

## The Protection of Cultural Property : the 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared

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### I. – FIVE YEARS OF LEGISLATIVE ACTIVITY

The five-year period 1991-1995 saw the preparation of no fewer than eight multilateral international instruments or resolutions dealing with the protection of cultural property by six separate international or supranational organisations and associations, to wit: the United Nations,<sup>1</sup> the International Institute for the Unification of Private Law (UNIDROIT),<sup>2</sup> the European Union,<sup>3</sup> the Council of Europe,<sup>4</sup> the International Law Association<sup>5</sup> and the Institute of International Law.<sup>6</sup> During this same period, bilateral treaties or agreements were concluded by Germany<sup>7</sup> and the United States of

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<sup>1</sup> United Nations General Assembly Resolution 48/15 on the return or restitution of cultural property to the countries of origin, 2 November 1993, U.N. Doc. A/RES/48/15; United Nations General Assembly Resolution 50/56 on the return or restitution of cultural property to the countries of origin, 11 December 1995, in *International Journal of Cultural Property* 5 (1996), p. 347, with note by Th. FITSCHEN.

<sup>2</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, *Uniform Law Review*, 1996, p. 110; *International Journal of Cultural Property* 5 (1996), p. 155 with article by J.H. MERRYMAN, p. 11 *et seq.*; *International Legal Materials* 34 (1995), p. 1330.

<sup>3</sup> European Council Regulation (EEC) No. 3911/92 on the export of cultural goods, 9 December 1992, *Official Journal of the EC* No. 395, 31 December 1992, p. 1 as amended by information of 27 March 1993, *Official Journal of the EC* No. 74, 27 March 1993, p. 80. Current version in *International Journal of Cultural Property* 6 (1997), p. 379; European Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, 15 March 1993, *Official Journal of the EC* No. 74, 27 March 1993, p. 74. Current version in *International Journal of Cultural Property* 6 (1997), p. 387.

<sup>4</sup> European Convention on the Protection of the Archaeological Heritage, 16 January 1992, *European Treaty Series* No. 143.

<sup>5</sup> Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage, 20 August 1994, in *The International Law Association, Report of the Sixty-Sixth Conference* held at Buenos Aires (1995), p. 15 and in *International Journal of Cultural Property* 6 (1997), p. 121 with note by J.A.R. NAFZIGER.

<sup>6</sup> The international sale of works of art from the angle of the protection of the cultural heritage, Resolution of 3 September 1991, in *Annuaire de l'Institut de Droit international* 64 II (Basel 1991), p. 403; *International Journal of Cultural Property* 6 (1997), p. 376 with note by E. JAYME.

<sup>7</sup> Cp. the treaties with the Soviet Union of 1990 (BGBl. 1991 II 703) and with Russia of 1992 (BGBl. 1993 II 1256), with provisions to return lost or illegally removed cultural objects.

America.<sup>8</sup> We are attempting, as the century draws to a close, to resolve cultural property issues created over fifty years ago during the Nazi period.<sup>9</sup>

These international activities have to a large extent developed coincidentally. The United Nations' efforts focused, as before, on the return of cultural property to the countries of origin. UNESCO, dissatisfied with the 1970 UNESCO Convention,<sup>10</sup> asked UNIDROIT to draft a better one. The European Union was confronted with the demands of a Single European Market without customs and the fears voiced by some Member States as to the risk of a South-North drain on their national treasures.<sup>11</sup> The Council of Europe was reviewing older conventions,<sup>12</sup> and private associations were finalising the work of their cultural property committees.<sup>13</sup> The gradual change in certain attitudes over the past thirty years or so provided a common core for all these activities: attempts to stop art theft and even to "unplunder" art objects removed centuries ago, the growing nationalist trend in the cultural policy of certain States, the firm, but to many countries unrealistic, belief that the State is the prime custodian of national treasures, and a concern to preserve cultural property for future generations.

Yet what all these bodies and groups failed to achieve was a consistent international policy with respect to cultural property. And so it may befall that an art object stolen in Ecuador has to be returned,<sup>14</sup> whereas an object stolen in the United Kingdom may be kept in Italy.<sup>15</sup> Or, even more astonishing, a piece of cultural property illegally removed within the European Union must be returned to the European State of origin,<sup>16</sup> whereas restitution might be declined if the object was illegally exported from New

<sup>8</sup> Cp., e.g., the treaties with Romania of 8 July 1992 (CTIA Release 1993-3, p. 465), with Ukraine of 4 March 1994 (CTIA Release 1994-1, p. 877) and with El Salvador of 8 March 1995 (CTIA Release 1995-2, p. 123).

