EXIT OR ILLICIT EXPORTATION
A BRIEF LOOK AT THE GREATEST PROBLEMS CONCERNING THE AREA OF CULTURAL GOODS

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The Italian legislative system is mainly inspired by the fundamental need to preserve the national cultural patrimony. It takes into account the damage derived from conduct which causes the decontextualization of cultural goods and the consequent harm that this causes the cultural patrimony of mankind. The measures which can be taken with respect to this matter are quite severe; even **though** the penal sanctions can present questions of unconstitutionality in terms of contravening the principle of set penalties (imprisonment is in fact directly alternative to the imposition of fines).

In addition, damage to national historical and cultural patrimony is not required, since the listing of protected goods is sufficiently detailed in terms of their typologies; therefore the damage is presumed.

We must point out that the perpetrators of these actions must always be aware of the cultural interests involved in illicitly exporting such goods, because, for it to be treated as an intentional crime, it is necessary that they be aware of all the elements of the case.

Goods which exit illegally will be confiscated, unless they belong to someone who is not directly involved in the crime. When the goods are archeological artifacts discovered in Italy after 1909, in such cases it is not correct to speak of confiscation, because the archeological items must simply be returned to the owner, that is, the Italian State.

As for the problems which can arise with other states, we must point out that clandestine exportation of cultural goods was in the past seen as a fiscal crime. This thesis also had a certain addendum to it because in fact, the Italian State, in order to consent to and authorize the exportation of cultural goods, used to **demand** the payment of a fee. Today this fee has been abolished.

Misunderstandings can occur with other countries. Although it is true that under the legal systems of certain states it is not a crime to export Italian cultural goods clandestinely, the clandestine exportation of their artistic patrimony is nearly always a criminal offence. Therefore, international assistance cannot be refused, as stipulated by the terms of reciprocity. Thus the issue of clandestine exportation is common to nearly all legal systems, given that nearly all States wish to preserve their cultural patrimony. But they forget to protect that of others.

This results in the creation of separate areas of protection. Thus *Commonwealth* countries have their own area, having reached an agreement for reciprocal protection of their artistic patrimony; Europe has another, in which the European Regulations and Directives are in force as communal instruments. This is also true in other geographical areas. Yet if one reads these agreements or norms, one notes that their content is almost the same.

Due to historical and political reasons, the world is divided into areas of influence. But it is clear that, faced with delinquency that operates thanks to triangulations - such as Italy/Japan, Japan/Switzerland, and Switzerland/U.S.- it becomes difficult to contrast such phenomena and contain a criminal sector which knows the various legislations very well and takes advantage of the difficulties of coordination.

Furthermore, it is has been observed that the division of countries into importers and exporters of cultural goods, is no longer satisfactory to anyone, neither from an ideological point of view, nor with regards to concrete experiences. Cultural goods are now considered universal values which belong to all of mankind, and their decontextualization damages everyone and not just the country of origin. From another aspect -in practice-, the country of destination of cultural goods

belonging to someone else is at the same time the victim of the exportation of its own cultural patrimony.

One must also note how the normative and jurisprudential sources in this matter have been influenced, certainly in the past, by generally dominant principles regarding the free ownership of cultural goods and by their free commercialization. This is true both in Common Law countries as well as in Civil Law countries.

A changed sensitivity, and consequently a changed consideration of the assigned values (firstly of the concept itself of cultural goods and then of the good faith of the third party and/or of his diligence), is moving towards the honoring of imperative norms of other legal systems. In line with this, the conventions and recommendations of UNESCO have been proposed; in the European area, Art. 30 (once 36) of the European Union Treaty contains norms that define so-called "national treasures" according to the legislation of member States.

One should also note regulation 3911/92 and directive 93/7EC, which require direct cooperation among States of the European Union with respect to cultural goods. They consequently request member states to evaluate the imperative measures of other member states. As a result, it is sufficient to refer to the above-mentioned Directive which specifically obliges one to return cultural goods exported in an illicit manner, whilst at the same time it gives full force to the different national legislations in the matter of exportation.

