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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Notes on the first session of the Unidroit study group
on the international protection of cultural property

(submitted by Ms Lyndel V. Prott)

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1. Scope of discussion.

A view was expressed at the first meeting of the study group that the group should be concerned only with matters of private law, and not with matters of private international law (which was the concern of the Hague conference) or with matters of public law. I disagree with this view. This is an area where scholars of experience have found it impossible to neatly encapsulate their work in any one of these areas. Unesco, which deals with public international law areas, has had, perforce, to deal with private law aspects in order to achieve satisfactory solutions for the problems of illicit traffic, and has indeed sought Unidroit's assistance in order to ensure co-ordination of these two areas. It is also very difficult to avoid the issues of private international law, since the private law aspects with which Unesco is concerned are inevitably international. I feel that, with the expertise of Professor Droz representing the Hague conference in this area and of other members of the study group with expertise in this area, the study group is also perfectly competent to deal with these issues. It would be unfortunate to relegate private international law issues to yet another international legal instrument. I note that M. Monaco, in his paper on the outlines for an instrument also takes the view that it is not possible to concentrate exclusively on civil law and private international law to the exclusion of public and administrative law.

2. Foreign public laws

At the first meeting of the study group some disagreement was expressed as to whether the group should consider the question of application of foreign public laws. I felt that some misunderstanding occurred on this point. Recent developments within the *Institut de Droit International* and the *International Law Association* have produced promising lines of development, and these have been endorsed, independently of any consideration of those studies, by Professor Rodota in his study for the Council of Europe. I attach extracts from the relevant documents which may be helpful. Since it seems that it is easier to discuss proposals in the form of a draft, I also attach two preliminary draft articles on this topic. (Draft articles 1 and 2).

3. Conditions of return

M. Loewe's draft Article 5 suggested that a possessor required to return a cultural object which had been illicitly exported could require the requesting State to pay him compensation or "transfer the property, for reward, or gratuitously, to a person of his choice in the requesting State" in which case "the requesting State shall undertake neither to confiscate the property nor to interfere in any

other way with the possession of the person to whom the property has been transferred or of his successors". I would be uneasy at the possibility thereby opened that an illegally exported object could be returned to the person who had in fact committed the illegal act - this would simply be an invitation to evade the law again (e.g. by choosing to export to a State which was not a party to the 1970 Unesco Convention nor to whatever rules Unidroit might develop). Special safeguards might need to be taken by a State to protect an object which was returned.

If it is thought appropriate to attach conditions to a return (and States which need to change long-standing rules of private law such as those protecting the *bona fide* purchaser may need to do so in order to justify these changes) then I suggest that appropriate conditions could be developed by analogy with those which had been used in connection with bilateral return agreements and arrangements between institutions e.g. that there be public access, inalienability, legislative and physical protection of the object etc. The following paragraphs summarize what I believe to be present practice in this respect.

Conservation and security of the object

This condition was developed in a 1977 "Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in view of Reconstituting Dispersed Heritages" by an ICOM *ad hoc* committee in the context of the Western museological principle of "primacy of the object". The ICOM *ad hoc* committee further spoke of certain countries having

> appropriate institutions which offer satisfactory conditions for the returned objects. If they do not exist in the country receiving the objects, serious studies should be undertaken with a view to creating such institutions.
> (ICOM, 1977, 4)

Such a condition for return may be inappropriate in the present context where a requesting State wishes to return such an object to use in the community from which it came, or to a special keeping place such as a traditional place on reservations as in the case of the medicine man's mask stored in a remote cave in *United States v. Diaz* 499 F. 2d 113 (1974); or places protected by strong taboos, such as those where Aboriginal *tjuringa* are placed. Should a returning State be entitled to require that a special institution be set up? There may be compromises such as modern designed keeping places which may be more secure from theft and misappropriation, but be closer to the traditions of the community which makes use of the objects. Placing them in a national museum which may be far away may not benefit those to whose cultural tradition they most closely belong.