<sup>9</sup> Cp. H. FELICIANO, *The Lost Museum. The Nazi Conspiracy to Steal the World's Greatest Works of Art* (New York 1997); E. Simpson (ed.), *The Spoils of War. World War II and its Aftermath: The Loss, Reappearance and Recovery of Cultural Property* (New York 1997).

<sup>10</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 *United Nations Treaty Series*, p. 231.

<sup>11</sup> Cp. A. MATTERA, "La libre circulation des oeuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique", *Revue du Marché Unique européen*, 1993, no. 2, pp. 9-31.

<sup>12</sup> The Council of Europe Convention of 1992 (*supra* n. 4) revised the European Convention for the Protection of the Archaeological Heritage, 6 May 1969, *European Treaty Series* No. 66.

<sup>13</sup> As to the International Law Association, cp. *Report of the Sixty-Sixth Conference* (*supra* n. 5) p. 432 *et seq.*; for the Institute of International Law, cp. A. FERRER-CORREIA, "La vente internationale d'objets d'art, sous l'angle de la protection du patrimoine culturel", *Annuaire de l'Institut de Droit International* 64 I (Basel 1991), pp. 90-121, pp. 140-186.

<sup>14</sup> Tribunale di Torino, 25 March 1982 (*Repubblica dell'Ecuador – Casa della cultura ecuadoriana c. Danusso*), *Rivista di diritto internazionale privato e processuale* 18 (1982), p. 625.

<sup>15</sup> *Winkworth v Christie, Manson & Woods Ltd.*, [1950] 2 *Weekly Law Reports* 937 (Ch. D.).

<sup>16</sup> This would have happened (*supra* n. 3) if *Kingdom of Spain v Christie, Manson & Woods Ltd.*, [1986] 1 *Weekly Law Reports* 1120 (Ch. D.) had occurred under the regime of the 1993 EC Directive and its national implementing rules.

Zealand.<sup>17</sup> Where there is such a network of competing international instruments and conflicting national policies, no “magic word” of plain common sense can prevent such a scenario. It simply cannot be argued that if an object is part of European culture it does not matter whether it is exhibited in England or in France, but that Maori carvings must imperatively remain in New Zealand. The uncoordinated proliferation of international instruments on the same subject matter must produce results which cannot be reconciled in every single case. What can be done, however, is to explain the differences and elucidate some distinctions.

## II. – STOLEN CULTURAL OBJECTS

### 1. *The EEC Directive*

Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (15 March 1993)<sup>18</sup> does not concern itself with stolen art objects except if smuggled or – in current European Union parlance – illegally removed from one member State to another. As a consequence, the English case *Winkworth v Christie, Manson & Woods Ltd.*<sup>19</sup> would be decided under the Directive exactly in the way it was back in 1950.

### 2. *The UNIDROIT Convention*

The solution would be different if the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995)<sup>20</sup> applied between the United Kingdom and Italy, the art object had remained in Italy and a claim for restitution had been brought in Italy. According to the UNIDROIT Convention, stolen cultural property must be returned if the following five conditions are met:

- (1) the object must qualify as a cultural object as defined in Article 2;
- (2) it must have been stolen;
- (3) it must have some connection with a Contracting State other than the State where it is actually located;
- (4) the claim for restitution must be brought in time (Article 3);
- (5) the claimant must compensate a *bona fide* possessor (Article 4). The Convention does not abolish national rules on *bona fide* purchase, therefore does not preclude that a valid title to the object was transferred to the *bona fide* possessor [in the instant case, under Italian law].

#### (a) Cultural objects

According to Article 2 of the UNIDROIT Convention, cultural objects are those “which, on religious or secular grounds, are of importance for archaeology, prehistory,

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<sup>17</sup> *Attorney General of New Zealand v Ortiz*, [1982] 2 *Weekly Law Reports* 10 (Q.B.), [1984] 1 *Appeal Cases (Law Reports)* 1 (C.A., H.L.).

<sup>18</sup> *Supra* n. 3.

<sup>19</sup> *Supra* n. 15.