From another angle, yet still in line with the prevailing norms and jurisprudences discussed, is the *Convention on the international return of stolen or illegally exported cultural objects* of 1995 (conventionally known as *UNIDROIT*), which de facto requires that the possessor of cultural goods exercise due diligence at the moment of purchase, not only regarding the quality of the items and the price paid, but also regarding the circumstances under which the possessor must consult every register and document that can reasonably be obtained. This is tantamount to requiring that, among other essential conditions, the possessor himself must have consulted the specific legislation of the relevant State.

Along the same lines, but from another perspective, are various codes of conduct, the first of which is the *ICOM code*, which, it is worth noting, was drafted in the 1980s along with the regulations of the *International Council of Museums.*

Without going into further details, it now behoves me to underline that the adherence to the rules of the countries of origin of cultural goods, is very important. In fact, differences among the countries which adopt *common law* principles versus *civil law* principles, will be, if not eliminated, at least reduced, because relationships will be significantly influenced by the legislation of the country of provenance of the object. Recourse in principle to the public policy of the country from which restitution is being requested, which in the past and also somewhat in the present has been invoked in order to justify the non-restitution of cultural goods, is coming to an end.

With the affirmation in this field of a different international public policy, composed of the norms and regulations of the legal systems of the countries of origin (which in non-legal terminology can be expressed with the affirmation, heretofore shared by many, that cultural goods which have been decontextualization have been damaged non only economically, but also culturally), the normative and jurisprudential inputs will be altered with respect to good faith and proof of diligence which are enriched by those factors that a given epoch and communal social sentiment assigns them.

Looked at from another perspective, Law n.88/98 in Italy had already anticipated the contents of the *Unidroit Convention* with regards to this matter, repudiating both in its probative and substantive aspects, the presumption of good faith of the possessor. This law places upon the possessor the burden of providing proof of his good faith, with all the consequent inconveniences that result from abandoning the presumption which, vice versa, generally is granted in other matters (for cultural goods the presumption is excessive, because proving the matter against someone who is capable either of hiding the fraud or of justifying his negligence is usually an impossible task, especially if the misdemeanor has taken place somewhere far away).

At the moment the reform deals with relationships regulated by the European Community as a consequence of illicit exportations verified since December 31, 1992 (or with relationships regulated by the legal systems of States which have ratified the *Unidroit* Convention). However it will undoubtedly also influence -to a greater or lesser degree, the revision of the indexes of evaluation of good faith - **both** the legislative choices and/or jurisprudential choices with regard to the circulation of cultural goods regulated by national or by international rights outside the community.

The following must be underlined: in the relationships with other legal systems (towards which, depending on the nature of the crime under examination, one unfailingly projects all investigative activities) two types of crimes can in general be imputed: first, those cases which are regulated by laws which specifically concern the preservation of artistic patrimony, and second, those norms that specifically punish the crime of contraband since cultural goods -even though one finds it repugnant- can be put on the par of other contraband. This in spite of the fact that the recent UNESCO Convention for the protection and the promotion of diversity in cultural expression, adopted in Paris on the 20th of October 2005, states that the activities, pertaining to both cultural goods and services, have a dual nature, both economic and cultural, in that they are vehicles of identity, of values, of feelings and thus should not be treated above all as only being endowed with commercial value. The above-mentioned Convention was adhered to by the European Council on the 2nd May 2006.

Certainly in the past, every nation considered it necessary to mark its own territory, be it juridically and/or physically - thereby introducing the crime of contraband. It is clear that reciprocity should therefore exist between all legal systems, even amongst those which do not recognize illicit exportation of cultural goods as a crime in its own right. One should also recall that these norms (those pertaining to contraband) can become advantageous with respect to specific legislations. For example: in the laws of the United States, for crimes concerning contraband, the burden of proof is inverted: the person indicted is required to *"justify his possession"* and also require that possession be *"explained to the satisfaction of the jury"*. Therefore, one can see that it would be difficult not to protect cultural goods, especially those of *"outstanding cultural importance"*, in view of all the crimes we are currently discussing.

