Private Law Beyond Markets for Goods and Services : The Example of Cultural Objects

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I. – INTRODUCTION

Cultural objects are more than simple goods. In many States they are classified as non-tradeable goods, *res extra commercium*. They cannot be sold and are not subject to acquisitive prescription, laches or statutes of limitations. Cultural objects are unique commodities, and claims for their restitution (in case of theft) or return (in case of illegal export) can properly be treated as special cases. Indeed, economists have recognised this special status of cultural objects and that they are not subject to normal economic determinants.[1] Besides, the art trade operates in secret and the art market requires concealment at every level.

Claims for the return or restitution of works of art are typically based on rules of private law. However, cultural objects being invaluable assets, the rules of private law are inadequate to meet the special demands of this special category of goods. The general rules of private law are insufficient because they were not created to take the peculiar characteristics of these special goods into account.

II. – NATIONAL LAWS

The global effort to protect cultural objects relies on national laws.[2] Since national legislation must operate in the context of international trade, there is convergence in the statutes. The laws regulate both local sale and export of cultural objects. They control their management, their movement across State boundaries and rights of State pre-emption in respect of them. There are provisions for their inalienability and imprescriptibility, and there are many kinds of conditions or restrictions regarding their alienation: requirements as to notification, a restricted range of transferees (such as nationals or registered collectors), or special procedures. Most definitions of

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1 A. MAS-COLELL, "Should Cultural Goods be Treated Differently?", 23 *Journal of Cultural Economics*, 1992, 87.

2 See contribution by A. WAHED in this issue, 529, which extensively develops how – and how successfully – Egypt is securing the restitution and return of its cultural objects by applying its national law.

cultural heritage, whether in national or international law, provide criteria of selection. Some national legislation may seem to include protection of a very wide class of every day objects: in many cases this is because so much of a traditional lifestyle has been destroyed that the few remnants of even mundane activities have become rare and valued relics of cultural tradition.[3]

National laws (legislation and judicial decisions) dealing with theft or unlawful export of cultural objects fall into two broad categories. The typical common law rule is that the court will order the good faith purchaser of a stolen cultural object to return it to the owner without compensation under the *nemo dat quod non habet* rule. In the civil law world, however, the *bona fide* purchaser is often protected against the owner or is entitled to compensation from the owner as the price of restitution. In the case of an illegally exported cultural object, the rule – whether in a common law or a civil law jurisdiction – is that the courts will not order the illegally exported object returned to the source nation. The similarity in judicial decisions with regard to illegally exported cultural objects is that while it is universally acknowledged that theft is unlawful, illegal export of cultural objects is a matter of violation of national legislation for the protection of cultural objects which States are not obliged to enforce at the international level in the absence of a treaty obligation. The refusal of national courts to give legislative extra-territoriality to other countries' export controls is well exemplified in *Attorney-General of New Zealand v. Ortiz*.[4] Thus, a cultural object smuggled out of one country can be legally imported into another. However, undeclared or improperly declared cultural objects entering most countries may be confiscated by customs and offered to the authorities of the source country. In this case, the country will not be enforcing foreign public law but its own import control law. Import control is not dependent on foolproof enforcement by border interdiction. As posited by BATOR:

> "An illegally imported artefact continues to be a contraband even though it penetrated the border, and if it later surfaces in a museum or collection, it can still be seized and repatriated." [5]

Thus, in the recent case of *United States v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos C. 400 B.C. et al*,[6] the Court of Appeals for the Second Circuit ruled that material false statements contained in United States customs documents were sufficient grounds for forfeiture of an ancient gold platter under United States customs laws, and the gold phial was returned to Italy from where it had been illegally exported following the refusal of the United States Supreme Court to hear the case.

3 L.V. PROTT, "Problems of Private International Law for the Protection of the Cultural Heritage", *Recueil des Cours,* 1989, 217, 226-227.

4 [1982] 2 *Weekly Law Reports*, 10; [1982] 3 *Weekly Law Reports*, 570; [1983] *2 Weekly Law Reports*, 809.

5 P. BATOR, "An Essay on the International Trade in Art", 34 *Stanford Law Review*, 1982, 275, 327. Reprinted as a monograph: *The International Trade in Art,* University of Chicago Press, 1988.

6 184 F.3d 131 (2d Cir. 1999).

There is also agreement in the international community that cultural objects taken from occupied territories during hostilities are being illegally trafficked. That is the rule in the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, to which over 90 States now adhere. Unfortunately, not all States enforce the principle of returning such an object to its place of origin and a thriving black market in such goods continues to flourish. The removal of antiquities from the Turkish-controlled territory of Cyprus is a well-documented feature of recent art history, dramatically illustrated in *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg and Feldman Fine Arts Inc*.[7]

III. – THE UNESCO AND UNIDROIT CONVENTIONS

In 1970, UNESCO adopted the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (*the 1970 UNESCO Convention), an international treaty requiring signatory nations to co-operate in tracking down and repatriating stolen and illicitly exported cultural objects. It was prompted, in part, by the legal tradition which refused to regard illegal export from another country as any ground for refusing to allow trade in the goods concerned. The UNESCO Convention, however, has its limitations. It is a scheme under public law and basically founded on a philosophy of government action. It also did not resolve some important issues, such as the protection of the *bona fide* purchaser.