<sup>20</sup> *Supra* n. 2.

history, literature, art or science and belong to one of the categories listed in the Annex to this Convention." If these two preconditions (cultural importance, qualification under a category listed in the Annex) are met, the stolen object must be returned unless the remaining preconditions are not given.

Generally, almost every object of some cultural interest may be said to be protected by Chapter II of the UNIDROIT Convention, be it a collection of bugs,<sup>21</sup> an Etruscan sarcophagus illegally excavated in Italy,<sup>22</sup> a receipt written by Molière,<sup>23</sup> a drawing by Picasso<sup>24</sup> or Leonardo's Mona Lisa.<sup>25</sup> None of these objects need qualify as "national treasures" of the State of origin. They are protected not because of their importance in terms of national heritage, but because they are objects likely to be endangered or divided up in the event of robbery or theft.

(b) Theft

According to Article 3(1) of the Convention, "the possessor of a cultural object which has been stolen shall return it." This provision, allegedly of "crystal clarity",<sup>26</sup> does not answer four questions at the very least:

- (1) What is meant by "theft"?
- (2) Must the object have been stolen in a Contracting State?
- (3) Can every object, once stolen, be secured under the Convention even though it was acquired *bona fide* in the State of origin?
- (4) Who may bring the suit for restitution (the owner, the State)?

According to general rules of construction of international instruments, the terms "stolen" and "theft" should be interpreted autonomously, without reference to national law.<sup>27</sup> There is however no supranational unanimity as to the definition of these terms. In respect of illegally excavated objects, Article 3(2) of the UNIDROIT Convention provides that, for the purposes of the Convention, these are considered stolen "when consistent with the law of the State where the excavation took place."<sup>28</sup> For all other objects, the matter has to be settled by the domestic law of the State where the object was allegedly stolen.<sup>29</sup> It is here that considerable differences may arise. At least one

<sup>21</sup> Annex (a): rare collections of fauna. Cp. also "Käfersammlung endlich in Basel", *Neue Zürcher Zeitung*, 25/26 October 1997, p. 20.

<sup>22</sup> Annex (c): products of archaeological excavations. Cp. also Swiss Federal Court, 6 February 1985, *BGE* 111, I a, p. 52.

<sup>23</sup> Annex (b): rare manuscripts. Cp. also Cour d'appel de Paris, 3 January 1846, *D.H.* 1846, II, p. 212.

<sup>24</sup> Annex (g) (i): drawings. Cp. also Swiss Federal Court, 7 June 1988, *BGE* 114 II, p. 131.

<sup>25</sup> Annex (g) (i): paintings. Cp. also S.V. REIT, *The Day They Stole the Mona Lisa* (London, 1981).

<sup>26</sup> L.V. PROTT, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects* 1995 (Leicester 1997), p. 28.

<sup>27</sup> Cp. Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties.

<sup>28</sup> The Convention does not seek to impose this rule on any Contracting State unless the latter agrees to the qualification "as being stolen".

<sup>29</sup> PROTT (*supra* n. 26).

misunderstanding should be corrected, however. In many Civil Law countries, too, objects entrusted to another person and converted by the trustee (or even the bailee) are not considered stolen.<sup>30</sup>

An object need not have been stolen in a Contracting State. An object on loan in a non-Contracting State and stolen there must be returned to the Contracting State of origin if it is habitually located in a Contracting State. Likewise Article 10(1), which deals with intertemporal problems, provides that the object must be either stolen or located in a Contracting State.

Another problem refers to the “international character” of a claim for restitution of stolen cultural objects. Should a stolen cultural object be returned to its Italian owner if, before its removal to another State, it was sold in Italy to a *bona fide* purchaser? This question has to be answered in the negative. An object is no longer stolen if it has been validly transferred to a *bona fide* purchaser. As the *bona fide* purchase of stolen objects is valid under Italian law unless they belong to the “*demanio pubblico*”, and since the UNIDROIT Convention does not apply to cultural objects stolen and sold in one and the same State, the object has lost the stigma of having been stolen. The original owner cannot recover the object if the *bona fide* purchaser transfers it to a Contracting State. Chapter II of the Convention keeps well out of national cultural politics with respect to national treasures. It simply protects property interests in cultural objects. *Exemplum docet*. If the objects in *Winkworth v Christie, Manson & Woods Ltd.*<sup>31</sup> had been stolen and sold in Italy to a *bona fide* purchaser and then transported to London to be sold at auction, the original owner’s suit for restitution in England would not have been successful under the UNIDROIT Convention. But it would have been successful if, as in the original case, the objects had been stolen in England and then sold in Italy. In that case, the object would have had to be returned.

