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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Extract from the report of the 67th session of the Governing
Council (Rome, 14 to 17 June 1988) relating to item 5 (d) on
the agenda (C.D. 67 - Doc. 8; Study LXX - Docs. 2 and 3)

(prepared by the Unidroit Secretariat)

Rome, October 1988

In introducing this agenda item, the President recalled that the Council had before it three documents, the second study prepared by Ms Reichelt, the text of a preliminary draft Convention on the restitution of cultural property drawn up by Mr Loewe and the outlines for a possible private law Convention on the international protection of cultural property which he had himself submitted to the Council but which originally had been prepared for a small informal meeting of experts convened by him earlier in the year. As regards that latter paper, the point of departure had been the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which had been ratified by many States, the principal private law provision of which was Article 7 (b)(ii) which granted a certain measure of protection to the good faith purchaser while at the same time requiring restitution of the cultural property in dispute to the country of origin. The question of acquisition in good faith had been addressed in the 1974 Unidroit draft LUAB which had enjoyed little success while the authors of the 1985 Council of Europe Convention on Offences relating to Cultural Property had eventually decided to exclude all the civil law aspects whose inclusion had initially been contemplated.

Other important issues to be considered, apart from that of the extent to which a future Convention might deal with certain public and administrative law matters and the possible definition of cultural property, were those related to the special treatment which might be reserved to property inalienable under the law of the State of origin, that exported in defiance of an export prohibition or of an export licence requirement, whether by the owner or by another person and property of which the legitimate owner had been deprived of possession by theft. Not least, consideration should be given to the according of particular effect to the law of the State of origin of the property by providing that Contracting Parties should recognize and give effect to any law of the State of origin prohibiting the export of the property or subjecting its export to certain requirements and by having regard, where appropriate, to that law as being the law most closely connected with a transaction for the sale of property even if that law was not the law which would normally govern the sales contract.

Ms Reichelt stated that her second study had, in compliance with the request of Unesco, concentrated in the first place on the transfer of ownership in respect of which she had provided a general survey from the standpoint of comparative law, although in her view this was not an issue essential for an effective protection of cultural property. She had also completed her first study by making further recommendations in the field of civil law, in particular in relation to the so-called "right to payment", an institution known to many legal systems whereby the original owner

could, by reimbursing a person who had acquired title to the property, obtain its restitution. Finally, she had examined in detail another means of providing an effective protection of cultural property, namely the application of mandatory rules which could translate political considerations into legal concepts. Such an approach would be a novel one in the field of the protection of cultural property and could for example take the form of the recognition of foreign laws governing the export of cultural property. What was therefore important was to recognize the interplay of civil law, private international law and public law in providing a comprehensive solution to the complex problem of the international protection of cultural property.

Mr Loewe expressed the opinion that if Unidroit were to embark on work in this connection it must be with a view to the preparation of an international convention as there were too many conflicting interests involved to offer any chance of success to a recommendation or model law. Moreover, if a convention were to enjoy any possibility of wide acceptance it would have to take account of political and economic realities, and especially the attitudes of exporting and importing States and of those States which could at the same time be seen as falling into both categories. A fair balance would have therefore to be struck between the interests of the different countries and what he had done in his preliminary draft was to lay down minimum standards, States being free under Article 9 thereof to extend the protection of cultural property beyond that contemplated by the draft. This being said, he was not convinced that "protection of cultural property" was necessarily the right term to employ as what he was proposing was the protection of persons or States who could in certain circumstances call for the restitution or return of the property to the country of origin.

Turning then to the question of what was to be understood as cultural property for the purposes of his draft, Mr Loewe expressed doubts as to the efficacy of classification and enumeration, the latter in particular requiring constant updating or a system of registration which would differ widely from one State to another. He had therefore opted for a broad definition of cultural property as "any material object created by man of artistic, historical or cultural importance". Thereafter particular items of cultural property were distinguished according to their value at the place where they were located.