From another perspective, the norm under examination which, we repeat, is common to many legal systems, is also in line with the inspired principles of the recommendations and conventions of UNESCO (first of all the one signed on 14 November 1970 and to which the so-called importing countries -Australia, Canada and the United States, and recently England and Switzerland- have adhered). This legislation is also in line with the various dispositions of the European Union, whose regulations and directives have been cited above, not to mention the agreement known as the *Unidroit* Convention and the obligations that Commonwealth States have reciprocally taken upon themselves.

Thus it is hard to believe that letters rogatory, based on the crime of clandestine exportation will be denied, given the specific norms internal to the States requested and given the international obligations deriving from the conventions those States had approved.

One must add that from the accusatory point of view, crimes of illicit exportation can be accompanied by the crime referred to in article 483 of the Italian Penal Code (ideological falsity committed by a private party in a public act). It can be hypothesized that someone who crosses the Italian border with an undeclared cultural good will make a false declaration to Customs officials. The officials in turn, either at that moment or at the end of their duty, will register false circumstances, different from those they would otherwise have reported.

The crime of Art.483, Italian Penal Code, would obviously also be indicated in a letter rogatory, not only for completeness, but also and above all, in relation to the problems inherent to international assistance and to the related principle of reciprocity, since the crime in question obviously pertains to all legal systems and adds weight to the crime of illicit exportation (the so-called fraud in import-export operations). This renders inquiries in other countries possible (as for example searches and seizures). In addition, the crime itself is never considered of a fiscal nature.

Therefore the rogatory request cannot be refused specifically for the aspect now under discussion, that is, fraud connected to the *importation/exportation* of the good.

We must now point out that preventative cooperation, (until today rarely initiated), would in fact lead to continual vigilance by the Authorities of those countries **which** have ratified one of the many conventions in this sector, since, albeit not expressly, these conventions ultimately impose the obligation of coming forward with spontaneous information without necessarily waiting for information and *in-put* from the investigative Authorities of another country -for example, of Italy-.

In Italy we would obviously have more information at our disposal and what's more, the market of Italian artistic goods would come under the required scrutiny in foreign territories. Thus, not only clandestine trafficking would be discouraged, but honest dealers would be rewarded and would no longer be exposed to unfair competition or to actions of vindication by previous private owners, perhaps after several years. If preventative cooperation were to begin, many situations, seriously prejudicial to the cultural patrimony of Italy, would disappear. At the same time those areas of privilege would also disappear (markets, free-ports, auction houses, etc.), which in the past, and still today, represent places in which trading in Italian artifacts of illicit provenance was and still is particularly flourishing.

We should also stress how international collaboration in the matter of cultural goods is becoming an ever-greater necessity. In Italy this is confirmed both by the recent ratification of the *Unidroit* Convention, and by the stipulation of a bilateral agreement between the United States and Italy, signed on the 19th of January 2001. With respect to the latter, part of the agreement states that, to effectively combat illicit excavations, there must be: a) strengthening of the expected penalties in order to combat so-called archeological brigandage; b) expansion of the policies which involve loaning of archeological artifacts and co-operation with the community of research scientists; and c) to reinforce cooperation amongst the nations of the Mediterranean for the protection of the cultural patrimony of the area, recognizing that political borders and cultural borders do not coincide. The prospects appear encouraging and we cannot dismiss the possibility that the normative activity of the legal systems of the two above-mentioned countries (United States and Italy), will end up by establishing the principle that a cultural good of difficult attribution with respect to its geographical origin, will be returned to that nation to which the majority of the patrimony refers. This would do away with those gray areas of the market which have always favored criminals. This same principle was adopted and developed by the UNESCO Convention *on the protection of the underwater cultural heritage* of 2 November 2001 (see articles 6, 7, 9, 10, 11, 12 and 18).