The claim for restitution may be brought by anyone with good title as the owner or the bailee. The State, unless it is itself the owner or bailee, is not entitled to enforce private property interests in foreign courts dealing with disputes between private parties.

(c) Time limitation of claims

Article 3(3)-(8) provides extensive time limitations for claims for restitution. If these have expired, no claim can be brought under the UNIDROIT Convention. The question of whether the limitation period amounts to a limitation of a suit *in rem* or a claim *in personam* must be decided by the national law.

(d) Reasonable compensation

A *bona fide* possessor of stolen cultural objects who has to return these objects is entitled to reasonable compensation (Article 4). The UNIDROIT Convention does not specify what should be compensated: loss of title, loss of possession, loss of both? It is up to the applicable national law to decide whether the possessor as defendant must

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<sup>30</sup> As to German Law, cp. § 932 German Civil Code and PALANDT / BASSENGE, BGB, 57<sup>th</sup> ed. 1998, § 935 BGB, note 1; as to Swiss law, cp. Article 933 Swiss Civil Code and Honsell / Vogt / Geiser (eds.), *Schweizerisches Zivilgesetzbuch II* (Basel 1998), Article 934, note 1.

<sup>31</sup> *Supra* n. 15.

transfer title, or possession only, since the UNIDROIT Convention neither substitutes domestic law nor sets out to change it. If the Convention were applied to the facts of the Italian *De Contessini* case (French tapestries stolen in France and sold in Italy to a *bona fide* purchaser),<sup>32</sup> the *bona fide* purchaser (De Contessini) would lose his title through restitution of the tapestries since the Italian domestic law applicable under the *lex rei sitae* rule says that he acquired good title in the objects. Transfer of title would likewise be required if the possessor of a stolen object had acquired title by prescription (*usucapio*). But even had the possessor acquired no title and was then required to return the object, he would get reasonable compensation for the loss of possession in an object he bought for value.

### 3. Intermediate summary

The EEC Directive does not regulate the return of stolen art objects unless illegally removed from a Member State.

Under Chapter II of the UNIDROIT Convention, stolen cultural objects must be returned between Contracting States. The Convention does not abrogate domestic rules on *bona fide* purchase of stolen objects or acquisition of title by prescription (*usucapio*), but insists on the return of stolen cultural objects whether the possessor has acquired good title in the object or not. There is, however, one exception. A cultural object stolen and acquired *bona fide* in the same Contracting State no longer qualifies as stolen and hence need not be returned.

## III. – ILLEGALLY REMOVED OR EXPORTED CULTURAL OBJECTS

### 1. The EEC Directive

EEC Directive 93/7/EEC requires the Member States of the European Union to return cultural objects unlawfully removed from the territory of another Member State.

#### (a) Cultural objects

In order to qualify as a cultural object under the Directive and the national implementing regulations, an object must be a “national treasure” within the meaning of Article 36 of the Rome Treaty;<sup>33</sup> it must be subject to national rules providing that it may not be removed to another State without a government licence; it must belong to one of the categories listed in the Annex to the Directive or form part of a public or ecclesiastical collection (Article 1(1), second indent). Graphically illustrated, only those objects contained in the intersection area of three overlapping circles (representing Article 36 Rome Treaty, national legislation on national treasures, and the EC Directive respectively) are subject to the Directive.

<sup>32</sup> Cass. n. 12166 of 24 November 1995 (*Stato francese c. Ministero dei beni culturali ed ambientali d'Italia e De Contessini*), *Rivista di diritto internazionale* 80 (1997), p. 515 with article by NANETTI/SQUILLANTE at pp. 396-420; *Rivista di diritto internazionale privato e processuale* 33 (1997), p. 427; *Foro italiano* 1996, I, p. 907; Tribunale di Roma 9 March 1987, *Rivista di diritto internazionale* 71 (1988), p. 920 with comment by L. MONACO at p. 842-855. Cp. also F. ZERI, “La scandalosa sentenza sugli arazzi rubati”, *Orto aperto* (Milano 1993), p. 215.