With regard to the problem of good faith, he recalled that the Unidroit committee of governmental experts which had concluded its work in 1974 on the draft LUAB had been evenly divided on the issue of the passage of title in stolen property acquired by a *bona fide* purchaser. His solution had been to describe good faith in terms of the precautions which would have been taken by the purchaser having regard to the value of the property in

question. As to real rights such as ownership, pledge and, in some legal systems, the right to retention, he deemed it to be impossible to establish rules which could at this moment in time meet with universal acceptance. He had therefore sought to avoid dealing with them and rather to concentrate on the obligation to return the property, subject where appropriate to reimbursement.

Mr Loewe stressed that the draft was submitted simply as a basis for discussion. He had attempted to lay down rules of substantive law, intentionally leaving aside problems of private international law and especially the issue of mandatory rules and references to another law other than that which would otherwise be applicable which enjoyed a more or less close connection with the transaction in question.

Mr Enderlein stated that this item had been discussed in the sub-committee on the Work Programme, not so much from the substantive angle, although Mr Loewe had briefly introduced his draft, as from that of procedure. There had been a consensus within the sub-committee that work should continue on the subject and that a study group be set up as it was the general view that it would be premature to constitute a committee of governmental experts and preferable to proceed on a step by step basis. The study group might consider the three papers submitted to this session of the Council, as well as Ms Reichelt's first study and the Governing Council could, at the appropriate time, examine the findings of the group with a view to deciding whether or not a committee of governmental experts should be convened. Although, as he had already mentioned, the sub-committee had not gone into any detail on matters of substance, a view had been expressed that perhaps Mr Loewe's draft did not cover all the ground but this would be a matter for consideration within the study group which, it had also been agreed, would need to seek a compromise between the interests of the groups of States involved if a successful foundation for later work were to be laid.

Mr Sanchez Cordero associated himself with what had been said by Mr Enderlein and stated that he would be willing to serve on the study group.

Mr Parra Aranguren was also of the opinion that work should proceed on the basis of the three papers before the Council and supported the setting up of a study group.

Mr Hartkamp likewise favoured continuance of work on the subject in the framework of a study group. Mr Loewe's draft should be considered by that group and, while himself believing it to be preferable to contemplate the elaboration of a uniform law, he would not be opposed to some private international law aspects being dealt with if need be.

Ms Collaço paid tribute to the authors of the three documents before the Council. Ms Reichelt's paper had been prepared in response to the mandate of Unesco and it was of great utility even if it had reached the conclusion that it might not be wise to seek to introduce rules regarding the transfer of ownership or the acquisition of ownership by a *bona fide* purchaser. As to the document submitted by the President of Unidroit, it had the merit of providing an exhaustive list of the problems which would have to be faced if a convention on the subject were to be envisaged, emphasizing in particular the need to strike a balance between the interests of the countries of origin of cultural property and those of the so-called importing countries.

With respect to the draft Convention submitted by Mr Loewe, she found it to be extremely astute, in the best sense of the word, as it studiously avoided certain problems, such as acquisition in good faith and the question of transfer of ownership, the approach being essentially a pragmatic one in that it was based on the concept of the right to payment and on restitution. She was convinced that any successful future Convention must be based on a fair balance between the interests of the exporting and importing countries and in this perspective it was perhaps too early to discuss Mr Loewe's draft in detail, a draft which, she felt, perhaps concealed certain private international law solutions. One further point which might at a later stage also be taken into consideration was that of the provision of some mechanism permitting cooperation between the administrative authorities of the States Parties to any convention which might be drawn up.

Mr Bennett expressed his appreciation for the three papers submitted in respect of this agenda item. He had however some questions to pose, the first of which was whether the subject was one for proper inquiry by the Institute since a number of policy issues were involved that would more normally fall under the aegis of Unesco which had commissioned the two studies from Unidroit. His second question was whether Unesco would now drop out of the picture, which would in his view be unfortunate given that organisation's involvement in the preparatory studies.

