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Proposal for a Model Law on the Protection of Cultural Property

(submitted by the Secretariat)

<i>Summary</i>	<i>Consideration of preparation of a Model law on the Protection of Cultural Property</i>
<i>Action to be taken</i>	<i>Future work</i>
<i>Mandate</i>	<i>UNESCO's proposal</i>
<i>Priority level</i>	<i>To be determined</i>
<i>Related documents</i>	<i>UNIDROIT 2009 - C.D. (88) 7 and C.D. (88) 10</i>

Introduction

1. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects has attracted a great deal of attention recently in the media – due, in particular, to several sensational cases –, among United Nations Member States and in the international scientific community, and it regularly re-fuels the debate on international cultural property claims, also in respect of situations pre-dating the entry into force of the international conventions on the subject.

2. Just as a reminder, UNESCO approached UNIDROIT in the early 1980s, asking it to draft this Convention which is the result of very close co-operation between the two Organisations. UNESCO continues to play a key role in promoting the instrument, which now has 29 States Parties and which complements the 1970 UNESCO Convention, which has 116 States Parties.

3. At the Extraordinary Session of UNESCO's *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, which took place in Seoul in November 2008 to commemorate the Committee's 30th anniversary, the preparation of a law or articles for a model law on the protection of cultural property against illicit trafficking was a major theme. Such a text would complement UNESCO's Cultural Heritage Laws database, and would clearly state the principle of State ownership of cultural property, in particular of archaeological objects. The objective would be to provide all States with sufficiently explicit legal principles guaranteeing such ownership and which could be relied upon in court in respect of cultural property claims. States participating in the meeting named UNIDROIT as the most suitable forum to draft such a law or articles for a model law.

4. Professor Patrick O'Keefe (Emeritus Professor at the University of Queensland) and Mr Jorge Sánchez Cordero (member of the UNIDROIT Governing Council) were both been strongly in favour of this proposal at the Seoul meeting and provided food for further thought on this issue. Annexe I to this documents reproduces the relevant extract from the paper given by Professor O'Keefe. Mr Sánchez Cordero for his part has prepared a Note setting out the project which is reproduced in Annexe II. It should be stressed that there is no question of re-assessing any of the principles embodied in the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, but simply to facilitate their application.

5. UNESCO's Assistant Director-General for Culture, Ms Françoise Rivière, has put in a formal request for co-operation to UNIDROIT in view of its expertise in the matter (see Annexe III). At this stage, the invitation is of a purely consultative nature and intended, among other things, to provide food for thought in view of the 15th session of the UNESCO intergovernmental committee which is to be held in May. The UNESCO Member States will also be consulted at that time, while the practical details of any co-operation arrangement between the two organisations will be worked out at a later stage.

ANNEXE I

Expert Meeting and Extraordinary 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, Seoul – November 2008

Extract of the presentation of Mr Patrick O’Keefe

(International Legal Consultant, Honorary Professor, University of Queensland, Australia)

“State Ownership

Many States claim ownership of all or specified categories of undiscovered antiquities lying in or on their territory including the seabed within specified limits. This may seem a very specialized topic to suggest for study in the context of the Committee’s activities. However, it may well be crucial in claims for repatriation.

A State wants the return of an antiquity it claims to own. The claim is based on legislation stating that all undiscovered antiquities are State property. It is met by arguments that it does not have title because

- the legislation is too vague
- people dealing with the object weren’t aware of the legislation
- the State doesn’t enforce the legislation against its own citizens

For example, in the case *Iran v. Barakat*, Iran sued the Barakat Gallery Ltd. in the English courts to recover antiquities it claimed had come from South East Iran. In the High Court the judge found that, although Iran had a body of law regulating the discovery and handling of antiquities, there was no law specifically indicating Iran was the owner of these antiquities. The Court of Appeal, on the other hand, found that Iran’s rights were so extensive and exclusive that they should be regarded as giving ownership.¹ But to reach this conclusion took years of effort and the expenditure of a great deal of money. A clear piece of legislation would have made all this unnecessary or at least reduced the expenditure.