<sup>33</sup> This Article was not affected by the Maastricht Treaty.

Doubts exist as to the first test. Which cultural objects qualify as “national treasures” (“*trésors nationaux*”, “*tesori nazionali*”) within the meaning of Article 36 of the Rome Treaty? No consensus has been achieved so far as to the notion and definition of the term “national treasure”; the only thing that is agreed is that it should have some echo as a concept in European law. It is not left exclusively to the Member States to qualify an object as a “national treasure”. This is a point recognised even by those who reject the notion of a “European” “national treasure” yet are dead set against abusive labelling of objects as national treasures.<sup>34</sup> But how can there be abuse if there is no European notion of “national treasure”, however generously defined? Some attempt must be made to define or describe such a European concept, even if only in the form of negatively formulated rules (*infra* III(3)).

(b) Unlawful removal

The Directive requires the Member States of the European Union to enforce foreign public law (rules restricting the free circulation of goods) in domestic courts. This obligation is not only an exception to the general rule of free movement of goods within the Union (Article 30 Rome Treaty), it is also ground-breaking in that it makes it impossible for Member States to continue to ignore foreign law on export controls.<sup>35</sup> In effect, it obliges the authorities of all Member States to tolerate a degree of cultural nationalism of other Member States. Whether such nationalism violates national property guarantees is not a problem of European law. Every Member State has to determine for itself which privately-owned cultural objects may be validly encumbered with a devaluating export ban.<sup>36</sup> What is a question of European law is whether the application of the Directive and its national implementing statutes may violate the free movement of persons in Europe. Such violation might occur if European citizens are debarred from taking their personal property with them while exercising their European freedom of movement.<sup>37</sup> To that extent, the Directive may be “unconstitutional” according to the Rome Treaty, or alternatively it may be upheld if interpreted restrictively in conformity with the freedom of movement of persons.

(c) Fair compensation

Article 9(1) of the Directive stipulates that fair compensation shall be paid to a person who has to return an art object and who exercised “due care and attention in

<sup>34</sup> Cp. J. SCHWARZE, “Der Schutz nationalen Kulturguts im europäischen Binnenmarkt”, *Juristenzeitung* 1994, pp. 111-117.

<sup>35</sup> As in *Kingdom of Spain v Christie, Manson & Woods Ltd.* In the United Kingdom (*supra* n. 16) and *De Contessini* in Italy (*supra* n. 32).

<sup>36</sup> Cp. Cour de cassation, February 1996 (*Agent judiciaire du Trésor c. Walter*), *J.C.P.* 1996, Jur., 22672; Cour d’appel de Paris, 6 July 1994, *Dalloz Sirey* 1995, Jur., 254; German Bundesverwaltungsgericht, 27 May 1993, *BVerwGE* 92, p. 228 (Silver Room of Marienburg Castle).

<sup>37</sup> Consiglio di Stato: No. 22, 24 January 1989, *Rassegna* 40 (1989) I, p. 41; No. 7, 23 September 1991, *Rassegna* 42 (1991) I, p. 1293; *Rivista di diritto internazionale privato e processuale* 29 (1993), p. 430 (*Pagenstecher c. Provincia autonoma di Bolzano*). In respect of this issue, cp. K. SIEHR, “Freizügigkeit und Kulturgüterschutz in der Europäischen Union”, in *Festschrift für Ernst-Joachim Mestmäcker* (Baden-Baden 1996), pp. 483-496.

acquiring the object." Such "fair compensation", whatever it may mean, may create new problems as yet unknown or virtually unknown in the international art trade. Art galleries, auction houses and private sellers may be held responsible for breach of warranty of clear title of the cultural object unlawfully removed from the territory of a Member State and subject to national restrictions on mobility.<sup>38</sup> It will be up to national law to decide whether such warranty may be excluded by general terms of contract or by individual stipulations.

(d) Title of returned object

According to Article 12 of the Directive, "ownership of the cultural object after return shall be governed by that law of the requesting Member State." The actual meaning of this provision would seem to be in some doubt.<sup>39</sup> A careful reading suggests that it does not change the time-hallowed *lex rei sitae* rule of private international law by substituting for it the rule of *lex originis* as advocated by the Institute of International Law.<sup>40</sup> Article 12 of the Directive is expressly restricted to the period "after the return" of the unlawfully removed cultural object when every Member State is free to apply its own domestic rules on such matters as, e.g., "*domaine public*" or "*demanio pubblico*", rules on forfeiture of illegally removed objects, or its regular provisions of private international law. The EEC Council in fact was loath to tamper with national rules on property law. In order to achieve the purpose of the Directive, i.e., to substitute a duty to return objects for vanishing customs controls, it was sufficient to impose an obligation to restore the *status quo ante*.