As to the issue of mandatory rules which had been discussed in Ms Reichelt's report, he acknowledged that reference to them was sometimes the price to be paid if some degree of uniformity were to be achieved. He was however not enthusiastic as to their introduction as a solution in this context and he recalled that such an approach had failed to find favour in the recent Hague Conventions on the Law Applicable to Trusts and on their Recognition and on the Law Applicable to Contracts for the International Sale of Goods.

With regard to Mr Loewe's draft he had three questions, the first being whether sub-paragraphs (a), (b) and (c) of Article 2 (1) were cumulative. The second was whether the solution provided by Article 3 necessarily infringed the principle normally followed in Common Law systems of *nemo dat quod non habet* which had proved to be the stumbling block in respect of the 1974 draft LUAB and which likewise seemed to inform Article 4 (2)(b), while the third related to Article 4 which appeared to depart from the field of private rights in that it referred to violation of the rules of States prohibiting the export of cultural property, in which connection he wondered whether this was a proper concern of the Institute.

In reply to Mr Bennett's queries, Mr Loewe stated in the first place that Article 2 (1) of his draft was not cumulative in its application but exhaustive in that it sought to cover all cultural property as described in Article 1 (1), while the *nemo dat quod non habet* principle would be respected if the purchaser had failed to take the necessary precautions in the circumstances. With respect to the question of the application of mandatory rules to which Mr Bennett had alluded, he was as a matter of principle in agreement with the desirability of avoiding such references in international conventions and he personally believed the inclusion of Article 7 in the 1980 Convention on the Law Applicable to Contractual Obligations to have been a mistake. What however he was proposing here was not a vague reference to the mandatory rules of another legal system but rather the exemplification of one mandatory rule, namely that of prohibitions on the export of cultural property. Admittedly he had in preparing Article 4 stepped outside the strict confines of private law but this had been with a view to ensuring some degree of fairness. The rule was moreover one subject to certain conditions as in the first place the property must be of importance and secondly the person exporting or acquiring it must have had actual or constructive notice of the prohibition. Again, Article 4 (2) described three circumstances in which paragraph (1) would not apply. In his view the problem of defiance of export prohibitions could not be ignored although he believed, and this idea was reflected in his draft, that there was a considerable difference on the moral plane between for instance theft or fraud resulting in the dispossession of the original owner and an illegal transfer from one country to another, especially if the property were exported by its owner. In these circumstances Article 5 provided that it would be the requesting State which would have to compensate the possessor called upon to return the cultural property under Article 4 (1) or to allow him to transfer it, for reward or gratuitously, to a person of his choice in the requesting State, the option to be exercised by the possessor.

Ms van Vliet stated that Unesco welcomed Unidroit's continuing activity in this field. The point of departure for the cooperation between Unesco

and Unidroit had been the fact that the 1970 Convention, to which the President of the Institute had already referred, had represented something of a compromise between the interests of the so-called exporting and importing States. The President had also mentioned Article 7 (b)(ii) of the 1970 Convention which made provision for the return to the country of origin of cultural property stolen from a museum or similar institution subject to certain conditions, in particular that the property be described in an inventory and that the *bona fide* purchaser receive compensation. Since 1970 the situation of the countries of origin, and in particular that of the developing countries, in respect of the loss of their cultural heritage had not improved. The illicit international art market was continuing to encourage theft, illegal traffic and the looting of archaeological sites in developing countries. Unesco was desirous of making some advance on the 1970 solution and to this end it had sought other fora in which such progress might be made. The developing countries would no doubt favour the return of all items of cultural property which had illegally left their territory without making any payment for their return but this was clearly not possible. It was therefore necessary to strike a new compromise which would constitute one further step in meeting the concern of the exporting countries and it was with this in mind that Unesco had turned to Unidroit to see whether such progress might not be accomplished by recourse to private law mechanisms. The notion of the right to payment was certainly an interesting one as likewise was the idea launched some years ago by the Secretary-General of the Hague Conference of making provision for the return to the State of origin of cultural property pending a final decision as to its fate in accordance with a procedure analogous to that to be found in the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Unesco was in these circumstances extremely interested in the developments within Unidroit and wished to remain closely associated with the work. The 1988/89 Unesco budget made provision for continuing cooperation with Unidroit and she doubted whether a different attitude would be adopted in respect of the 1990/91 biennium as the matter was one of prime importance to many of the member States of Unesco. There was therefore no question of its withdrawing from the exercise.