All the above leads us to conclude that in this matter it would be opportune to intervene, not only with new norms, but also with the revision of the canons of evaluation, especially on those most exposed to changing times and changing social consciences. We refer to the concept of proportionality, of good or bad faith, of diligence, and of substantial reciprocity, etc., that obviously can and has been interpreted and proposed differently at different times and in **specific** cases. These concepts are today coming under close scrutiny precisely because the entire question concerning cultural goods is changing in many legal systems, thanks to the pressures of international opinion, particularly sensitive to these issues. Obviously these steps will be particularly useful if they are supported by direct and continuous contacts, thereby avoiding misunderstandings and, in fact, improving the consciousness of reciprocal problems in a spirit, not only of collaboration, but also of promotion of new themes, both precious and indispensable in a matter at times treated and interpreted in a surprisingly benevolent way. Unfortunately though, in the majority of these cases evaluations are made mainly by private parties and nations who emphasize their own interests rather than the superior values of culture and dignity of peoples, thereby damaging humanity in its entirety.

De jure condendo, it would be appropriate to coordinate Italian legislation and European legislation regarding the thresholds of value, leaving aside any reference to the concept of damage. It would then be possible to remove existent vacuums in the sanctions, reserving penal intervention only to those cases of contemporary violation of the Italian and European norms. It would be possible to demand administrative sanctions for less serious violations.

One should then take into consideration the possibility of decreasing penalties for those who collaborate in recuperating goods transferred abroad. This could also apply to all those crimes which frequently coincide with clandestine exportation and illegal excavation.

Furthermore, other means of investigation could be extended to all crimes **connected** to this subject matter, for example, by verifying simulated acquisitions or sales; by considering the possibility of delaying the intervention of the Police even in the face of crimes that have already been committed etc. All of which, *mutatis mutandis*, along the lines of Article 97 of Law n.309/390, in the matter of drugs.

It would also be useful to envisage an appropriate crime for anyone who, in specific circumstances, hinders the reentry of cultural goods he knows to be fruit of illicit exportation.
With regard to this, it has been noted that criminality in this sector often "freezes" illicitly exported cultural goods for five-six years or longer -in the closest foreign banks which are major practitioners of secret banking-. After such periods, the crime is beyond the statute of limitations, but in the interim the goods have lost none of their value. So one of the aspects of reform which needs to be passed is that which would render crimes of this kind permanent, or would establish different statutes of limitations, since it is difficult to prove the date of the consummation of the crime and one is usually obliged to revert to a hypothetical moment of clandestine exportation.

Finally, it would be advisable that the documentation authorizing the exportation and/or importation of cultural goods be as detailed as possible in depicting and describing its provenance and value. Such a proposal should be accompanied by commercial and customs agreements with other nations so that the so-called *forms* of entrance for cultural goods would be sufficiently detailed and be accompanied by photographs of the object itself.

One must always remember that, just as there has been continuity in this discipline since June 1909, confiscation appears to be one of the sanctions that is most effective in combating this phenomenon, given that it has to be applied even in those cases where the crime has elapsed due to statute of limitations.

With regard to this, it is useful to take note of recent Italian jurisprudential decisions when confronted with a third party who is in good faith: "…because someone can qualify as a person extraneous to the crime and prove his right to free the goods from seizure and obtain their restitution; they have the burden of demonstrating that they have not engaged in culpable conduct by failing in diligence to maintain control over the person who materially and illicitly" perpetrated the crime (see Supreme Court, Section I, Sentence 1927, 9 December 2004). More generally: "… confiscation … is excluded when the object of the intended crime belongs to a person extraneous to the crime itself, but the burden of proving such a preclusion falls on the interested party, who then must document, in addition to his right to the object, his extraneousness in fact and in good faith, the latter given as an exclusion of any negligent attitude which may have favored the undeserved use of the object…" (See Supreme Court, Section VI, Sentence 37888, 8 July 2004). These principles should without doubt act as guidelines when one considers that in such a case the hypothesis is that of obligatory confiscation.

We must now draw your attention to the fact that crimes of handling and laundering of cultural goods are not only recurrent, but also particularly insidious and this matter should become a separate discipline unto itself.

