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Strengthening the response to the protection of cultural property: UNIDROIT's role

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Your Excellency,

Mr Secretary General,

Excellencies, distinguished Delegates and Panellists,

Ladies and Gentlemen,

It is a great honour to represent UNIDROIT in this Colloquium addressing the ways to strengthen international co-operation to protect cultural heritage from destruction and illicit trafficking.

I would like to thank the Government of Cyprus and the Council of Europe for organising the event and for the kind invitation, also on behalf of the Secretary General of UNIDROIT José Angelo Estrella Faria. Cyprus is not only a member State of UNIDROIT since 1999, but is also a State party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and we are thankful for its commitment into the support of the Convention and in strengthening international protection of cultural heritage.

The importance of the topic discussed today and of the work undertaken by the Council of Europe towards a new Convention on offences related to cultural property cannot be overestimated.

Theft and illicit trafficking of cultural property not only endanger the cultural heritage of States, but they also provide a profitable business for organised crime. In recent years, there have been strong reasons to suspect that illicit art trade may be one of the sources for the financing of terrorism, as evidenced by Security Council resolution 2199/2015. UNIDROIT is sensitive to these issues in view of its long history of contribution to the international fight against illicit art market and, among other things, actively participates in the inter-agency task force launched by the Director-

General of UNESCO to coordinate the response of international organisations to implement the Security Council resolution.

As I said, UNIDROIT has a long history of contribution to the international fight against illicit art market.

There are in particular two instruments of note:

1. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which was developed at the request of UNESCO to provide a private law framework for the restitution and return of cultural objects, to complement the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*;

2. The 2011 Model legislative Provisions on State Ownership of Undiscovered Cultural Objects adopted by the UNESCO and UNIDROIT Expert Committee on State Ownership of Cultural Heritage. These provisions take into account the difficulty of claiming restitution of illegally excavated objects.

Before looking at how these instruments, and especially the 1995 UNIDROIT Convention, fulfil their role in complementing the work of other organisations in this field, let me make a couple of more general preliminary points.

First of all, the protection of cultural property at an international level cannot be fully achieved and effectively implemented without the setting up of a strong, complete and multidisciplinary international framework and the engagement of international organisations and States.

Domestic policies are important, and international instruments may play a supporting role in developing them, for example through recommendations or non-binding rules (e.g. model legislative Provisions such as the UNESCO- UNIDROIT ones; but also, in the field of criminal law, the work undertaken by the United Nations Office on Drugs and Crime (UNODC) in cooperation with UNESCO, Interpol and UNIDROIT, in particular the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences and the related UNODC Practical Assistance Tool).

Equally important are, however, multilateral treaties introducing a uniform law regime applicable in cross-border situations. Treaties are needed in order to overcome the obstacles due to the differences in national legislation the enforcement of the international protection of cultural property. They are also needed to introduce predictability of outcomes, which is of paramount importance in criminal law but it is also crucial in the sphere of property entitlements (which is what the UNIDROIT 1995 Convention wishes to achieve).

Secondly, the instruments developed by international organisations complement each other in order to provide a fully-fledged protection of cultural heritage. For example, the 1995 UNIDROIT Convention complements the 1970 UNESCO Convention by introducing private law remedies which can be directly invoked by the owner before the courts. The CoE future Conventions fill in the gap regarding criminal law measures and sanctions.

Thirdly, the synergy between the different instruments and the organisations adopting them is all the more essential. It is not by chance that the Terms of Reference of the Committee on Offences Relating to Cultural Property (set up under the authority of the Committee on Crime Problems to prepare a Convention superseding and replacing the 1985 Delphi Convention) explicitly mention the Committee’s role to

“ensure that the new instrument is fully compatible with already existing, relevant international and supranational legally binding standards”.

UNIDROIT has a long history of cooperation with other organisations both in the development and in the implementation of international instruments in this field, as well as in policy advocacy and capacity-building initiatives together with UNESCO, World Customs Organisation, Interpol and others.

I would like here to refer in particular to the cooperation with the Council of Europe in this field.