But the case of *Iran v. Barakat* is only one where the claim of state ownership was at issue.² Furthermore, how many States have received advice that it is not worthwhile taking legal proceedings? We never learn of these instances. The problem is that often legislation dealing with undiscovered antiquities is old and was never designed to deal with claims for return being made in foreign courts. Until a problem arises, no one thinks to consider the legislation and whether it is clear and effectively administered and enforced.

A very useful study could be done on what courts in art market States are demanding before they will regard a claimant State as the owner of an antiquity. Advice could then be given to States as to how they should frame their legislation and how they need to enforce it.”

¹ [2007] EWCA 1374

² *United States v. Schultz* (178 F. Supp. 2d 445; 333 F. 2d 393) is another important case.

ANNEXE II**PROPOSAL: THE DRAFTING OF A UNIFORM LAW OF THE PROTECTION OF CULTURAL PROPERTY**

(prepared by Mr Jorge SÁNCHEZ CORDERO)

I. - BACKGROUND

In 1974, the International Institute for the Unification of Private Law (UNIDROIT) finished developing the draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables (herein after LUAB).

At the beginning of the 1980's, several international organizations, UNESCO in particular, expressed an interest, within the framework of their own work on cultural objects, in turning to UNIDROIT in the hope that, through the works carried out in the development of LUAB, this international organization could develop a set of rules which would be applicable to the illegal traffic in cultural property and would act as an essential supplement to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The reasons were multi-fold: the 1970 UNESCO Convention mentioned, without resolving, a series of important questions regarding private law, such as the impact on the existing rules of national law concerning the protection of the good faith purchaser. UNIDROIT was considered to be the appropriate international organization of ad hoc private law to formulate a solution to these questions.

In April, 1986, during its 65th session, the Governing Council made the decision to include the subject of the international protection of cultural objects in its Work Programme for the period between 1987 and 1989.

UNIDROIT initially carried out a study on the international protection of cultural objects, having LUAB of 1974 and the 1970 UNESCO Convention as references.¹ A second study was later concluded that made reference to the rules of private law governing the transfer of title to cultural objects.² These two studies were entrusted to Dr Gerte Reichelt from the Vienna Institute of Comparative Law.

In its 67th session in June, 1988, the Governing Council made the decision to create a study group on the international protection of cultural objects, whose mandate was to examine the different aspects of the subject, as well as the possibility and opportunity of developing uniform rules regarding the international protection of cultural objects.³ This study group initially worked on a preliminary draft Convention regarding the restitution of cultural objects and was devised by the Austrian professor Roland Loewe, who was, at the time, a distinguished member of the Governing Council of UNIDROIT.⁴

¹ See UNIDROIT 1986, Study LXX-Doc. 1

² See UNIDROIT 1988, Study LXX- Doc. 4.

³ See the report of the 67th session of the Governing Council. p. 34 UNIDROIT 1988, C.D 67 –Doc. 18.

⁴ See UNIDROIT 1988, Study LXX- Doc. 3.

The Study group met on three occasions in Rome (December 1988, April 1989 and January 1990⁵) under the chairmanship of Dr Ricardo Monaco, who was president of UNIDROIT at the time. At the end of the third session, the study group approved the preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁶

At its 69th session, the Governing Council examined the preliminary draft Convention which had been approved by the study group and resolved to convene a Committee of governmental experts. This Committee was presided over by Dr Pierre Lalive of Switzerland, and was in session on four occasions, during which, fifty of the fifty-six Member States of UNIDROIT at the time, participated, as well as a certain number of non Member States.⁷

In its 73rd session, the Governing Council considered the text approved by the Committee of governmental experts and decided to submit it to a diplomatic Conference. In that session, the Governing Council thought that the text of the preliminary draft contained a compromise between the different opinions originating from diverse legal systems, and that its approval by a diplomatic Conference was viable. The General Secretary was instructed so that he could proceed accordingly.

The Italian Government hosted the diplomatic Conference that took place in Rome from the 7th to 24th June, 1995. The diplomatic Conference approved the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects that came into force, and has been ratified by a significant number of States. The 1995 Convention has been one of the finest achievements by UNIDROIT if we consider the number of national States which have ratified it and the increase of various studies in the academic field and debates that have been initiated. This undeniably shows the great interest in the subject on the part of the international community.