If, e.g., the *Kingdom of Spain v Christie, Manson & Woods, Ltd.* case<sup>41</sup> had been governed by the Directive and the respective national implementing statutes, Spain could have treated the returned Goya painting "The Marquesa de Santa Cruz" either as "*propiedad nacional*" or as forfeited under the Spanish rules on circulation of cultural property.<sup>42</sup>

## 2. The UNIDROIT Convention

Chapter III of the UNIDROIT Convention deals with the return of illegally exported cultural objects. These rules apply between Contracting States but, according to Article 9(1) of the Convention, do not prevent a Contracting State from applying any rules more favourable to the return of illegally exported cultural objects. If Member States of the European Union are also bound by the UNIDROIT Convention, those rules apply which are more favourable to the return of illegally removed cultural goods.

<sup>38</sup> Cp. K. SIEHR, "Die EG-Richtlinie von 1993 über die Rückgabe von Kulturgütern und der Kunsthandel", in G. Reichelt (ed.), *Neues Recht zum Schutz von Kulturgut. Internationaler Kulturgüterschutz, EG-Richtlinie, UNIDROIT-Konvention und Folgerecht* (Wien 1997), pp. 29-43 (at pp. 40-42).

<sup>39</sup> Cp. E. JAYME, "Kulturgüterschutz in ausgewählten europäischen Ländern", *ZVgIRWiss* 95 (1996), pp. 158-169 (at p. 168); K. SIEHR (*supra* n. 38), p. 38.

<sup>40</sup> Cp. Article 3 of the 1991 Resolution (*supra* n. 6).

<sup>41</sup> *Supra* n. 15.

<sup>42</sup> Cp. Article 75(1) of the Spanish Act No. 16 of 25 June 1985 on the "Patrimonio Histórico Español", A. Maresca Compagna / P. Petrarola (eds.), *Beni culturali e mercato europeo* (Roma 1991), pp. 569, 575.

(a) Cultural objects

As in the EEC Directive, the illegally exported cultural object has to satisfy three separate tests before it qualifies as an object to be returned under the UNIDROIT Convention. It must be subject to national export prohibitions in the State of origin (Article 5(1)) at the time of its export and of the request for its return (Article 7(1)(a)); it must fall within one of the categories listed in the Annex to the Convention (Article 2) and not be excluded by Article 7(1)(b) (works exported during the lifetime of the artist or within fifty years after the artist's death); finally, the requesting State must establish that the removal of the object impairs certain interests (Article 5(3)(a)-(d)) or " ... that the object is of significant cultural importance for the requesting State" (Article 5(3), *in fine*). This has to be decided by the courts of the Contracting State where the illegally exported cultural object is located (Article 8(1)). Whether this new *forum rei sitae* will be supplemented by additional rules of jurisdiction is a question to be resolved under the jurisdictional rules of the country whose courts are seised of the return claim. The Brussels and Lugano Conventions<sup>43</sup> do not apply, because a claim brought by a Contracting State to return illegally exported cultural property is a matter of enforcing public law in foreign courts and not a civil or commercial issue within the framework of the European Conventions of Brussels and Lugano. What counts is this: the question of whether a cultural object is of "significant cultural importance for the requesting State" is not conclusively decided by the authorities of the requesting State,<sup>44</sup> which instead must seek to convince foreign courts of this importance. Still open is the question as to what determines such "significant cultural importance" for a nation. Perhaps this evaluation cannot be made in positive terms. Some negative criteria, however, may be inferred from past experience. Here are four of them:

- (1) A cultural object is not usually of significant cultural importance to a nation if much or most of the same artist's output is already located on its territory. For example, Francisco de Goya's "Marquesa de Santa Cruz" is not of *significant* importance to Spain;<sup>45</sup> the same is true of Germany in respect of Caspar David Friedrich's "Kreidefelsen auf Rügen",<sup>46</sup> of France as regards Georges de La Tour's "The Penitent Magdalen"<sup>47</sup> and of England where Thomas Gainsborough's "The Blue Boy" is concerned.<sup>48</sup>
- (2) The fact that national museums are short of cultural objects of a certain period or by a given artist is of no importance. Hence, it is unlikely that Switzerland would have been compelled to return Jean-Etienne Liotard's "Portrait de M.

