
Conference Reports

The Penal Protection of Cultural Property: A Seminar held by the International Institute of Higher Studies in Criminal Sciences (ISISC), Siracusa (Italy), 22–26 March 1992

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It is now fairly widely admitted that the cultural heritage contributes to the formation of national identity and that the fundamental geopolitical changes currently taking place, the creation of supranational entities and the simultaneous re-emergence of regional consciousness render still more urgent the recognition of the value of cultural property and its protection, all the more so on account of the illicit commerce in works of art which is increasing in a rapid and disquieting fashion. This commerce constitutes today a form of criminality which is in full expansion and which is at the same time becoming more international in character. The International Institute of Higher Studies in Criminal Sciences (ISISC) organised a seminar focusing in particular on the penal aspects of the protection of cultural property.

Professor Stile (Dean, ISISC; University of Naples) opened the seminar stressing the importance of its subject-matter in a country such as Italy which has, according to UNESCO, half of the world's cultural heritage on its territory. He recalled that this was not the first experience of ISISC in this field as it had organised a first meeting in 1982 and an interdisciplinary meeting of experts on the legal protection of cultural property, held under the auspices of the Secretary General of the Council of Europe, in 1989.

Professor Giarrizzo (University of Catania) referred to the political dimensions of any decisions that need to be taken in being liberal or not in the protection of cultural property and the consequences of a 'liberal' attitude; Italy having the highest density of cultural property in the world but lacking objects from other countries as a by product of colonialism. Mr. Alberto Bombace (Director General, Assessorato Regionale Beni Culturali, Palermo) deplored the marked increase of the phenomenon of art theft and the comparative insensibility of society. He then described the legislative framework in Sicily and showed how, despite the special status of the region in this field since 1975, destruction of the heritage was continuing and that a new system of protection was necessary, stressing the importance of prevention rather than sanction which is only one subsidiary aspect of the problem.

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The three parts of the seminar were in turn devoted to the following main subjects:

1. Circulation of cultural property and its relationship to a given territory.
2. Illicit circulation and circulation of goods illicitly obtained.
3. Penal protection and alternative measures of protection.

Under the chairmanship of Professor Stile, the first session of the seminar was devoted to the means adopted by international or regional bodies to deal with the problem of the circulation of cultural property. Professor O'Keefe (University of Sydney) described the role of UNESCO in the protection of the cultural heritage of States and the dissemination and exchange of cultural objects. He demonstrated how UNESCO's efforts have generally been restricted to assisting and encouraging States to adopt appropriate national laws and to seek international cooperation, but has no penal sanctions at its disposal. He then reviewed various UNESCO instruments¹ and indicated areas where penal sanctions could be applied in respect of, for example, deliberate damage to, or destruction of, cultural property, but the absence of an international tribunal with criminal jurisdiction, the difficulty of adducing proof leading to conviction and the lack of official diligence in prosecuting crimes against another country's cultural heritage created difficulties. Moreover, sanctions have to be applied under national laws whose application varied enormously and offenders were adept at exploiting those differences in legislation. This first report was followed by an historical introduction to the protection of cultural property by Mr. Giulio Volpe (Fondazione Cesare Gnudi, Bologna).

Convinced that intergovernmental cooperation is the solution to these problems, Mr. Candido Cunha (Division of Crime Problems, Directorate of Legal Affairs at the Council of Europe), in his analysis of the European Convention on Offences relating to Cultural Property of 1985, (which is not yet in force), questioned whether it is permissible to speak of a European system of protection of cultural property. This Convention established the principles of the recognition of a common responsibility of European States and of solidarity for the protection of the European cultural heritage, and he insisted on the importance of publicity given to a theft, on a system of mutual notification of facts relating to the theft, the presumed localisation and the discovery of the object, and finally on an international system of penal cooperation. He concluded that the various texts of the Council of Europe² contained the seeds of a real system of protection of the European cultural heritage, notwithstanding a deficiency, namely a reference to *bona fides* and its legal impact on restitution, recalling that other instruments already filled this gap or were under preparation (i. e., by organisations such as the EEC and Unidroit).

Within the framework of the recent regulatory developments in the international art trade, the EC Draft Directive on the Return

of Cultural Objects³ and the Draft Regulation on the Export of Cultural Goods⁴ were analysed during the session. Mr. Ignacio Díez Parra (EEC Council of Ministers, Legal Department) described the legal context of the EC drafts, beginning with the 1957 Treaty of Rome – the principle of the free movement of goods laid down in Article 30 and the exception embodied in Article 36 – the 1986 Single European Act (Article 8A) and the 1992 Maastricht Treaty (Article 128). He then gave an exposé of the problems currently facing the delegations during the negotiations in Brussels and in particular the legal basis of the draft Directive.