These cultural goods are often subject to real or fictitious manipulations aimed, either at removing or obscuring their original provenance -harmful to the goods themselves- or, at their illicit exportation into a foreign territory. Both of these actions usually constitute the crime of laundering.
Let me explain this. Many of the triangulations by which cultural goods are physically transferred abroad, (exclusively for the purpose of hiding their true provenance), should be reconsidered and censured in view of the issue under discussion, that is: laundering. In fact, such triangulations are carried out for the purpose of relocating the artistic objects in a foreign territory where the norms are more permissive, so as to be able to put them on those markets which offer the highest profits. In fact, the cultural goods are often exported to those countries which, for example, have not ratified the UNESCO Conventions. These countries are chosen precisely because from there, the goods can

then resurface in those states which instead have ratified the above-mentioned Convention, with the advantage, of course, that the cultural goods would not be subject to the controls and limitations in force in cases of *import-export* between two countries which have both signed these agreements.

We must also point out another form of conduct which is particularly insidious but unfortunately widespread in this sector of criminality. At times illicitly excavated archeological objects, even when found intact, are deliberately fragmented, or, if found in fragments, are, once again, deliberately not restored. Such conduct, which might at first appear to be against the interests of those who commercialize archeological artifacts, is instead useful to criminals who operate in this field, so as to launder the objects. Whilst on the one hand exportation is easier, because undoubtedly a fragmented object can be hidden more easily, in general, fragments do not attract attention at Customs controls, because little value attributed is to them (Customs officials usually are not experts and do not appreciate the importance of the artifact, which, in those conditions can at times be underestimated even by experts).

Frequently the fragments are subdivided amongst the various participants of a criminal group. By so doing, the group achieves two results: they split the loot of the illicit activity, and they reinforce the ties which link the members of the conspiracy. On top of that, paradoxically, the criminal organization earns greater profits in economic terms, thereby creating a strong -and extortionist- bond with the buyers.

This becomes part of a dangerous system of sales of fragments of vases, generally fragments of the highest quality, destined to be recomposed, in part or entirely, in a matter of years. This practice reveals a studied and intentional sales policy on the part of mediators and traffickers, who put only a part of the vase on the market, thus increasing the price of the fragments with each sale. At times they are used as promotion for other sales. The purchase of these fragments, which go to complete an object of which the principal part is already in someone's possession, serves two purposes: to complete the object as much possible, and to avoid that such fragments -in tomb-robber's jargon, the so-called "orphans"- can indicate both the provenance and the illegitimacy of the acquisition.

It is both obvious and significant that the purchasers of these fragmented objects are not immune to censure, since the acquisition of fragments in itself denotes the provenance of clandestine excavation of the artifact/s. In fact, the market for legitimate acquisitions offers artifacts that for the most part are complete, with accompanying certification and research.

A similar case of criminal conduct is that in which a painting is cut so as to create different and apparently distinct works of art. This happens when the dimensions of the painting are large, as for example, in the case of a triptych or an altarpiece.

When the object is composed of several lots, it is easier to sell and it produces greater profits. In addition, the different compositions thus created, become an obstacle for the search of the good, precisely because it is not easy to compare the objects which finally reappear, with photographs of the originals. And it is even more difficult if, as is usually the case, the object has been touched up and restored, thus occulting the illicit provenance of each portion (Experts are at times helped in their investigative research by posture and orientation -in appearance, faces, etc.- of the figures depicted, and thereby get an indication of the dismembering of the object).

Another expedient used by criminals who operate in this field is the following: in order to bolster the legitimate provenance of a good which they know full well to be of illegitimate acquisition, is that of requesting notification from data banks -for example, IFAR in New York, or the Art Loss Register in London- which document stolen works of art in their archives. Obviously, if an archaeological artifact is the fruit of clandestine excavations, the resulting research on its criminal provenance will be negative, since it can never have been registered as a stolen object. By so doing, the dishonest *dealer* (at times found in possession of photographs of the excavation), can always show his buyer the certification of the data bank he has questioned. Whilst on the other hand, should he be questioned, he will have the excuse and documents to sustain his good faith, since he had done all that were possible to certify the licit provenance of the good.

