THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

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Possible means of approach: each of the following courses, or a combination of them, would improve the protection of cultural objects above the present level of protection.

1. Draft rules concerning the application of foreign (public) laws concerning the protection of cultural objects e.g. rules restricting export, rules as to inalienability and imprescriptibility (Art. 13 (d) Unesco 1970 Convention) in accordance with modern trend on application of foreign public laws (see report of Lalive for l'Institut de Droit International, Wiesbaden session 1975 and resulting Resolution; report of Carter for International Law Association Warsaw Conference 1988 and resulting resolution; concurrent developments in certain national legal systems such as Switzerland).

2. Draft rules concerning the application of foreign mandatory rules where there is an appropriate connecting factor e.g. object concerned in transaction is part of the cultural heritage of a State other than that whose law would be applied under the lex rei sitae rule (see reports of Lalive and Carter cited above as to mandatory rules; Reichelt 1988 report as to mandatory rules and connecting factors (Sonderanknüpfung); 1970 Unesco Convention (Art. 4) on possible connecting factors and writings of Niec and Graham on connecting factors).

3. Draft rules concerning application to transactions concerning cultural objects of international public policy on the reciprocal enforcement of foreign laws concerning protection of cultural objects (inalienability, imprescriptibility, export control)
   Unesco 1970 Convention Arts. 3, 6, & 13

4. Draft rules modifying application of lex rei sitae to transactions concerning cultural objects; e.g. by applying law of country with strongest connecting factor - distinguish from 2. above, may not be expressed as mandatory rules
   cf. Winkworth v. Christie (would reverse result)
   Ville de Genève v. Consorts Margail (Cazenoves fresco case)
   French jurisprudence applying French law to goods stolen in France even where possessor relies on bona fide acquisition valid by law of country where transaction occurred.
   Discussion as to rules on acquisition of title (Reichelt 1988) and lex rei sitae rule (Reichelt 1986).
5. Draft rules restricting reliance on good faith
   (1) by reversing onus of proof
       Council of Europe draft provision, dropped from final text
   (2) by redefining "good faith"
       e.g. cannot rely where negligence: various possible standards
           available such as
           those proposed in Loewe draft
           consulting register of stolen goods (Crewdson)
           consulting INTERPOL list of stolen works of art, IFAR reports
           etc.
           e.g. placing higher burden on dealers, experienced collectors,
                experts, connoisseurs etc.
           Ecuador v. Danusso (Court of Appeal, Turin)
           (to counter result in Winkworth v. Christie)
           e.g. constructive notice of national export provisions published by
                Unesco etc.

6. Draft rules concerning standing to sue:
   e.g. as to owners
       as to States of origin
       as to special interest groups (National Trusts, museums,
        heritage foundations) which may or may not be owners.

7. Draft rules limiting prescriptive acquisition
   e.g. establishing longer terms for cultural objects such as 30
        years (proposed by Chatelain for Council of Europe)
   e.g. establishing date from which limitation of owner's action is
        to run - date of loss?
        - date of discovery of whereabouts?
        - date of owner's demand for return?
        - date of refusal to return to owner
   cf. Kunstsammlung zu Weimar v. Elicofon
       Menzel v. List.

8. Draft rules providing for specific restitution of cultural objects
   (i.e. return to the original possessor/State of origin of a unique
    object) subject to payment of a good faith possessor (Reichelt report
    1988).

    Possible recommendation to Unesco that a fund be established to
    assist developing States.

    Cf. current practice in European States reflected (De Raad v. OvJ)
    (Batz-sur-Mer Madonna). U.K. retrieval of church sculptures from
    Belgium.
Note

To be useful, the study on each of these possibilities would need to include

(1) a consideration of the aptness of the method suggested
   - in respect of illegally taken cultural objects (theft, fraud, etc.
   - in respect of clandestinely excavated cultural objects
   - in respect of illicitly exported cultural objects

(2) a consideration of its particular impact on illicit traffic
   e.g. by making purchasers more careful
      by increasing the geographical effectiveness of national protective legislation
      by adoption of a common policy for judicial regulation
      by making membership of the Unesco 1970 Convention more attractive etc.

(3) a suggestion ratione materiae for the particular method studied
    based on the considerations in (1) and (2).