Internationally organised marketers in art benefit from laws which vary from one country to another and above all from legal loopholes: as a rule, cultural objects of dubious origin are immediately transferred to other countries where less stringent laws apply. Such objects sell well there. It has been shown that national regulations alone are insufficient to deal with transborder problems. International regulations are necessary and indeed special laws, since particularly sensitive objects are involved.[8]

UNESCO therefore asked UNIDROIT to prepare a complementary Convention which was adopted in 1995. The UNIDROIT Convention is a special regulation that determines under which conditions the victim of theft regains the cultural object and when a country may bring an illegally exported cultural object back to its territory. It is the legal basis for anyone who has bought a cultural object in good faith and must return it being compensated instead of being left empty-handed.[9] By establishing private law regulations for the return of cultural objects which have been removed from a country, either by theft or illegal export, the *UNIDROIT Convention for the Return of Stolen or Illegally Exported Cultural Objects* seeks to bring about a better scheme for the protection of cultural objects on a world-wide scale. The then Director-General of

7 917 F.2d 278 (7th Cir. 1990); PROTT, *supra* note 3, 233-234.

8 See contribution by I. VOULGARIS in this issue, 541, stressing the need for unification or harmonisation in this field, assessing which issues have been resolved by harmonisation, and speculating as to whether it is possible to go any further.

9 A.F.G. RASCHER, "Legal Security in International Trade and Exchange of Cultural Objects", < http://arthistory.rutgers.edu/heritage/rascher.htm > .

UNESCO described the UNIDROIT Convention as "a breakthrough international framework to combat private sector transactions in stolen art and cultural property." [10]

The UNIDROIT Convention is the outcome of multilateral negotiations among 70 countries representing a great variety of interests. It is a compromise solution between countries with important art markets and countries most threatened by theft, pillaging of excavated artefacts, and illicit export. A compromise can obviously never satisfy everyone completely; it goes too far for one party but not far enough for another.[11] Take, for example, the issue of time limitations. To many critics, the absolute time limitations established by the Convention appear overdrawn. In many civil law jurisdictions, a *bona fide* purchaser does not have to return even a stolen object after five years. UNIDROIT extends this limit to 50 years – in exceptional cases to 75 years. Certainly, these time limitations seem long at first glance. But if one considers that a stolen cultural object must be returned over eternity in the common law system, the UNIDROIT time limitations must be regarded in terms of international comparison as a compromise between protecting private property and protecting trade. If one considers the age and significance of many cultural objects, these time limitations appear in a quite different light.[12] This is the essence of the harmonisation of rules solely applicable to cultural objects which is the *raison d'être* of the UNIDROIT Convention.

IV. – BILATERAL AGREEMENTS

An import control regime that enforces another country's export restrictions at the national level within narrow limits was one of Bator's most significant proposals in his seminal article, but it did not immediately receive the attention it deserved. Fortunately, the United States has now given the lead in the matter. The 1983 *Convention on Cultural Property Implementation Act* enables the United States to implement the 1970 UNESCO Convention, and to enter into bilateral or multilateral agreements

> "to apply import restrictions ... to the archaeological or ethnological material of [a] State Party the pillage of which is creating jeopardy to the cultural patrimony of the State Party."

Such an agreement is effective for five years and may be extended for additional periods of five years. The ultimate goal of this international framework of co-operation is to reduce the incentive for pillage and unlawful trade in cultural objects. The State Parties with which the United States has signed agreements, and the objects contemplated, are:

10 UNESCO *News*, Volume 2, No. 5, 20 September 1995.

11 WAHED, *supra* note 2.

12 RASCHER, *supra* note 9.

Bolivia	Antique ceremonial textiles from Coroma
Cambodia	Khmer stone archaeological material from Cambodia
Canada	Archaeological artefacts and ethnological material of cultures of Canadian origin [13]
Cyprus	Byzantine ecclesiastical and ritual ethnological materials from Cyprus
El Salvador	Archaeological material representing Pre-Hispanic cultures of El Salvador
Guatemala	Archaeological material from sites in the Peten Lowlands of Guatemala and related Pre-Columbian material from its highlands and south coast
Italy	Archaeological material representing pre-classical, classical and Roman periods from approximately ninth century B.C. to approximately fourth century A.D.
Mali	Archaeological material from the Niger River Valley Region of Mali and the Bandiagara escarpment forming part of the remains of the sub-Saharan culture
Peru	Archaeological artefacts and ethnological material from Peru

This bold move by the United States has circumscribed the refusal to enforce the public laws of another State. It is the first and only step taken by a major art-collecting country to effect some change in the free flow of illegally exported cultural objects. The challenge is for European art-collecting countries to emulate this bold initiative by the United States.

V. – EUROPE : THE EUROPEAN COUNCIL REGULATION AND DIRECTIVE

Apart from the UNESCO and UNIDROIT Conventions, a notable multinational regulatory framework is provided by the *European Council Regulation on the Export of Cultural Goods* (the "Council Regulation") [14] and the *European Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State* (the "Council Directive").[15] These instruments will be only briefly presented here.[16] The Council Regulation establishes a licensing system for the export of cultural goods outside the European Union, while the Council Directive outlines provisions for the restitution of illegally exported goods within the EU. As a common export regulation for trade with third countries, the European Union seeks to ensure through the Regulation that no cultural object protected by any Member State will be exported without an export licence issued by the country of lawful location. The Directive, on the other hand, allows Member States to prohibit the removal of cultural objects from their territory and to enforce these prohibitions by bringing action for the

13 The agreement also offers protection to American cultural property by obliging Canada to take reasonable tests to prohibit the import, and facilitate the recovery, of archaeological resources as defined by the *Archaeological Resources Protection Act* 1979, cultural items as defined by the *Native American Graves Protection and Repatriation Act* 1990 and archaeological items recovered from shipwrecks as defined by the *Abandoned Shipwreck Act* 1987 that have been illegally removed from the United States.