II. – The project's approach

It can be maintained that national heritage has noticeably contributed to the formation of national identity and that the geopolitical changes, the emergence of regional consciousness and the construction of regional organizations have provoked the recognition of the importance and value of cultural property and its protection in the international field.⁸

The increase of the illegal traffic of cultural objects on the international market, particularly after World War II, has brought about an impoverishment in the cultural heritage of the States of origin. It must be emphasized that the illegal traffic of cultural objects is not a phenomenon which is privative to developing countries; it affects the cultural heritage of all countries in the same manner. It must be equally as clear that impoverishment of the cultural heritage alters the cultural specificity of national States. It is suffice to analyze the international precedents, to consider the statistics or to consult the catalogue of stolen cultural objects which exist in INTERPOL. To mention some statistics; between thirty and forty thousand works of art which originate from the small churches, local museums or private collections, are lost on the Italian illegal art market.⁹

⁵ See the report of the three sessions in UNIDROIT 1989, Study LXX - Doc.10; UNIDROIT 1989, Study LXX – Doc. 14; UNIDROIT 1990, Study LXX - Doc.18.

⁶ See UNIDROIT 1990, Study LXX – Doc. 19.

⁷ See the report of the four sessions in UNIDROIT 1991, Study LXX - Doc.10; UNIDROIT 1989, Study LXX - Doc. 14; UNIDROIT 1990. Study LXX - Doc. 39 and UNIDROIT 1994, Study LXX - Doc.48.

⁸ See UNIDROIT 1995, CONF. 8/3.

⁹ See UNIDROIT 1995, CONF. 8/3.

The international protection of cultural objects has a capital importance, particularly in those States where they are a significant number of cultures (tribal, mixed societies, etc.) and where the illegal traffic of cultural objects is considered as flagellum, which has had a surprising expansion in the international field.

The permeability of the inter-state borders, the emergence of new markets and the presence of new purchasers and a fluidity of communications have created propitious conditions for the illegal traffic combined with an extraordinary increase in the prices of cultural objects on the art markets.

It is very clear that despite the availability of human and financial resources and the uncertainty of the internal legislation of countries, measures have been insufficient to combat the illegal traffic of cultural objects. The national States have shown their great concern for the internationalization of stolen and illegal traffic of works of art. Cultural antiques and other objects are noted for the insufficiency of their internal legislations and of the actions taken which has prevented them from designing truly operational legal mechanisms to combat illegal trafficking.

Reference should be made to some of the many agreements and treaties, including regional ones like the European Convention of 1985 on infractions regarding cultural objects; EEC regulation no. 3911/92 of the Council of the European Communities December, 1992 regarding the export of cultural objects; the EEC Council Directive 93/7/CEE of March, 1993 regarding the restitution of cultural objects which have illegally left the territory of one of the Member States of the European Union; the Convention of San Salvador in the Latin American region or the Protection of Cultural Heritage within the Commonwealth as signed in Mauritius in November, 1993 and other universal ones like the UNESCO Conventions, most notably the one of 1970.

The protective laws of internal cultural objects of the Member States must be included amongst this cluster of agreements and treaties.

In the international field, the serious difficulty in applying article 7 b) ii) in the UNESCO Convention of 1970, which is a disposition of private law, prompted UNESCO to ask UNIDROIT to draft the Convention that regulates the stolen and the illegal export of cultural objects and develops the mechanisms of restitution of these cultural objects when they have been acquired by a good faith purchaser. (UNIDROIT Convention of 1995).

In the same context, the Intergovernmental Committee for Promoting the return of Cultural Property to its Countries of Origin or its Restitution in case of illegal appropriation at the UNESCO session in Seoul, Republic of South Korea in commemoration of its 30th anniversary in November, 2008 convened for a reflection meeting. During which, Dr. Patrick Or' Keefe and myself raised the convenience of the formulation of a model law model on the protection of cultural objects. This proposal was accepted with a great enthusiasm and the same Committee proposed asking UNIDROIT for a contribution to the project.

In the regional field, efforts have been stepped up to combat illegal traffic. One of the key problems is the immense difficulty in the terminology used regarding cultural objects. In this matter, the Dictionary of cultural terms in Europe can be mentioned, which is pieced together under the auspices of the International Legal research Group on Cultural Heritage under the direction of Prof. Marie Cornu and Prof. Jérôme Fromageau and has been promoted by the Mexican Center of Uniform Law in the Mesoamerican and Andean regions. These efforts are oriented to identify functional equivalences in the various national legislations, but they also highlight the terminological differences which constitute one of the great obstacles in the protection of cultural objects.