Frequently, that same delinquency "introduces" a cultural good fictitiously into a private collection with the objectives of conferring upon it a legitimate provenance and concealing its recent acquisition from clandestine excavation. This occurs especially with respect to *serial goods* (for instance, coins), or with collections which are not entirely documented. And one cannot forget that often authentic artifacts are substituted by fake ones, and that the collections in question are dismembered, following the sale of the most valuable pieces. However, to maintain that the good itself comes from that collection, whereas it in fact never belonged to that *universitas*, can in itself be considered and punished as an act of laundering.

To put an object up for auction for the purpose of selling it and repurchasing it through a front or through a company of convenience, is a fictitious act, aimed exclusively at "laundering" the object and attributing to it a value which is often arbitrary. Such conduct is particularly insidious because it can alter the market value (values are often uncertain and are determined only by comparison with other works of equal cultural interest), or because, for acquisitions made on the *"overt market"*, the so called *time limit* (that is, the time one has to take action to claim the object), is very short.

Therefore, as observed above, it follows that it is indispensable to have a targeted-regulation of the crimes of receiving and laundering when such criminal conduct has as its object cultural goods which are subject to the appliances indicated above, given their nature and the huge profits that criminals in this field set out to make.

Finally, it would be advisable that all crimes which have cultural goods as their object be considered of a permanent nature. With this adjustment, many operations, today fallen under the statute of limitations, could be counteracted thus exonerating the Public Prosecutor of the burden of proof which is diabolical - with its frequently merely circumstantial answers- and from which all too often impunity for so many of these serious acts of delinquency follows.

At this point it would useful to explain briefly the most important international norms which regulate this matter. The first thing one notice is how this legislation does not always coordinate with national norms. It would instead be of fundamental importance a careful reading of the relevant measures, where some of the essential elements are instead blank. Then, entirely new interpretations could be given, which at the moment are instead ignored.

Furthermore, it appears evident that an examination of the conventional norms in this matter could be useful, not so much to certify the objective and subjective elements in the penal matter, but rather towards the recovery of cultural goods. With this in view, the following indications and references are obviously insufficient, but only a brief explanation is possible here.

First and foremost one must recall the UNESCO Conventions and the UNESCO Recommendations. Although these conventions are not *self-executing*, by ratifying them, the participating States are obliged to adhere to certain specific legislative and jurisprudential obligations. The purpose of these obligations is to establish fundamental measures which cannot be set aside (for example the reservations adopted by the United States often betray these conventions). With regard to this, it is sufficiently clear that the UNESCO Conventions have not been fully implemented. It is also obvious that many times they have been adhered to on the wave of -legitimate- international pressures, whether cultural or not. But thereafter they were applied with limitations, almost as if their full impact was to be feared. But thanks to a changed sensitivity in this matter, and thanks to the creation of ever-wider international public policies in this field, we can hope to harvest the desired fruits.

These are the principle obligations that bind all States -and not just private parties - who ratified the Paris UNESCO Convention of 14 January 1970:

A) One cannot consent the *import-export* of cultural goods when this hinders the updating of inventories of the objects, especially with respect to objects of particular importance.
B) The *import-export* of cultural goods must be forbidden when this represents an obstacle to the *preservation in situ* of certain cultural goods and the protection of certain areas reserved for future research.
C) Import-export is prohibited and punishable in the absence of certification, including that of the country of origin of the cultural good in question. (See the combined dispositions of Articles 2, 3, 8

and 10 of the UNESCO Convention to which we refer, and the Stockholm Recommendations dated 2 April, 1998).

With respect to this, once again we refer to Article 4 of the UNESCO Recommendations of 19th November 1964, which both exhort and prescribe that Member Countries avoid any importation of cultural goods which have not been cleared of every restriction by act of State from which the same good has been exported; with the consequence (article 7 of the same Recommendations) that any *import-export* conduct or transfer of property effected in violation of the rules adopted by the State of origin of the cultural goods … must be considered illicit (on this point one can also see the *European Convention on the Protection of the Archeological Heritage* and specifically, Article 10).