14 9 December 1992.

15 15 March 1993.

16 See contribution by K. SIEHR in this issue, 551, which discusses these instruments in the context of a special regime for cultural objects in Europe.

return of the illegally removed objects in the law courts of any Member State where the object may be located. The Directive thus seeks to introduce the extraterritorial enforcement of national protection policies, and has accordingly been cited as an example of cultural nationalism.[17]

VI. – THE COMMONWEALTH SCHEME

The *Scheme for the Protection of Cultural Heritage within the Commonwealth* was adopted at the Commonwealth Law Ministers' Conference at Mauritius in November 1993. It establishes a procedure for the return of stolen or illicitly exported cultural objects within the Commonwealth. Model legislation has been drafted which the 54 Commonwealth member States may use as a basis for national legislation. Unlike the European Union Directive, implementation of the Scheme is not obligatory for member States.

VII. – THE BASEL RESOLUTION OF THE INSTITUTE OF INTERNATIONAL LAW

Since conflicts arise from different attitudes with respect to good faith purchasers, export controls and national ownership laws, illegally exported cultural property can be turned into legal property in another country. During its session in Basel from 26 August to 3 September 1991, the *Institute of International Law* adopted a resolution on *The International Sale of Works of Art from the Angle of the Cultural Heritage*.[18] The Resolution is an attempt to provide a legal answer to some unsatisfactory situations resulting from international sales involving stolen objects or illegally exported works of art. While, generally, the proprietary questions concerning art sales are subject to the *lex situs* rule, the Resolution advocates a different approach to conflicts law in the sense that, for certain *significant* objects of cultural heritage, the *lex originis* should prevail.[19] The "cultural link" between the State and certain art objects representing the cultural heritage becomes relevant for determining the applicable law. The Resolution does not solve the question of how this cultural link is to be determined. The law of the "country of origin" refers to the country "with which the property concerned is most closely linked from the cultural point of view."[20] JAYME has suggested several indicators as possible determinants for the nationality of cultural property – the artist's nationality, the geographical residence of the object in question, its religious meaning for a certain group, or its inclusion as part of a particular collection.[21]

17 K. SIEHR, "The Protection of Cultural Heritage and International Commerce", 7 *International Journal of Cultural Property*, 1997, 304, 315, 319.

18 E. JAYME, "Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law", 6 *International Journal of Cultural Property*, 1997, 376.

19 Article 4(1).

20 Article 1(1)(b).

21 Cited in M.M. MULLER, "Cultural Heritage Protection: Legitimacy, Property, and Functionalism", 7 *International Journal of Cultural Property*, 1998, 395, 401. See also contribution by J. SÁNCHEZ CORDERO in this issue, 565, who stresses that, in the particular context of pre-Columbian culture,

Good faith purchasers would have to return stolen or illegally exported cultural objects against compensation by the owner or the country of origin. There is no problem with respect to stolen property – this must be returned unless the owner is estopped by laches. Export controls, however, should be limited to significant objects of the cultural heritage of the country of origin. Every State may try to keep art objects within its borders and spend money to exercise any right of redemption. But importing States should not be obliged to yield to excessive foreign export regulations. Here the idea of "national treasures" may be used to restrain exuberant cultural nationalism and to reduce it to an internationally acceptable policy of retention of significant national treasures.[22]

The Resolution contributes to the creation of soft law in this field which might become relevant in certain cases where courts have to determine the content of "good morals" or trade customs by resorting to international standards.[23]

VIII. – CODES OF ETHICS

The sacred value of many cultural objects means that they take on a value enhanced by emotion and sense of identity. Many cultural objects are about the spiritual and intellectual life of a community. Black letter law cannot therefore fully settle the matter, and as a complement to the laws, therefore, we now have codes of ethics enjoining museums, art dealers and auctioneers not to acquire, buy or handle objects of doubtful provenance. Gaps and loopholes remain in national legislation and international instruments and the codes of ethics are invoked in order to impose a higher moral duty on the actors buying and selling antiquities. Codes of Ethics are intended to counter the problem of secrecy in the art market and close legal loopholes.

In 1984, a *Code of Practice for the Control of International Trading in Works of Art* was signed by representatives of several British auctioneers and dealers including *Christie's* and *Sotheby's*. Members of the United Kingdom fine art and antiques trade agreed "to the best of their ability, not to import, export or transfer the ownership of such objects" exported illegally from their country of origin, or acquired dishonestly or illegally. Two years after the British initiative, ICOM in 1986 adopted a *Code of Professional Ethics* that every museum professional vows to respect upon joining the organisation. It urges museums to:

> "recognise the relationship between the market place and the initial and often destructive taking of an object for the commercial market, and must recognise that it is highly unethical for a museum to support in any way, whether directly or indirectly, that illicit market."