Mr Plantard found the documents submitted to the Council to be particularly rich in content. They were also characterised by different approaches since on the one hand both Ms Reichelt's and Mr Loewe's papers were to some extent concerned with the transfer of property *a non domino*. This was a problem known to all legal systems, firstly at purely national level, and it was in no way confined to cultural property as there was also for example a flourishing trade in stolen or fraudulently acquired motor vehicles, one which was moreover becoming increasingly international in

character. As he understood Article 2 of Mr Loewe's draft, it laid down minimum rules for national as well as international situations and it seemed in some respects at least to depart from what he had thought to be the initial stimulus to the exercise, namely a concern to protect cultural property or the cultural heritage of States by dealing with the international aspects of the question. Article 2 of the draft appeared to him to be very broad in its application and he wondered whether it was not conceived primarily as an arm against certain criminal or fraudulent actions and if that were so then there was no logical reason to restrict its application to cultural property. In this sense it was an extremely ambitious proposal and he had doubts as to whether it would meet with wide acceptance, notwithstanding the fact that the draft very ably avoided tackling directly certain problems, such as *bona fide* acquisition, by concentrating on possession.

On the other hand, the paper submitted by the President of the Institute was addressed to problems associated with the international protection of cultural property, namely those dealt with in the second part of Ms Reichelt's study and which were the principal concern of Unesco. Here especial importance was attached to the question of the transfer of cultural property in violation of export prohibitions, particularly those of States whose cultural heritage had been systematically pillaged. This aspect was also treated in Article 4 of Mr Loewe's draft and in his view this should be the starting point for further enquiry.

Mr Singh considered that Unidroit should pursue its work on this subject. It had been encouraged to do so by Unesco and it would be most unfortunate if the Institute were to refuse to put its expertise at the service of the international community. The study prepared by Ms Reichelt was an admirable one although he was unsure as to whether it addressed in full the problems faced by the developing countries in protecting their cultural heritage, countries it should be recalled which had made representations to Unesco in this connection. It was therefore important to proceed to the constitution of a study group which should enjoy a balanced composition of members from countries of origin and importing countries and on which Unesco should be most certainly represented. As to the draft submitted by Mr Loewe he had not had time to consider it in detail but he did believe that any definition of cultural property should include a reference to religious objects and he expressed some hesitations as to whether the system of valuation set out in Article 2 was necessarily the best approach.

Mr Widmer stressed the importance of Unidroit's continuing work in this field, notwithstanding the difficulties involved. The question of according international legal protection to cultural property was one of the greatest

topicality as the solutions offered up to now had either theoretically or from the practical angle proved unsatisfactory and it was desirable to attempt to make progress even if the road might prove to be a long one. It was therefore essential to ensure cooperation with Unesco in this field, perhaps in the form of a joint venture, concentrating on the international aspects of the protection of cultural property and in particular on the need to strike a balance between the interests of the countries principally involved. He was broadly in agreement with the views expressed by Mr Plantard although he felt that a limitation to the problem of the violation of export prohibitions would result in too narrow a field of enquiry and it would therefore be useful for the study group to consider all the material hitherto made available to the Council, as well as the possibility of taking over some elements from the Child Abduction Convention, although he insisted that too much time should not be spent before convening a committee of governmental experts.