This instrument was analysed in greater detail by Professor Manlio Frigo who summarised the regime proposed by the future Directive and offered some reflections on its content in the light of the international instruments in force or under preparation, and of the national laws with which the future Directive will intertwine. Finally he enquired whether differing regimes will not have to be envisaged, one for the protection of the national heritage and another for the protection of a common heritage.

The provisions of the draft Regulation on the Export of Cultural Goods were presented by Ms. Claire Dossier-Carzou (Counsellor at the French Senate, Department of European Affairs) who defined the work in this field at European level as a ‘technocratie tempérée par le lobbying’. She explained the mechanism of consultation between the various European institutions in this connection and briefly outlined their views on the draft through reports and opinions. Several references to cultural identity were moreover to be found in the recent Maastricht Treaty, both in the general part⁵ and in Title IX which refers to the necessity of protecting the European cultural heritage without defining this new notion, and which establishes the foundations of some sort of Community competence in cultural matters.⁶

The second part of the seminar, dedicated to the illicit circulation and circulation of goods illicitly obtained, was divided into two sections. The first dealing with an examination of various aspects of the position of the good faith purchaser. The international and European dimensions of this concept were discussed by Ms. Marina Schneider (Research Officer, Unidroit) who recalled that while the law of the majority of continental countries was based on the principle of the protection of the good faith purchaser, other legal systems, and in particular the common law systems, were, on the contrary, based on the opposing principle of the safeguard of the rights of the dispossessed owner, although in neither group was the basic principle rigorously applied. These differences called for international harmonisation and Unidroit had drawn up a draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables⁷ and was currently elaborating at intergovernmental level a preliminary draft Convention on Stolen or Illegally Exported Cultural Objects.⁸

The status of the good faith purchaser of art works under United States law was considered by Ms. Patty Gerstenblith (Associate Professor of Law, DePaul University College of Law) who focused on the recovery of stolen cultural property. After a brief summary of the United States law concerning the acquisition of title to stolen goods,⁹ Ms. Gerstenblith described some judicial decisions concerning in particular the accrual of a cause of action for the recovery of stolen personal property.¹⁰ She then considered the likely impact on current United States law of the adoption of the provisions of the preliminary draft Unidroit Convention, one change being the concept of a single limitation period throughout all fifty states for a cause of action, which until now had generally been considered to be a claim arising under state law. Another significant departure from Anglo-American law was the compensation requirement in cases where the original owner was entitled to recover the property.

Joseph Andrew Och, Senior Director of Sotheby's and the Company Secretary emphasised the need to distinguish between stolen works of art and those exported in defiance of any national regulations governing exports from those countries which have specific legislation regulating such export.

On the issue of free circulation of cultural objects, he expressed reservations about the latest draft Regulation on the export of cultural goods which he believed were deficient in 1) failing to define national treasures, 2) failing to provide for clear periods in which the export licence for cultural goods should be granted, and 3) failing to provide for compensation based on the market value in respect of those items where the owners of the works of art were denied the permit to export. Unless these three points are clearly accommodated in the final draft, any form of legislation on this point would be doomed to failure. Moreover those Member States of the Community which believe in the liberal concept of free movement of cultural goods will find it difficult to embrace the more restrictive and punitive legislation of the States which are interpreting Article 36 of the Treaty of Rome too widely.

On the issue of preventative measures concerning the theft of cultural goods, the British Fine Art Trade believes that there is reason for some optimism as the International Art Loss Register is now fully functional and has registered its first successes. The advantage of the International Art Loss Register lies in the fact that it circumvents the problems which arise between those countries embracing the principle of *nemo dat quod non habet* and those who accept that the *bona fide* purchaser acquires good title. The International Art Loss Register allows for the first time quick circulation of information concerning the theft of cultural goods in a form which can lead to the early identification of such property and allows prompt investigation by national police forces in the country where the theft had taken place. More importantly, its very existence now imposes the new duty of care on the part of the *bona*

fide purchaser who, in order to establish his good faith, will have to, in future, prove that he had contacted the Register ensuring that there were no impediments in existence to his ability to acquire a good title. The British Fine Art Trade is justifiably proud of its pragmatic approach to this problem and hopes that it will prove to be a most effective tool in combatting the theft of works of art.

Joe Och concluded by urging representatives of the police forces attending the conference to make greater use of the International Art Loss Register to ensure the effective prevention of theft in this particular sector.

All participants agreed during the discussion that existing national measures did not constitute an effective instrument against the impoverishment of the heritage, and that the principal solution lay in international agreements. Differences of opinion were expressed on a number of key provisions of the 1970 UNESCO Convention, the Unidroit project and the EC drafts, in particular as to the notions of possession, good faith and the limitation periods, but Mr. Silvio Raffiotta (Public Prosecutor, Enna, Italy) placed emphasis on the specific issue of clandestine excavations and on the fact that it is impossible to dispose of any information regarding an object whose existence is unknown.