The British Code itself was adopted (with appropriate adjustments) by the *Confédération Internationale des Négociants en Œuvres d'Art* (CINOA) at Florence in

the "best cultural interest" and the "interest of preservation of a culture" should prevail over nationalistic and market interests.

22 K. SIEHR, "Book Review", 10 *International Journal of Cultural Property*, 2001, 343.

23 JAYME, *supra* note 18.

September 1987, and Venice in July 1992. The preamble to the CINOA Code expressly states that it was adopted

> "in view of the world-wide concern expressed over the traffic in stolen antiques and works of art and the illegal export of such objects."

The *Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History* of the *College Art Association in the United States of America*, revised in January 1995, indicates that:

> "An art historian who has reasonable cause to believe that an item of cultural property has been the product of illegal or clandestine excavation or has been illegally exported will not assist in a further transaction of that object, including exhibition, attribution, description, or appraisal, except with the agreement of the country of export, nor will an art historian under these circumstances contribute to the publication of the work in question."

The *Council for the Prevention of Art Theft* (COPAT) launched two Codes of due diligence in March 1999: the *Code of Due Diligence for Auctioneers Trading in Fine Art, Antiques, Antiquarian Books, Manuscripts and Collectors Items*, and the *Code of Due Diligence for Dealers Trading in Fine Arts, Antiques, Antiquarian Books, Manuscripts and Collectors' Items*. Their avowed aim is to "prevent the illicit trade in stolen art and antiques." Finally, the 30th General Assembly of UNESCO in November 1999 adopted the *International Code of Ethics for Dealers in Cultural Property*. This Code builds on the principles developed in the UNESCO and UNIDROIT Conventions, and also relies on the experience of various national Dealers' Codes, including those of France, the Netherlands, Switzerland and the United Kingdom, as well as the CINOA Code. There are naturally some differences between these Codes which have been harmonised in the UNESCO text. Experience had shown that there were some loopholes which allowed cultural material to be handled even though it had been abstracted from its country of origin under conditions of some illegality. These areas were tightened up.

The new UNESCO Code is also close to the model rule on the acquisition policies of museums which is to be found in the *Code of Professional Ethics* of the *International Council of Museums* (ICOM). Its key clause is Article 1 which reads:

> "Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported."

The effect of the phrase "reasonable cause to believe" is set out in later clauses. However, it is to be read as requiring traders to investigate the provenance of the material they handle. To satisfy this requirement, traders must actively examine the background of the objects they are offered and question the person concerned. They must pay attention to any circumstances likely to arouse suspicion, such as a demand for a large payment in cash or too low a price for a valuable object. That said, if there are no suspicious circumstances and questions are answered satisfactorily, traders can proceed with the transaction, having no reasonable cause to believe there is any illegality involved. Adoption of the Code by dealers indicates that there is an ethical

body of dealers who are not to be confused with those instigating and commissioning thefts, clandestine excavations and illegal exports of cultural property.[24]

Codes of Ethics do not replace the law, they complement it. And ethics have a higher moral status than law.

One example is the *Code of Practice for the Control of International Trading in Works of Art* adopted by several British organisations in 1984. Although the government did not play an active role in the preparation of the Code, it certainly favoured the emergence of such a document as a means of countering criticism that the government was doing nothing to deter unlawful trade in cultural heritage material. As an indication of its good faith, the government presented the Code to the 4th 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* in 1985.[25] Thus, although this is a private code of ethics in the sense that adherents to it are all private entities, it also has political implications. It has been observed that the real significance of self-denying ordinances by museums, art dealers, auctioneers, archaeologists and art historians is probably that they should have been made at all, having never been made in the past. What is also significant, however, is that the weight of such soft law as exists has shamed them into making such guidelines.

Codes of Ethics and international treaties are two important elements of the current, major international effort to prevent the damage caused by the illegal trade in cultural objects. However, while codes of conduct may stop an auction – and instances abound –, they do not compel the return of a cultural object and the victim may still have to institute an action to reclaim it.

IX. – OXFORD UNIVERSITY AUTHENTICATION THERMOLUMINESCENE POLICY

In 1991, the *Oxford University Committee for Archaeology*, which oversees the activities of the *Research Laboratory for Archaeology and the History of Fine Art*, adopted a new policy with regard to its authentication services. For over twenty years, the Research Laboratory had provided thermoluminescence (TL) services to art historians and dealers, despite the demonstrable correlation between the publication of TL dates for terracottas from Ghana, Mali and Nigeria and the rapid inflation of prices

24 UNESCO Document prepared by P.J. O'KEEFE, "Feasibility of an International Code of Ethics for Dealers in Cultural Property for the Purpose of More Effective Control of Illicit Traffic in Cultural Property", Doc. CLT/94/WS/11, also available on website < http://www.unesco.org/culture/legalprotection/theft/index.html_eng/publication.htm > . See also UNESCO's Pamphlet "Why an International Code for Dealers?". Also, P.J. O'KEEFE, "Codes of Ethics: Form and Function in Cultural Heritage Management", 7 *International Journal of Cultural Property*, 1998, 32; C.C. COGGINS, "A Licit International Traffic in Ancient Art: Let There be Light!", 4 *International Journal of Cultural Property*, 1995, 61.