43 1968 Brussels Convention and 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

44 PROT (supra n. 26), p. 59 *et seq.*

45 *Kingdom of Spain v Christie, Manson & Woods Ltd.* (supra n. 16).

46 Owner: Stiftung Oskar Reinhart, Winterthur (Switzerland).

47 Owner: Metropolitan Museum of Art, New York.

48 Owner: Henry E. Huntington Library and Art Gallery, San Marino (California, USA).

Levett et de Mille Glavani assis sur un divan"<sup>49</sup> or Vincent van Gogh's "Jardin à Auvers"<sup>50</sup> to France had they been illegally exported to Switzerland.

- (3) Cultural objects which have no connection whatsoever with the requesting State do not have significant importance for that State. Hence there would be no obligation to return to Italy the illegally exported Matisse painting in the *Jeanneret v Vichey* case<sup>51</sup> or the French impressionist paintings owned by Ms Pagenstecher had they been illegally exported.<sup>52</sup>
- (4) An art object which has been part of a national public collection for a very long time no longer qualifies as a national treasure of the State of origin. Raffaello's "Sixtine Madonna" may therefore remain in Dresden, Albrecht Dürer's "Rosenkranzfest" in Prague, Leonardo da Vinci's "Mona Lisa" in Paris, the "Palatina" of Heidelberg in the Vatican<sup>53</sup> and the *Codex Argenteus*, the Bible of Wulfilas, in Uppsala.

In short, the UNIDROIT Convention is not designed to provide *international* support for *national* museum strategies, *national* interests in fostering tourism or other *national* aspirations to top up the cultural treasure chest. In fact, apart from illegally excavated archaeological objects, there may be very few cultural treasures in Europe which would be subject to Chapter III of the UNIDROIT Convention and to requests from European States. As most national treasures are already kept in public museums which do not indulge in illegal export, and since these treasures are protected by Chapter II of the UNIDROIT Convention, only objects in private ownership (individuals, private associations or foundations) are apt to be covered by Chapter III. They may be of significant cultural importance if known as such to the general public or if they are discovered to be such (e.g. if "The Just Judges", the missing panel of van Eyck's polyptych "The Adoration of the Lamb" at St. Bavo's in Gent, were to be found and then illegally exported). Privately owned art objects which are not known to the public (unless they are important archives) are most unlikely to be national treasures or considered to be of significant importance to a State.

(b) Illegal export

It is up to Contracting States to define or designate those cultural objects which may not be exported without a government licence. This is no different from the national bans on unlawful removal in the EEC Directive (*supra* Part III(1)(b)), except perhaps in one respect. National restrictions (general rules or decisions to issue a

<sup>49</sup> Cp. N. POWELL, "Le Louvre achète un Liotard, à un prix Getty", *Le Journal des Arts*, November 1995, p. 39; H. HANISCH, "Der Fall des Liotard und die nationale Zuordnung eines Kunstwerkes", in R. Frank (ed.), *Recht und Kunst. Symposium aus Anlaß des 80. Geburtstages von Wolfram Müller-Freienfels* (Heidelberg 1996), pp. 19-36.

<sup>50</sup> Cp. *Agent judiciaire du Trésor c. Walter* in France (*supra* n. 36).

<sup>51</sup> *Jeanneret v Vichey*, 541 F. Supp. 80 (S.D.N.Y. 1982), 693 F. 2d 259 (2d Cir. 1982).

<sup>52</sup> Cp. *supra*, n. 37.

<sup>53</sup> K. DÖHRING, "War die Universität Heidelberg verpflichtet, die Bibliotheca Palatina dem Vatikan zurückzugeben?", *Ruperto Carola* 39, No. 76 (1987), p. 138 *et seq.*

removal permit) to the free movement of cultural goods may not violate the free movement of persons in Europe (*supra* Part III(1)(b)).

(c) Reasonable compensation

Here again, the *bona fide* possessor is entitled to reasonable compensation (Article 6(1)) for loss of title. The possessor may, however, agree with the requesting State to retain ownership without compensation (Article 6(3)(a)) and return the art object to the requesting State (to his own premises or as a loan to a museum), or else sell or donate it along with a guarantee that it will be so returned (Article 6(3)(b)).