The other issues falling under the theme of the illicit circulation and circulation of goods illicitly obtained concerned the illicit market. Four reports were delivered. Two representatives of the police authorities, Col. Roberto Conforti (Italy)¹¹ and Mr. Guy Bernard (France),¹² drew a dramatic picture of the situation regarding the theft and illicit export of cultural property throughout the world,¹³ which can be compared in scale to the traffic in drugs, forming the need for the creation of their special sections. They explained their twofold mission of repression and prevention, emphasising the necessity for international cooperation in this field, and described some of the difficulties facing them in their investigations: identification of the object, problems arising from the differences in national law, recovery of the object with special reference to statutes of limitation. A certificate accompanying the object seemed to be one possible remedy to those difficulties.

International mutual assistance in criminal matters aiming at the restitution of cultural property was the subject chosen by Mr. Christian Hess (Federal Police Office, Bern, Switzerland) who presented the two principal instruments which enable Switzerland to fight against the illicit traffic in works of art.¹⁴ He indicated that Switzerland sought to achieve protection of its national heritage in particular by means of the provisions of domestic law concerning mutual assistance, provisions which permit requesting States to call for restitution even though Switzerland is not a party to the international conventions in this field.

Another aspect of the illicit market was analysed by Mr. Sandro Raimondi (Assistant Public Prosecutor, Milan), namely the relationship between good faith and 'riciclaggio' (laundering), an activity

expressly forbidden by the Italian legal system in 1990 (Article 64.8 *bis* of the Italian Criminal Code) which have given rise to particular concern on account of its profitability. He demonstrated why the aim of the legislation had not been achieved because of the deficiencies in the newly created system, and concluded that the intervention of the judge should only be subsidiary, the most important action being prevention in various other fields such as administration, tax law or the establishment of a catalogue.

During the discussion, Mr. Möhrenschlager (Federal Ministry of Justice, Bonn, Germany) made a brief statement regarding the applicability of European Conventions on the prosecution and punishment of illegal export of cultural property¹⁵ which offer a sound approach for prosecuting breaches of cultural property prohibitions in other Contracting States of which the offender is a national.

During the following morning, the participants were invited to attend a guided tour of the regional archaeological museum in Siracusa which provided an excellent introduction to the afternoon debate concentrating on the Italian perspective. The first report was presented by Mr. Giuseppe Voza (Soprintendente Beni Culturali, Siracusa) who insisted on the ideological criteria of protection and, in particular, on the importance of the context of an excavated object which must be considered as crucial for the knowledge of a culture. He stated that it is only after becoming familiar with an object that one can embark upon a communal or international process.

Mr. Lorenzo Guzzardi (Dirigente tecnico archeologo, Soprintendenza Beni Culturali, Siracusa) made an assessment of the recent activity directed towards the protection of the archaeological heritage in the province of Siracusa, conducted in collaboration with the criminal police section entrusted with judicial matters, illustrating his report with statistics.

The Italian perspective with reference to the recent EC drafts on restitution and the export of cultural property was the topic covered by Mr. Beno Reverdini (lawyer, Milan). He explained that the present trend was towards an internationalisation of the European cultural heritage which further contributed to the achievement of the Single Market and particularly in Italy to the problem of the one-way illicit removal of cultural property. The solution advocated by him was an inventory of the heritage in a uniform manner both at national and at international level through the creation of a European data bank of works of art.

Following these contributions, Mr. Stephen Z. Katz (lawyer, Winnipeg, Canada) described the Canadian experience in the preservation and protection of cultural property. He summarised the legal framework¹⁶ for protecting both domestic (by a control list and a system of export permits) and foreign, cultural property (it being by virtue of a control, designated as property having been illegally imported into Canada, that triggers the mechanism for permitting

a State on the basis of reciprocity to request the recovery and return of foreign cultural property). He concluded by stating that future efforts should concentrate on better law enforcement techniques and on improving existing legislation.

The last main subject of the seminar concerned penal and alternative measures of protection. The first report was presented by Mr. Silvio Raffiotta (Public Prosecutor, Enna, Italy) who made a critical analysis of Italian criminal law relating to clandestine excavations¹⁷ which form the principal source of supply to the illicit national and international market in archaeological objects. It appears that its provisions have no effective deterrent value. The reason for this was that there is little knowledge of and no work being done to ascertain the major part of the archaeological heritage which is in private hands. He suggested an amendment to the law making it compulsory for owners to declare private collections within a certain time, after which the object would be considered to be the product of a recent excavation.