25 O'KEEFE, "Codes of Ethics", *supra* note 24, at 35-36. On the other hand, the existence of the Code was used by the British Government during negotiations on the *Scheme for the Protection of the Cultural Heritage Within the Commonwealth* as partial justification for failing to support the Scheme. See P.J. O'KEEFE, "Protection of the Material Cultural Heritage: The Commonwealth Scheme", 44 *International Comparative Law Quarterly*, 1995, 147.

commanded in the art market for those art pieces and the acceleration of clandestine digging at archaeological sites in the presumed source areas. The Research Laboratory had long returned a financial-expediency argument to counter the allegation that they contributed to the looting of archaeological resources by authenticating pieces removed illicitly from their stratigraphic context and from their country of origin. The policy with regard to terracotta pieces of unknown provenance is an important self-denying ordinance similar to the Codes of Ethics. The Committee's statement began by declaring that with regard to fired clay artefacts of West African origin, the Research Laboratory would in future restrict its services to the dating of specimens recovered in the course of lawful archaeological excavations submitted by a responsible person. It concluded by announcing that:

> "Dating/authentication of such West African objects will no longer be carried out for private individuals, salesrooms or commercial galleries." [26]

The self-denying ordinance imposed on itself by the Research Laboratory is as important as the Codes of Ethics discussed in the previous section.

X. – NATIONAL PATRIMONY AND NATIONAL CAPITAL

Cultural objects are distinguishable from everyday objects in that they have not only financial, but also intrinsic value. Various interests – the country of origin, the market, dealers, collectors, museums, archaeologists and art historians – compete for supremacy in the debate on possession and ownership of cultural property. The legal mind treats antiquities as a commodity to be shared. Thus it is Bator's view that:

> "The Elgin Marbles are a part of England's national patrimony. All such works of art are part of the national capital: they generate income (by attracting tourists, etc.) and they can produce social and psychological benefits for a country and its inhabitants." [27]

But the cultural heritage is a seamless tapestry that cannot be cut into little squares and shared around internationally.[28] Hence at the 4th session of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*, held in Paris from 24-27 April 1989, Recommendation 9 adopted at the end of the session deplored that the Treaty of Rome classifies cultural property as merchandise and thus subject to the rules governing the free market.[29] Besides, the appeal of cultural objects for investment, as a hedge against inflation and in connection with illegal activities continues to wax, and is enhanced by the secrecy of the trade. Art investors, museums, private collectors and diplomats,

26 R.J. MCINTOSH, "New Oxford University Policy on TL Authentication Services", 25 *African Arts*, 1992, 103.

27 BATOR, *supra* note 5, at 303.

28 C.C. COGGINS, "United States Cultural Property Legislation: Observations of a Combatant", 7 *International Journal of Cultural Property*, 1998, 52, 63.

29 IGC, 4th Session (1985), UNESCO Doc. CLT-85/CONF.202/7.

sheltered from knowledge, provide demand of a magnitude which can only be satisfied by illicit trade and which provides significant rewards for illegal activity.[30]

The high prices paid for cultural objects make illegal trade in these objects extremely attractive. INTERPOL, the international police organisation, estimates that illicit trade in cultural property is worth U.S. $4.5 billion a year world-wide, well up from the U.S. $1 billion annual figure a decade ago.[31] By that token, illicit trade in cultural property is the most important illegal trade after narcotics and illegal arms. Moreover, it is sometimes carried on by the same people, who occasionally launder the proceeds from the illegal drug trade by purchasing cultural objects.

It is also frequently contended that there is a close connection between traffic in cultural objects and organised international crime. A valuable Renoir painting stolen from Sweden's National Museum on 22 December 2000 was found in a bag by police during an unrelated "drug bust" when they detained three drug suspects.[32] British police have had more than one case where a "drug bust" has left them with a good many cultural objects on their hands – some of which have been traced through data bases, and some of which they cannot find owners for. In a recent Australian case, it was found that the packages of cocaine seized by police were being used as packing around antiquities which disappeared from Greece years ago. These objects were subsequently returned to Greece. Thus, there is growing evidence that artworks are used as a kind of non-traceable currency which can circulate for years among criminal groups without losing their value.[33]

In one area, however, there is need for an urgent reappraisal of national legislation: that of chance finds where more favourable treatment of chance finders could be of immense value in combating the illegal trade in cultural property. Most people do not wish to break the law by selling antiquities that have accidentally turned up either in the course of farming or construction or as a result of erosion through flooding. Yet most national laws do not provide for the payment of the economic or international market value of antiquities discovered in this manner.[34] If chance finders can be sure of adequate payment, their discoveries may no longer go to fuel the illegal trade in cultural objects.

30 PROTT, *supra* note 3, 231.

31 S. ROBINSON / A. LABI, "Endangered Art", *TIME*, 18 June 2001, 56, 57.

32 "Chronicles", in 10 *International Journal of Cultural Property*, 1998, 355.

33 L.V. PROTT, "Cultural Heritage Law: The Perspective of the Source Nations", 5 *Art Antiquity and Law*, 2000, 333, 338.