Mr Droz shared the views of those who had emphasized the importance of the subject. Mr Loewe's draft had relied on certain techniques which had already been employed at the Hague although there must be a hard core of uniform law rules in any future convention in this field. Both Mr Loewe's draft and Ms Reichelt's study represented an interesting step forward as against the 1974 LUAB in that they envisaged penalising purchasers in bad faith and not simply the protection of *bona fide* purchasers.

He had noted with particular interest Article 4 of Mr Loewe's draft and the treatment of the violation of prohibitions on the export of cultural property which avoided certain substantive problems. This approach could be further consolidated as Mr Loewe's proposal might perhaps be too restrictive in its protection of States with limited financial resources possessing nothing but their own cultural heritage which had been systematically despoiled. Provision should therefore be made for the return, against compensation, of cultural property in cases when it was of vital importance to the State of origin, even if the purchaser had been in good faith. In this connection he was hesitant as to the usefulness of providing too general a definition of cultural property, a preferable approach being to indicate those items which merited special protection and in respect of which restitution could be sought, for example those which had been numbered or registered before the illegal export or transfer had been effected. In any event the Hague Conference would be most grateful if an invitation were to be extended to it to participate in the study group whose constitution had been proposed.

The President considered that it might be helpful at this stage in the discussion to delimit the field of application of the envisaged uniform rules. In the first place the experience of the 1970 Unesco Convention

suggested that it might be desirable to avoid any definition of cultural property, all those so far proposed whether at national or international level being open to criticism. Second, he favoured the exclusion of any reference to conflicts of law which would moreover avoid impinging on the competence of the Hague Conference while third it was essential to concentrate on the notion of restitution and to steer clear of the concept of return, a political problem in which the Institute should not become involved. On the other hand the Council had discussed at length the question of the international transfer of cultural property in defiance of rules of public law to which effect should be given in other States in which the property was located. There was little national legislation in the field under consideration while existing international instruments had enjoyed less success than might have been hoped for and in these circumstances he strongly favoured proceeding with work on the subject in close cooperation with Unesco.

Mr Enderlein believed that the study group, which it seemed there was general agreement to convene, should consider all aspects of the question including issues of conflicts of law. The Hague Conference had not hesitated on occasions to deal with substantive law and in an area such as that under consideration it would be inappropriate to exclude any aspects *a priori*. Evidently Ms Reichelt and Mr Loewe should sit on the group while both Unesco and the Hague Conference on Private International Law might be invited to participate in its work. In addition it would be necessary to provide for representation of the countries of origin and importing countries as well as the different legal systems and he would welcome any more detailed information regarding the composition of the group and in particular the extent to which it would comprise members of the Governing Council.

Mr Plantard was of the view that it would be advisable to discuss the terms of reference of the study group before determining its composition as the latter might to a large extent be determined by the former. For example a decision to concentrate on the question of the violation of rules prohibiting the export of cultural property would lead to a different composition from that which would be desirable if the essentially private law approach reflected in Mr Loewe's draft were to be followed.

Mr Hartkamp believed that it was difficult to define precisely the group's terms of reference as the Council's discussion had been of a general character. He would therefore favour broad terms of reference to examine the material so far submitted to the Council while as to the composition of the group it was in his view more important for it to be manned by experts in the field from the different groups of interested countries than by Council members.

Ms Collaço considered that the study group should, in the first instance at least, examine all the international aspects of the problems associated with the protection of cultural property and not just those related to the violation and possibly recognition of rules prohibiting or limiting the export of such property.

Mr Singh expressed the opinion that the precise composition of the group ought to be determined by the President of the Institute, although it should permit representation of countries of origin, the importing countries and the international organisations, in particular Unesco. He wondered moreover whether, given the cost of bringing experts from the developing countries to Rome, it might not be possible for Unesco to consult the countries of origin, as well as the importing countries, with a view to providing valuable information to the group.