The availability of conservation techniques is also cited as a requirement. However, conservation techniques need not necessarily be the sophisticated ones used by Western museums. There are many relatively simple and cheap conservation measures which can be taken in local communities which will ensure the survival of the material and have the additional benefit of ensuring the continuance of traditional skills. The third session of the Unesco *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation* adopted a Recommendation as to the provision of the necessary facilities for conservation and added that

> these activities should have recourse to the re-use and adaptation of traditional technologies used until recently for the production and protection of cultural objects rather than on the exclusive assimilation of modern technology.
> (Unesco Doc. CLT-83/CONF.216/8, Annex I, 4)

The Unesco convened Committee of Experts which met at Dakar in 1978 to advise on the establishment of the Intergovernmental Committee added to the ICOM *ad hoc* Committee's principle the rider that

> conditions of protection and conservation ... [should not] serve as a pretext for refusing to restitute or return the property in question.
> (CC-78/CONF.609/ 6, 5)

Nonetheless the Dakar Committee accepted without question the proposal that

> certain conditions of protection and conservation must prevail, namely those recommended by competent international organizations. Where appropriate institutions and/or satisfactory conditions are lacking in the requested country, international technical assistance might be necessary to establish such institutions and adequate facilities, and to train specialized personnel.
> (CC-78/CONF.609/6, 5)

Unesco can be asked to provide technical assistance in meeting conditions of return in the requesting country.

Accessibility

The ICOM *ad hoc* Committee and the Dakar Committee of Experts proposed that restituted or returned objects "should be used for essentially cultural purposes" (CC-78/CONF.609/6). This was interpreted to mean accessibility "to as many people as possible in the country of origin" and certain other purposes such as scientific research. The only exception recommended (this was added by the Dakar Committee) was that

of religious constraints. This may be a very significant limitation: for example, the exhibition of Australian Aboriginal sacred and secret objects to anyone but a selected group of initiated men of a particular totem is deeply offensive to the whole of the Aboriginal community. There is also the question of how accessibility is to be measured: placing an object in a museum in the capital of a large country with a poor and immobile population may benefit only tourists and be contrary to the inetention of the government to provide access to local communities.

This problem was clearly in the minds of the experts who did case-studies for Bangladesh, Mali and Western Samoa for Unesco when they wrote

> ... the respective countries should not only think in terms of building one national museum, but propose regional museums as well in order to create closer contacts between the collections and their creators, that is to say between the ethnic groups of the regions and their cultural heritage.

There is also the question as to what are "cultural purposes". "Cultural" use in many communities is not distinguishable from functional or ritual or religious use. While there is general agreement on the principle of accessibility, therefore, it needs to be interpreted to include not only Western ideas of exhibition and research but concepts of dissemination and teaching in use in the receiving communities. Thus the slit drum return by the Australian Museum to Vanuatu has been taken to Mele village on several occasions for appropriate ceremonies.

Complete legal protection

The Dakar Committee adopted the principle stated by the ICOM *ad hoc* committee that restitution and return is based on the idea that certain objects belong to the inalienable heritage of a nation and that, therefore, complete legal protection should be provided by the receiving country. Such protection may be by way of rules of inalienability, imprescriptibility or classification; the latter applies certain controls on the movement and care of important cultural property. The ICOM *ad hoc* committee was clear that there could be no attempt to "systematically transpose the most complete legal systems for the protection of cultural property". Another possible legal protection besides those mentioned would be control of clandestine excavation - there can be little point in returning a clandestinely excavated object if far great numbers of important objects are continually being removed.

There are however some questions to be discussed about the imposition of legal requirements. Some countries from which return may be sought have themselves a poor record in respect of legal protection of their cultural heritage e.g. United States domestic legislation to protect its own cultural heritage is in many respects extremely weak when

compared with other legal systems and that of the United Kingdom also has many gaps.

4. Obligation to return.

I noted that there seemed to be, within the group, consensus, subject to dissent by M. Loewe, that a good faith purchaser be required to return an object proved to have been illegally exported, and that good faith should go to the issue of compensation only. I would simply point out that this would be consistent with Point 8 (b) of Resolution 1072 of the Parliamentary Assembly of the Council of Europe (copy attached).

DRAFT ARTICLES FOR CONSIDERATION

1. In determining the right to possession of an object which is part of the cultural heritage of another State, the court shall have regard to the laws of that State including its rules as to inalienability, imprescriptibility and export prohibition.

2. (a) In determining the right to ownership of a cultural object, the court shall have regard to the mandatory rules of the State with which there is a substantial connecting factor.

(b) Such substantial connecting factors include
(i) that the object is part of the cultural heritage of that State
(ii) that the object was stolen in that State.

3. In determining whether a transaction is void because it is contrary to public policy, the court shall take account of international public policy concerning the protection of cultural objects.