34 As an example, Section 26 of the Nigerian *National Commission for Museums and Monuments Act* 1979 provides that where any person has applied to the Commission for a permit to export any antiquity from Nigeria and the permit is refused, the Commission may for "a fair and reasonable local price" compulsorily buy the antiquity from the applicant. And if the latter is dissatisfied with the local price offered, he may apply to the Federal High Court to determine a fair and reasonable local price for his antiquity. In a situation where the exchange rate of the Naira (the Nigerian currency) is some 130 Naira to U.S. $1 (one), the local price to be obtained can hardly be described as enticing. And so smuggling is preferred to a licit sale.

XI. – ARBITRATION AND MEDIATION

Because of the high stakes and complexity of the legal issues in cultural property disputes, litigation for the recovery of stolen cultural property is often massively expensive. In recent years, many celebrated cases before U.S. courts over stolen or illegally exported cultural objects have ended in one form of compromise or another even after huge sums have been expended on both sides. To cite one famous example, the Metropolitan Museum of Art in New York returned the "Lydian Hoard" to Turkey after litigation had commenced in response to the "blackmail" of a potentially successful lawsuit. One estimate put the legal fees incurred by Turkey in its eight-year claim against the Metropolitan Museum of Art over the "Lydian Hoard" at 1.3 million pounds sterling.[35]

The high cost of legal action has prompted suggestions for recourse to arbitration and mediation rather than the drama and trauma of litigation. The first reported conference on the subject, entitled *Dispute Resolution in Art and Antiquity Claims*, was organised in June 1997 by the *Institute of Art Law* in London. It was followed in October 1997 by the Geneva-based *Art-Law Centre* conference on *Resolution Methods for Art-Related Disputes*.[36] And finally, from 29-30 September 2000, the *Venice Court of National and International Arbitration* (Venca) devoted its third conference to *Arbitration of Art Trade and Cultural Property Disputes*.[37]

Apart from lectures on international arbitration in general, the conference concentrated on different problems in the art trade: problems of substantive law in cultural property disputes, problems of arbitration concerning such disputes, and a mock trial of a hypothetical dispute. In this connection, it should be noted that Article 8(2) of the UNIDROIT Convention offers the avenue of arbitration for the recovery of stolen or illegally exported cultural objects. It provides that

> "[t]he parties may agree to submit the dispute to any court or other competent authority or to arbitration."

In *Union of India v. The Norton Simon Foundation*,[38] the return of stolen "Siva Nataraja" to India was postponed to enable the good faith acquirer, a United States collector, to display it for ten years. In the case of a garland sarcophagus lent to the Brooklyn Museum, the lender, a private collector, appeased the Republic of Turkey that was claiming it by donating the eleven-million-dollar artefact to the American-Turkish Society. Subsequently the American-Turkish Society sent the garland sarcophagus back to Turkey, the plaintiff country, where it remains on loan indefinitely. Experience thus teaches that art transactions are rich in potential for these

35 N. Palmer (ed.), *The Recovery of Stolen Art*, Kluwer Law International (London), 1998, at 19, fn. 173.

36 Q. BYRNE-SUTTON, "Resolution Methods for Art-Related Disputes", 7 *International Journal of Cultural Property*, 1998, 249.

37 K. SIEHR, "Resolution of Disputes in International Art Trade, Third Annual Conference of the Venice Court of National and International Arbitration", 10 *International Journal of Cultural Property*, 2001, 122.

38 United States District Court, Southern District of New York, 74 Cir. 5331; United States District Court, Central District of California, Case No. CV74-3581-RJK.

types of arrangement, which can be facilitated by a mediator whose knowledge allows him/her to imagine mutually beneficial solutions. From an ethical point view, such constructive solutions are welcome, since art disputes quite often involve conflicting yet legitimate interests. Precedents therefore exist which arbitrators can, through process design, help parties to create value for themselves. The question still remains, however, of whether cultural property disputes are better handled by arbitration than by State courts. The practice of mediation and conciliation offered by certain institutions may help to develop art trade arbitration in the future.[39]

XII. –UNIFORM STANDARDS FOR DOCUMENTATION AND IDENTIFICATION

If inventories and accurate descriptions of cultural objects do not exist, it will be very difficult subsequently to establish where an object came from and to whom it really belongs. Successful law suits for the return of cultural objects generally occur where the objects are documented and their ownership is clear. The critical role of adequate registration and documentation in the fight against illicit traffic in cultural property has been emphasised again and again in discussions at every session of UNESCO's Intergovernmental Committee to date. At the Committee's inaugural session held at UNESCO headquarters in Paris in May 1980,

> "several delegates and observers brought up the question of inventories of cultural property, stressing the fundamental importance of such instruments."

At the 5th session in Paris in 1987, the Director of the Division of Cultural Heritage drew attention to "the fundamental role of inventories." Thereafter,

> "the crucial importance of inventories as a means of putting on record and accurately supervising cultural property was confirmed by several speakers."

Finally, at the 10th session in Paris in January 1999, it was concluded that:

> "documentation is of crucial importance for the protection of cultural property, since, without a precise description and photographs, it is difficult for the legitimate owner to recover it." [40]

Although there is some backlog in registration and documentation in most museums in rich countries, this is nothing compared with the situation in third world

39 L.J. BORODKIN, "The Economics of Antiquities Looting and a Proposed Legal Alternative", 95 *Columbia Law Review*, 1995, 377; E. SIDORSKY, "The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration", 5 *International Journal of Cultural Property*, 1996, 19; F. SHYLLON, "The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration", *Unif. L. Rev. / Rev. dr. unif.*, 2000, 219.