Ms van Vliet stated that she would raise with her authorities the question of Unesco participation in the Unidroit study group. She hoped that it would be possible to finance the presence at the meetings of the group of one or two experts who had already worked with Unesco. As to Mr Singh's suggestion, she recalled that Unesco had circulated Ms Reichelt's first study to some fifty institutes and organisations but this time she could envisage a wider written consultation procedure also embracing experts directly concerned with the preservation of cultural property.

Mr Akipek believed it to be important for the exporting countries to be associated with the work of the study group and he was convinced that many countries such as his own which attached great importance to the matter in hand would, if a large group were contemplated, be prepared to finance the presence of their own experts.

Mr Widmer associated himself with the views expressed by Ms Collaço and Mr Hartkamp. He feared that an extension of the exercise to cover domestic law could blur the central point at issue and he therefore proposed that the study group be given wide terms of reference to study measures aimed at halting the illegal international traffic in cultural property on the basis of the papers submitted by the President, Mr Loewe and Ms Reichelt, as well as the sources cited by the latter. He added by way of information that the question was under consideration within the Parliamentary Assembly of the Council of Europe which had commissioned a report from Mr Rodotà, who had already submitted a paper to the colloquy organised by the Council of Europe at Delphi in 1983 which had contained radical but nevertheless interesting proposals. Finally, he requested information as to how many meetings of the study group were contemplated. The convening of a committee of governmental experts should not be unduly delayed and he wondered whether it might not be possible to envisage one ten day meeting of a study

group or two five day meetings before the next session of the Governing Council so as to permit the latter to take a decision on the setting up of a committee of governmental experts on that occasion.

The Secretary-General asked whether the Council could accept the terms of reference of the study group in the terms proposed by Mr Widmer. If this were so, then the composition of the group would, as was traditionally the case, be determined by the President of the Institute who would naturally pay due regard to the suggestions made during the discussions of the Council, particularly as far as they concerned those who had hitherto made such an important contribution to the work and the need for a balanced membership permitting representation of the different geographic regions, legal and economic systems and of the so-called exporting and importing States. In addition he suggested that when inviting observers from international organisations it should be borne in mind that, apart from those already mentioned, the Commonwealth Secretariat, the European Communities, the Council of Europe and the International Bar Association had also conducted research in this field and might be able to supply valuable expertise.

As to the schedule of meetings of the study group, this would to a large extent be determined by financial considerations given the fact that two meetings of the group on principles for international commercial contracts would be held in 1989. It would in any event be possible to contemplate a first meeting of the new study group in late 1988 or early 1989 and, perhaps, a second meeting immediately before or after the 68th session of the Governing Council although the timing of that second session would to a large extent be affected on the one hand by the time elapsing after the first session and on the other by the number of Council members sitting on the group as considerable savings in travel expenses would be made if a meeting of the group were immediately to precede or to follow the Council session. If such a procedure were to be envisaged it would not however be possible for the Secretariat to submit the report on the second session in advance of the Council's 1989 session.

Ms Collaço stressed the importance of sufficient time being given to the Council to consider reports or drafts submitted to it and this was even more necessary in respect of the delicate subject under discussion in which so many members of the Council had expressed particular interest. She did not therefore believe that the Council could take any decisions at its next session without having been able to consider at length and in detail the findings and proposals of the study group.

The Governing Council decided to constitute a study group on the international protection of cultural property entrusted with consideration

of the various aspects of the subject on the basis in particular of the two studies prepared by Ms Reichelt, the paper submitted by the President of the Institute and the draft Convention drawn up by Mr Loewe as well as any other material which might be submitted to the group by the Secretariat. The composition of the group would be determined by the President in the light of the various suggestions made and the schedule of meetings established by the Secretariat, having regard to the desirability of proceeding speedily with the work and to the financial resources available.