public and administrative law.

(2) The underlying philosophy of the new Convention will of necessity determine to a large extent its scope ratione materiae, i.e. the definition of cultural property - will this be general, enumerative or left to each Contracting State to determine?

(3) On the assumption that the new instrument will neither duplicate nor be in conflict with the 1970 Unesco Convention, will it follow the pattern of the private law rules set out in Article 7 (b) (ii) in respect of cultural property not caught by those provisions?

(4) Is it feasible or desirable to make provision for specific uniform rules concerning the passage of title to cultural property and, if so:

- (a) should a special rule be laid down concerning the definition of good faith?;
- (b) should a special rule be established concerning the effect of good faith as regards the acquisition of title to cultural property?;
- (c) what importance, if any, should be given to the existence of registration systems in the assessment of good faith?;
- (d) should provision be made for the reimbursement (and, if so, by whom) of a bona fide purchaser who does not under the applicable national law acquire title to cultural property, or indeed of a person who has acquired such title?;
- (e) should special rules be contemplated regarding acquisitive prescription?

(5) Will it be necessary, in respect of the substantive rules to be elaborated, to draw any distinctions between:

- (a) property inalienable under the law of the State of origin;
- (b) property exported in defiance of an export prohibition or of an export licence requirement, whether by the owner or by another person;
- (c) property in respect of which the legitimate owner has been deprived of possession by theft?

(6) Should the future instrument accord particular effect to the law of the State of origin of the property:

(a) by providing that Contracting Parties shall recognise and give effect to any law of the State of origin prohibiting the export of the property or subjecting its export to certain requirements;

(b) by having regard, when appropriate, to that law as being the law most closely connected with a transaction for the sale of property even if that law is not the law which would normally govern the sales contract?

(7) What other matters might be dealt with in any future Convention?