40 IGC, First Session (1980), UNESCO Doc. 21 C/83, p. 2; IGC, Second Session (1981), UNESCO Doc. CC-81/CONF.203/10, pp. 7-8; IGC, Third Session (1983), UNESCO Doc. CLT-83/CONF.216/8, p. 8; IGC, Fourth Session (1985), UNESCO Doc. CLT-85/CONF.202/7, pp. 6-7; IGC, Fifth Session (1987), 24/C/94, pp. 1. 5; IGC, Sixth Session (1989), UNESCO Doc. 25 C/91, p. 3; IGC, Seventh Session (1991), 26 C/92, p. 3; IGC, Eight Session (1994), UNESCO Doc. CLT-94/CONF.203/3, pp. 5-6; IGC, Ninth Session (1996), UNESCO Doc. 29 C/REP.12, pp. 6-7; IGC, Tenth Session (1999) UNESCO Doc. 30/C/REP.4, pp. 6-7; IGC, Eleventh Session (2001), UNESCO Doc. 31 C/REP.16, p. 2.

source countries where cultural heritage management is seriously under-funded. Even so, some initiatives have been developed in third world countries as well. The major African contribution in the area of documentation is the *Handbook of Standards* published by ICOM in 1996.[41] The result of a four-year effort by professionals of six African museums and the ICOM *International Committee for Documentation* (CIDOC), it has been described as "one of the most important museum documentation standards of recent years." [42]

Exchange of information, the establishment of inventories and co-operation are all needed to combat illicit trafficking in cultural property. To that end, the General Secretariat of INTERPOL has developed a new database of works of art – the *Automatic Search Facility* (ASF) – which currently lists 14,000 objects identified by text and image. Created by the police for their own use, the ASF database may be consulted by any suitably equipped National Central Bureau (NCB). The importance of harmonising existing national police databases and co-operation cannot be over-emphasised.

XIII. – WORLD CUSTOMS ORGANIZATION

The smuggling and theft of cultural objects are transborder operations. Under the terms of its founding Convention, the *World Customs Organization* (WCO, formerly known as the Customs Cooperation Council) is instructed to secure the highest degree of harmony and uniformity in the customs system of its Member States. The Customs Cooperation Council adopted a Resolution on action against smuggling of works of art and antiquities at its June 1976 session, drawing members' attention to the growth in the number of cases of smuggling and theft involving cultural property as well as the serious harm that countries suffer as a result of these offences with regard to the preservation of their artistic and cultural heritage. It also invited Members to accede to the 1970 UNESCO Convention.

As far as legal co-operation among its members is concerned, the most important WCO instrument is the *International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Offences* (also known as the Nairobi Convention) of 9 June 1977. More specifically, Annexe XI of the Convention deals with the repression of illicit traffic in cultural property. At customs level, the Annexe supplements the provisions of the 1970 UNESCO Convention providing, for example, for action by the customs officials of a Contracting Party in the territory of another Contracting Party. Where it is not sufficient for evidence to be given solely in the form of a written statement, the requested Party may, at the request of the Customs administration of a Contracting Party, authorise its officials to appear before a court or tribunal in the territory of the requesting Contracting Party as witnesses or experts in the matter of smuggling of cultural property.

41 ICOM, *Handbook of Standards: Documenting African Collections*, ICOM (Paris), 1996.

42 R. THORNES, *Protecting Cultural Objects in the Global Information Society: The Making of Object ID*, Getty Information Institute (Los Angeles), 1997, 17.

Although the original membership of the Customs Cooperation Council was strictly European, the WCO has grown into a world-wide intergovernmental Organisation grouping the customs administration of over 140 member countries. There is no doubt that a more pro-active and interventionist approach to the import of cultural objects will curtail illicit trade in cultural property. In this regard, it is to be noted that once again, the United States is spearheading the movement via her customs service. Two recent commentators and attorneys specialising in customs litigation have remarked that stopping the illegal import of cultural property has become an important part of the United States Customs Service mission. As part of this focus, customs are aggressively enforcing the laws relating to the import of cultural property into the United States. Anyone interested in importing any type of cultural property into the United States for whatever purpose must make sure to comply with all relevant provisions of the United States law and to have all necessary documentation to prove to Customs that the import is legal. Failure to meet the stringent requirements of United States law can easily result in the loss, without remuneration, of any cultural property improperly imported into the country.

Imported cultural objects have been seized and forfeited under the *Cultural Property Implementation Act* in very few cases. One such example is *United States v. An Original Manuscript Dated November 19, 1778 Bearing the Signature of Junipero Serra, Located at Sotheby's, 1334 York Avenue, New York, New York*.[43]

The United States Government sought the forfeiture of the said document pursuant to the Cultural Property Implementation Act. The person who consigned the manuscript to Sotheby's for sale filed a claim in court seeking the return of the manuscript. The evidence showed that the manuscript had been part of the Mexican National Archives in 1956. The manuscript was bought by an American dealer in Mexico in 1992. The dealer imported the manuscript into the U.S. without declaring it to customs. In 1995, the dealer sold the manuscript to claimant, who then consigned the manuscript to Sotheby's for sale in June 1996. Upon hearing that the manuscript was for sale, the Mexican authorities investigated and discovered in June 1996 that the manuscript had been stolen. The Mexican authorities submitted a request to the United States Government under the Cultural Property Implementation Act seeking assistance in recovering the manuscript.