The case records mentioned above could be enriched with other examples, but they suffice to illustrate those interpretive instruments that can be adopted as a consequence of the combined measures of the UNESCO Convention and of the UNESCO Recommendations. The jurisprudence of the Country from which the return of goods is requested, could -as a legitimate orientation, and in actuation of the above-mentioned UNESCO Convention and Recommendations- state that the holder of the cultural good is not in good faith should his ownership be invalidated, for example, because of import-export activities contrary to the norms of the State of origin. This would result in that increased collaboration and cooperation which the norms themselves urge in every case, to combat practices of illicit *import-export* which are a real obstacle towards an *"understanding between nations"* which are, without doubt, damaging to the *"common heritage of mankind"*.

In this regard, the Paris UNESCO Declaration of the 17th October 2003, not only called for cooperation amongst States, but it also established a sort of *universal jurisdiction* against acts of intentional destruction of cultural patrimonies of great importance to mankind.

These are actions for which the States themselves are directly responsible, according to international legislation for not having taken appropriate measures for the interdiction, prevention, cessation, and sanctioning of any intentional destruction of such patrimonies (and for the Judicial Authorities: to punish with adequate sanctions any act of voluntary decontextualization that could have significant repercussions on the world's cultural patrimony).

One should also recall the contents of the *Convention on the international return of stolen or illegally exported cultural objects* (known as the Unidroit Convention), the main merit of which is that of combating any form of decontextualization - see article 5 - and that of voicing new dispositions in the matter of good or bad faith. *De facto*, in order to evaluate whether the possessor of a cultural good has exercised due diligence at the moment of acquisition, amongst other requisites, it stipulates that due diligence be applied not only to the quality of the objects and the price paid**,** but also to the possessor's obligation to consult any register and document that can be reasonably obtained. Furthermore, it is an essential condition that the possessor himself consults the specific legislation of the State of origin of the cultural good (with respect to the possibility of its illicit exportation). In other words, the Unidroit Convention demands verification with regard to the cultural good, to ensure that it has not been illegally exported and that it is accompanied by suitable certification as prescribed by the legal system of the country of origin (see the combined disposition of Articles 4 and 6 of the Convention in question).

The conventions entitled "European Convention on the protection of archeological heritage" extend their protection to any archeological object, apart from its economic value, according to the provisions of modern archeology (the protected items include *"all remains and objects and any other traces"*). These agreements oblige member States to consider sanctions for those who omit to declare the discovery of cultural goods. These international agreements also demand the respect of suitable *standards* for the conservation of archeological finds, condemning illicit excavation above all else. Against this, they call for full cooperation from all States. These agreements also demand vigilance in the transfer of archeological artifacts obtained from uncontrolled sources.

The European Community's legislation in this matter should be closely examined. Let us begin with Regulation n. 3911/92 and Directive n.93/7/EC. This legislation affects all member States. For the sake of precision, the Regulation is immediately effective, without any need for

specific internal acts of execution (if the norm of accompaniment is necessary, this would be adopted by acts of integration and not by those of execution). As for the Directive, it binds the member States to its contents, independently of any concrete actuation. Therefore, these same directives, especially where they are specifically detailed, are held to be effective immediately.

The international legislation now under examination, demands maximum collaboration. The imposition of so-called *confidentiality* when faced with legitimate requests advanced by the country of origin is no longer acceptable. A similar obligation to provide information is contained in Article 7 of the UNESCO Convention of 1970. Moreover, a member State which becomes aware of the presence of cultural goods within its borders regarding which there are *"reasonable grounds for believing"* come from illicit acquisition (for example, fragmented archeological objects), is bound to notify the country of origin of the conditions of those same goods. It is then incumbent upon the State in which the illegal importation has been verified, to adopt all the necessary measures for the physical protection of the cultural object/s, according to suitable *standards*. One should keep in mind that the Council of Europe, on the 2nd December 1977 (with resolution nr.36), had, with various Resolutions, already recommended that member States exercise the power of renunciation whenever this might facilitate the restitution of goods to their rightful owner.

