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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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
Allgemeine Versicherungsgesellschaft v. E.K. (Fed. German BGH - Nigerian masks case).
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. Litz.

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).