The Court found that the U.S. Government had probable cause to seize the manuscript. The court determined that the evidence was sufficient to show that the manuscript was "documented as appertaining to the inventory of a museum." The Court also determined that the claimant could not assert an innocent owner defence as such a defence is not available under the statute, and that the importer was not entitled to compensation from the Mexican Government.

As SIMON and HANIFIN have pointed out, the lack of case law dealing with seizures and forfeitures under the Cultural Property Implementation Act does not mean that the

43 No. 96 Civ. 6221 (LAP), 1999 U.S. Dist. LEXIS 1859 (S.D.N.Y. Feb. 22, 1999).

statute is not regularly used by customs. It is more likely a reflection of the expense and difficulty of prevailing in a judicial action once customs have moved to seize imported cultural property under the Act. In most cases, potential claimants simply do not contest customs' seizure and forfeiture. On occasion, claimants may arrange with the U.S. Government to be involved in returning forfeited cultural property to the claiming foreign government and thereby at least reap favourable publicity.[44]

XIV. – HARMONISATION OF OBJECT IDENTIFICATION USING *OBJECT-ID*

The *Object ID* project, coordinated by the Getty Information Institute, was the outcome of collaboration among UNESCO, the Organisation for Security and Cooperation in Europe (OSCE), the Council of Europe, the European Union, ICOM, INTERPOL and the United States Information Agency (USIA). The General Conference of UNESCO, at it its 30th Session in November 1999, recommended that all Member States use and promote *Object-ID* following its endorsement by the Intergovernmental Committee at its 10th session as the international core documentation standard for recording minimal data on moveable cultural property and for identifying cultural objects with a view to combating illicit traffic in cultural property. *Object-ID* is also compatible with other existing databases, as well as with the CRIGEN-ART form used by INTERPOL to collect information on stolen cultural property.[45] However, the Getty Foundation has withdrawn its financial support for *Object ID* and its future is far from assured.

XV. –THE ICOM "RED LIST"

The "Red List" is one of the latest attempts by the *International Council of Museums* to halt illicit trade in cultural objects. It focuses on "hot" African antiquities including terracottas from Ghana, Mali, and Nigeria and on Latin American cultural objects at risk. Any of those items offered on the market will almost certainly have been looted and illegally exported. Museums, collectors, and the trade are all asked to refuse to buy anything on the "Red List".[46]

XVI. – INTERNATIONAL FUND FOR THE RETURN AND RESTITUTION OF CULTURAL PROPERTY

The lack of resources remains an important obstacle to the realisation of an effective strategy against the dispersal of cultural objects through illicit trafficking. In November 1999, the general Conference of UNESCO at its 30th session established the *International Fund for the Return of Cultural Property to Its Countries of Origin or its*

44 J.K. SIMON / J.I. HANIFIN, "Enforcement of U.S. Laws Governing the Importation of Cultural Property", paper delivered at the Business Law International Conference of the International Bar Association, Cancun, Mexico, 28 October – 2 November 2001. The authors are Attorneys at Serko and Simon LLP; New York (United States of America).

45 IGC, Tenth Session (1999), UNESCO Doc. 30 C/REP.14, pp. 6-7; IGC, Eleventh Session (2001), UNESCO Doc. 31 C/REP/16, p. 2.

46 < www.icom.org/redlist > .

Restitution in Case of Illicit Appropriation. The Fund's aim is to support Member States in their efforts to fight illicit traffic in their cultural property, focusing in particular in priority areas such as training and the strengthening of museum systems. The recovery of cultural property is important for States with significant losses, but not all have the means to pursue their claims in other countries. Requests for assistance will be evaluated by the Intergovernmental Committee of twenty-two member States. The Fund is financed by voluntary contributions.

XVII. – CONCLUSION

Cultural property laws or cultural heritage laws are essentially national in character. The problem of illicit trafficking of cultural objects is, however, a global subject. To bring cultural property law into a more uniform mould internationally presents a major challenge. It appears that the only way to deal adequately with the challenge is through increased globalisation of cultural property law. This is because there are countries with strong cultural property laws (source nations) and countries with weak cultural property laws (market nations); the weak protection in the latter undermines the strong protection in the former. Harmonisation of private laws through the UNIDROIT Convention, harmonisation of Codes of Ethics through the International Code of Ethics for Dealers in Cultural Property, and harmonisation of identification of objects through Object ID indeed prove that the goal of preventing the exploitation of differences in national laws through the requirement of diligence in the acquisition of cultural objects which these harmonisation projects promote is attainable. This is after all what obtains in other areas of international trade – the acquisition of good title to property through unimpeachable and impeccable transfers. The protection of cultural objects is an affirmation of our responsibility towards future generations.

47 K. SIEHR, "The Protection of Cultural Heritage and International Commerce", 6 *International Journal of Cultural Property*, 1997, 304.

48 [1982] 3 *Weekly Law Reports*, 570 at 581.

49 Bundesgerichtshof of 22 June 1992, 59 Entscheidungen des Bundesgerichtshofes in Zivilsachen 82, *International Law Reports,* 226.

50 PROTT, *supra* note 3, 299-300.