Since the work of UNIDROIT began, as previously mentioned, the UNIDROIT study group considered the necessity of drafting uniform regulations regarding the international protection of cultural objects. In that study and in many other analyses which are reported in specialized literature, there was an emphasis on the jurisdictional criteria which have prevented the restitution of cultural objects; the constant is the deficiencies which are present in many of the national legislations, which, to a large extent, relate to the nature of private law.

III. - Proposal

Taking the previous considerations into account, the drafting of the model law on cultural objects must be considered as a natural complement to the 1995 UNIDROIT Convention. Its objective is apparent: to provide the national States with uniform laws that cover and respond to the different criteria which has prevented the restitution of their cultural objects. UNIDROIT should be considered as one of the international organizations that by its own natural vocation must be involved in the development of this uniform law of the protection of cultural objects.

The experience of UNIDROIT, in the context of LUAB of 1974, has demonstrated a different approach which is beneficial when contemplating the great difficulty that results when attempting to make the systems of common law compatible, ones that are governed by the *Nemo dat* rule and the systems from civil tradition, that offer various degrees of protection to the good faith purchaser. Nevertheless, the 1995 UNIDROIT Convention has demonstrated that compatibility in this scope is perfectly possible. The model law on cultural objects would be the great beneficiary acquired from UNIDROIT'S accumulated experience, where the convergence of different legal systems and the search for compromise are obliged.

Lastly, it should be mentioned that one of the problems which generates great uncertainty in the international field it is the basic ignorance of the states of origin about the national protective legislation of the cultural heritage in their own countries. The drafting of a model law on the protection of cultural objects by uniform law would offer elements of certainty and the possibility of eliminating the discrepancies in the international market of cultural objects. UNIDROIT could seriously contribute to it by means of the drafting of a model law on the protection of cultural objects.

ANNEXE III**LETTER SENT BY Ms FRANCOISE RIVIERE, ASSISTANT DIRECTOR-GENERAL FOR CULTURE
OF UNESCO TO Mr ESTRELLA-FARIA, SECRETARY GENERAL OF UNIDROIT**
(translated from French)

3 March 2009

Ref.: CLT/CIH/MCO/138

Sir,

Over the years, our two Organisations have maintained friendly and constructive working relations which have led, in particular, to the preparation and adoption of the 1995 Convention on Stolen or Illegally Exported Cultural Objects.

This international instrument, which supplements the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in important ways, forms part of the core array of tools deployed by the UNESCO Secretariat to protect the cultural heritage and to promote the return of illegally dispersed cultural objects.

Among the other instruments at its disposal, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, which acts in an advisory capacity, provides UNESCO Member States and its partners with a well-defined framework for discussion and negotiation but has no jurisdictional function and does not settle inter-State disputes by handing down binding decisions. At the commemoration of the 30th anniversary of this body, which took place in Seoul from 25 to 28 November 2008, several experts and representatives of the States taking part called for the preparation of a model law to define State ownership of cultural objects, and it was suggested that UNIDROIT take part in this initiative. This proposal, jointly presented by Dr Jorge Sánchez Cordero (Member of the UNIDROIT Governing Council) and Mr Patrick O'Keefe (Honorary Professor, University of Queensland) was warmly welcomed by the participants.

I believe that it would be appropriate to give further thought to the preparation of such a model law with a view to presenting a progress report to the 22 member States of the Committee, which will meet at UNESCO from 11 to 13 May 2009 on the occasion of its 15th Ordinary Session and to which I look forward to welcoming you as well as Ms Marina Schneider, Senior Officer at UNIDROIT, whose participation has already been confirmed.

The expertise offered by UNIDROIT, no less than the prestige it has won in the preparation of uniform law instruments, would seem to me indispensable in this context. Ms Schneider's contribution in particular will be much appreciated.

I should be most grateful if you could let me have your views on this project, so that we may discuss how our respective Secretariats may co-operate in this matter.

Yours faithfully,

Françoise Rivière