

# CENTRO MEXICANO DE DERECHO UNIFORME

## PROPOSAL TO BE INCLUDED IN THE AGENDA OF THE GOVERNING COUNCIL OF UNIDROIT.

### PROPOSAL: THE DRAFTING OF A UNIFORM LAW OF THE PROTECTION OF CULTURAL PROPERTY

#### 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 ( hereinafter 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. 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.<sup>1</sup> A second study was later concluded that made reference to the rules of private law governing the transfer of title to cultural objects.<sup>2</sup> 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.<sup>3</sup> This study group initially worked on a preliminary draft Convention

<sup>1</sup> See UNIDROIT 1986, Étude LXX-Doc 1

<sup>2</sup> See UNIDROIT 1988, Étude LXX- Doc 4

<sup>3</sup> See the report of the 67th Session of the Governing Council. P. 34 UNIDROIT 1988, C.D 67 – Doc 18

## CENTRO MEXICANO DE DERECHO UNIFORME

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**.<sup>4</sup>

The study group met on three occasions in Rome (December 1988, April 1989 and January 1990<sup>5</sup>) 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.<sup>6</sup>

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.<sup>7</sup>

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 Convention on the Restitution of 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.

---

<sup>4</sup> See UNIDROIT 1988, Étude LXX- Doc 3

<sup>5</sup> See el informe de las tres sesiones en UNIDROIT 1989, Étude LXX-Doc.10; UNIDROIT 1989, Étude LXX-Doc 14; UNIDROIT 1990, Étude LXX-Doc.18-

<sup>6</sup> See UNIDROIT 1990, Étude LXX – Doc 49

<sup>7</sup> Véase los informes sobre las cuatro sesiones en UNIDROIT 1991, Étude LXX-Doc.10; UNIDROIT 1989, Étude LXX-Doc. 14; UNIDROIT 1990. Étude LXX-Doc. 39 y UNIDROIT 1994, Étude LXX-Doc.48.

## CENTRO MEXICANO DE DERECHO UNIFORME

### 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.<sup>8</sup>

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.<sup>9</sup>

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.

---

<sup>8</sup> See UNIDROIT. CONF. 8/3

<sup>9</sup> See UNIDROIT. CONF. 8/3

## CENTRO MEXICANO DE DERECHO UNIFORME

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 O' Keefe, one of the most distinguished scholars in this field, 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 Objects can be mentioned, which is pieced together under the auspices of the International Legal Research Group on Art and Cultural Heritage under the direction of Dr Marie Cornu (*Centre d'études sur la coopération juridique internationale* CECOJI-CNRS-UMR) and Mr. Jérôme Fromegeau 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.

## CENTRO MEXICANO DE DERECHO UNIFORME

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 data* 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 uniform law on the protection of cultural objects.