This suggestion gave rise to a discussion from which it emerged that although there was agreement to the proposal in principle, there were considerable doubts as to how such an act might be implemented, and various participants stated that the proper way to deal with this problem would be to introduce tax incentives rather than sanctions.

Finally, Mr. Giovanni Pioletti (Counsellor at the Corte di Cassazione, Italy) drew the attention of the participants to the double frontier for cultural objects in a single European market, the intra-community and the extracommunity borders, and to the risk of an object being exported beyond the community frontier from a country with a more liberal export law. For this reason he underlined the necessity for unitarian concepts in the Community, in particular with regard to sanctions, and criticised the much too restrictive policy of the Italian 'uffici d'esportazione'. So as to render the market more fluid, he suggested replacing on the market objects of no great significance for the State, thus reducing demand, or the idea of a notarial record of objects in private hands which would simplify export procedures.

To conclude, and in the light of the many legal problems not dealt with in the course of the seminar, such as, for example forgery, Professor Stile suggested the creation, under the auspices of ISISC, of a centre for the study of the legal protection of cultural property with a view possibly to the founding of a new journal.

Notes

- 1 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Unesco Convention), Convention concerning the

- Protection of the World Cultural and Natural Heritage (1972, World Heritage Convention) and numerous Recommendations.
- 2 European Cultural Convention, 1954; European Convention on Offences relating to Cultural Property, 1985; European Convention on the Protection of the Archaeological Heritage (revised), 1992.
 - 3 Proposal for a Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State.
 - 4 Proposal for a Council Regulation on the export of cultural goods.
 - 5 Preamble, Art. 3 p) and Art. 92.3 relating to the Commission's action.
 - 6 Cf. Article 128 of the Maastricht Treaty.
 - 7 Unidroit draft Convention providing a uniform law on the acquisition in good faith of corporeal movables (LUAB, 1974), Unidroit 1975, Study XLV – Doc. 58.
 - 8 Unidroit 1992, Study LXX – Doc.31. In this connection, for the purpose of obtaining compensation at the time of the restitution of the object, the text provides that the possessor must bring evidence that the necessary diligence was exercised when acquiring the object.
 - 9 Namely the law of sales embodied in the Uniform Commercial Code, and the statutes of limitation.
 - 10 *Menzel v List*, 22 A.D. 2d 647, 253 N.Y.S. 2d 43 (1964), and 49 Misc. 2d 300, 267 N.Y.S. 2d 804 (Sup. Ct. 1966), modified on other grounds, 28 A.D. 2d 516, 279 N.Y.S. 2d 608 (1967) modification rev'd, 24 N.Y.S. 2d 91, 246 N.E. 2d 742, 298 N.Y.S. 2d 979 (1969); *DeWeerth v Baldinger*, 658 F. Supp. 688, rev'd, 836 F. 2d 103 (2d Cir. 1987), cert. denied. 108 S. Ct. 2823 (1988); *Guggenheim v Lubell*, for a summary of the facts, see 77 N.Y. 2d at 315–16, 569 N.E. 2d at 427–28, 567 N.Y.S. 2d at 625–26; see also Gerstenblith, *Guggenheim v Lubell*, (1992) 2 IJCP 359–367.
 - 11 The Comando Carabinieri Tutela Patrimonio Artistico, created in Italy in 1969 at the request of the Ministry for Public Education, was the first organ at a national or international level to work exclusively on activities relating to the prevention and repression of the illicit traffic in works of art.
 - 12 The Office Central pour la Répression du Vol d'Oeuvres et Objets d'Art (O.C.R.V.O.O.A.) was created in France in 1975 and is composed of 30 officers with national jurisdiction.
 - 13 According to the English publication *Trace*, the world turnover deriving from theft of works of art approaches some six billion U.S. dollars each year. In New York, between 1988 and 1990, according to the police, thefts increased by 300%. In Italy, between 1970 and 1991, 21,000 thefts were declared in relation to some 350,000 stolen objects (48% of which were stolen from churches).
 - 14 European Convention on Mutual Assistance in Criminal Matters, 1959; Federal law on international mutual assistance in criminal matters (EIMP) entered into force on 1 January 1983.
 - 15 European Convention on Offences relating to Cultural Property (1985), European Convention on the Transfer of Proceedings in Criminal Matters of the Council of Europe (1972), and 'Agreement between the Member States' of the European Communities 'on the Transfer of Proceedings in Criminal Matters' (1990).
 - 16 Cultural Property Export and Import Act enacted on September 6, 1977 (Statutes of Canada 1974–75–76 c.50, s.1.), discussed by S. Katz (1993) 1 IJCP 11–24.
 - 17 Legge 1/06/1939, n. 1089 amended by Legge 1/03/1975 n. 44.