Cooperation with the Council of Europe dates back to the preparatory work for the 1985 Delphi Convention – the antecedent to the new Convention in preparation. It is worth quoting the words of the then Secretary-General of UNIDROIT Malcolm Evans, participating in a Colloquium organised by the Council of Europe in

September 1983, who invoked a “joint approach by all international Organisations involved in the field with a view to finding solutions generally acceptable to the international community as a whole”. As to the negotiations regarding the new CoE Convention, UNIDROIT is happy to confirm its continuing support and participation.

On its part, the Council of Europe participated in the preparatory work leading to the adoption of the 1995 Convention and supported its implementation. Suffice to mention Recommendation 1372 of 1998 of the Parliamentary Assembly and the reply of the Committee of Ministers, according to which the question of the acquisition of stolen property in good faith is (I quote):

“an issue which was – and still is – at the centre of any attempts to encourage the protection of cultural property. The issue was taken up by UNIDROIT which, with great skill and with Council of Europe assistance, drafted a Convention with global coverage. The Committee of Ministers is therefore ready to do all it can to give political encouragement to the UNIDROIT Convention and to the systematic implementation of all its provisions.”.

Let me at this point turn again to the 1995 UNIDROIT Convention.

As we know, the 1970 UNESCO Convention, a veritable milestone and by far the most widely adopted instrument in the field of cultural property, provides for restitution through diplomatic channels, but cannot be directly invoked by the owner before the courts where the object is found.

Furthermore, the UNESCO Convention operates at the interstate level and does not deal directly with important private law aspects such as the definition of good faith acquisition, the period within which the owner may claim restitution and the issue of the burden of proof (who bears the burden of proving whether or not the current possessor acted with the required diligence in seeking information on the provenance of the object).

These aspects in practice count among the most important hindrances to restitution. Indeed, many countries create a very strong presumption of good faith in favour of the current possessor of a cultural object, which may be nearly impossible for the lawful owner to rebut. The lack of uniform solutions for these issues (among others) stimulates forum shopping by ill-intentioned dealers. Moreover, it contributes to discrediting the results achieved

after decades of effort and difficult negotiations by the international community.

The UNIDROIT Convention allows the deprived owner or country of origin to access the courts in the place where the stolen or illegally exported object is located. The Convention imposes on the possessor of a cultural object that has been stolen an obligation to return it. It also introduces as a balance the right for the possessor to claim compensation, but subject to a duty to prove its good faith in acquiring the object. Crucial to evaluate the good faith of the purchaser is the question of whether the acquirer has acted "with due diligence". The burden of proof is in favour of the legitimate owner.

It is important to note that those provisions formed the basis for the new EU Directive on the return of cultural objects unlawfully removed from the territory of a Member State (recast Directive 2014/60). The due diligence test of the UNIDROIT Convention is therefore on the way to becoming an internationally legally binding standard to be considered in the development of all future instruments on the protection of cultural property.

In this context, let me also mention the Resolution of the European Parliament on the destruction of cultural sites perpetrated by ISIS/Da’esh of 30 April 2015 which refers to the UNESCO and UNIDROIT Conventions as (I quote):

“essential instruments for strengthening protection of the global cultural heritage”

and calls on the member States which have not already done so to ratify the two Conventions.

And indeed, the rules of the UNIDROIT Convention with particular regard to the due diligence standard are important to discourage illicit trade in cultural objects in art markets. Past experience has shown that traffickers are very efficient in “laundering” illegally acquired objects by marketing them through those legal systems that favour the purchaser over the deprived owner or by “parking” them in a favourable jurisdiction for the time necessary to claim title to the objects by adverse possession or similar legal structures.

Wider implementation of the UNIDROIT Convention in art market countries would be an important step to discourage illicit trade and to raise the due diligence standards to be observed by the art market.

In conclusion, let me again express my sincere thanks to the Government of Cyprus and the Council of Europe for the initiative to organise this Colloquium. UNIDROIT will continue supporting the activities of the Council of Europe in the field of cultural property and look forward to cooperating towards the adoption of the new Convention. UNIDROIT hopes that the negotiations regarding the Convention of the Council of Europe reach the desired outcome and strongly encourages States to be as courageous as they were during the negotiations of the UNIDROIT Convention in adopting a truly innovative text.