3. *A comparison*<sup>54</sup>

Both the EEC Directive and the UNIDROIT Convention stipulate that unlawfully removed or illegally exported cultural objects must be returned. Apart from that basic tenet, the two texts present differences as well as similarities.

(a) Cultural objects

Both instruments set up three tests to determine whether an object qualifies as a cultural object (*supra* Part III(1)(a) and 2(a)). Only one of these is common to both, *i.e.* the national provisions on export licences for cultural objects. The second test in both cases refers to the respective annexes and the third to specific qualifications detailed in Article 36 of the Rome Treaty and Article 5(3) of the UNIDROIT Convention respectively. Graphically illustrated, the intersection area of three overlapping circles (representing (a) Article 36 Rome Treaty/Article 5(3) of the UNIDROIT Convention; (b) national legislation on national treasures; and (c) Article 1(1), 2<sup>nd</sup> indent of the EEC Directive/Article 2 of the UNIDROIT Convention) constitutes the common ground.

Article 36 of the Rome Treaty, with its reference to “national treasures”, should be interpreted restrictively and comprise only objects of “significant cultural importance” for the State of origin – as in Article 5(3) of the UNIDROIT Convention.

The annexes to the two instruments cannot be harmonised by interpretation. The EEC Directive sets certain limits as to the age and value of specific categories of cultural object.

Age	no limit as to value	value over 15000 ECU	value over 30000 ECU	value over 50000 ECU	value over 150000 ECU
no time limit				collections of historical, palaeontological, ethnographic or numismatic interest	
over 50 years	archives, incunabula, manuscripts	mosaics, engravings, prints etc., photographs	water-colours, gouaches, pastels	sculptures and statuary, other items	pictures and paintings
over 75 years				means of transport	

<sup>54</sup> Cp. also M. MARLETTA, *La restituzione dei beni culturali. Normativa comunitaria e Convenzione UNIDROIT* (Padova 1997), p. 199 *et seq.*

over 100 years	archaeological objects, dismembered monuments			books	
over 200 years	printed maps				

The annex to the UNIDROIT Convention, however, is wider. There is no limitation as to value, while age limits are set for antiquities and furniture (over one hundred years for both) and for objects not intended for traditional or ritual use by tribal or indigenous communities and which were “exported during the lifetime of the person who created [them] or within a period of fifty years following the death of that person” (Article 7(1)(b)). Clearly, here the difference between the two instruments is too vast to be reconciled.

(b) Enforcement of foreign export policies

Both instruments enforce foreign export policies with respect to cultural objects either directly (UNIDROIT Convention) or indirectly (national implementing regulations of the EEC Directive). This is a novelty for most countries concerned.

(c) Compensation upon return

Under Article 9(4) of the EEC Directive, compensation shall be paid upon the return of the object. The same is true of the UNIDROIT Convention.

(d) Property law

The UNIDROIT Convention emerges as the more explicit of the two instruments as regards the problem of title to an illegally exported cultural object. Compensation will be paid for transfer of title, and further solutions are provided in Article 6(3) in the event of no title being transferred to the requesting State and hence no compensation being paid.

The EEC Directive for its part boasts the mysterious Article 12 which, as shown (*supra* Part III(1)(d)), gives Member States a free hand as soon as the illegally removed art object has been returned. The same holds true under the UNIDROIT Convention.

**IV. – CONCLUSION**

1. There are two important international instruments obliging the States Parties to return illegally exported or removed cultural objects. One is Council Directive 93/7/EEC of 1993 on the return of cultural objects unlawfully removed from the territory of a Member State; the other is the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.
2. Stolen objects not having been illegally exported or removed are covered only by the UNIDROIT Convention.
3. Illegally exported or removed cultural objects are covered by both instruments.

- a) The two instruments are not mutually exclusive. Once ratified or implemented, both will apply and the instrument more favourable to the return of the object will prevail.
  - b) The UNIDROIT Convention appears as the more favourable to return since more objects are covered by it than by the Directive.
4. Each instrument has to be applied in full to every object. The provisions of the two instruments cannot be mixed (for example, by adopting the concept of cultural property spelled out in the UNIDROIT Convention while seeking enforcement under the EEC Directive).