One cannot overlook the fact that the illicit trafficking in cultural goods is a crime contemplated by the so-called European warrant for arrest. This is a signal that at the European level, cooperation is increasing. Furthermore, they have created hypothesis of crimes of shared content that are subject to the preferred procedure of the European warrant for arrest. This can also be considered as the appropriate application of the *European Convention on offences relating to cultural property* of 1985 which though, unfortunately, was never ratified by the States which took part in its preparation.

There is no doubt that considerable help in recuperating illicitly exported cultural goods could come from the internal norms or codes of conduct. These regulations, albeit only forming a subordinate body of norms, have often been considered more efficacious.

Self-regulation, in addition to being generally scrupulous with respect to the phenomenon it intends to discipline, undoubtedly produces superior results to those which derive from any imposed legislation. The latter at times does not have the same capacity of penetrating the real problems. Such internal norms represent -at least recently, in combination with the certifications that should accompany all sales- one of the instruments most supported by UNESCO, for opposing the illicit traffic in cultural goods. Whilst the evident limits of the codes of conduct lie in the sanctions (one cannot though omit the penalties that the association of the dealers can inflict on a member who risks expulsion in the most serious cases and prohibition from using the logo); the violations themselves, especially when intentional, are more or less indicative of probable bad faith, and, on the penal level, of malicious conduct. In fact, the conduct of someone who violates these internal rules should be censured and sanctioned in every respect and it will not be easy for them to invoke ignorance of the norms in this field.

Seen from another perspective, the codes of conduct -see the UNESCO Recommendations- serve as guidelines for whoever is called to decide on this matter. And the importance of giving content to subjective situations (good or bad faith) is mainly linked to experience and thus to the evolution of public awareness. Both for its importance and for its general diffusion, the *ICOM code*, must be recalled. As already mentioned above, this code represents the behavioral norms for almost all museums throughout the world. We must also recall the other codes, such as *CINOA* and *IADAA*, adhered to in Europe by almost all auction houses, as well as by the *Professional Art Dealers Association of Canada*, the *National Antique and Art Dealers Association of America inc.*, and the *Art and Antique Dealers League of America*, as far as American *dealers* are concerned.

It is important to take note of Switzerland's recently changed codes of conduct: operators must compile precise certifications regarding the provenance of cultural goods; eventual assurances offered by the seller in many cases are not considered sufficient. This is because, bad faith would otherwise be assumed regarding the acquisition of the object and no one could ever benefit from the

time-limit that would be due to them (These same principles have inspired the federal legislation of Switzerland regarding the "international transfer of cultural goods" of June 20th, 2003).

Let us now examine the ICOM code (which is obviously the most important, if for no other reason, because it deals with Museum curators throughout the world). This code (approved 4 November 1986, modified 6 July 2001 and 8 October 2004), places on those who adhere to it the following obligations:

a) museums must abide by the norms in force -of whatever rank- in the matter of cultural goods, be they national or international;
b) the museums themselves can acquire cultural goods if: 1) it has been demonstrated that there is valid ownership which permits sale; 2) there have been no violations of the laws of the country of origin and the object/s in question are not the fruit of recent damage to monuments or ancient sites;
c) all museums are called upon to collaborate concretely with the Authorities in charge, presenting, to begin with, a report, should they have *reason to believe or suspect illicit or illegal transfer, import or export*; and they are called upon to cooperate thereafter even with the restitution of the goods to the country of origin whose norms have been violated.

However, it is a fact that jurisprudence (as that of several states in the United States of America, theatres to the most flourishing markets in cultural goods) would appear to be more exacting with regard to the purchasers, by demanding that they produce precise certifications of the validity of ownership (for example by means of IFAR), since it is no longer considered sufficient to rely on declarations or assurances made by the vendor, particularly in those cases where the cultural goods are of *outstanding cultural importance.*

All the above, indicates that cultural goods are at the center of norm-setting and jurisprudence principally aimed at the recognition and evaluation of those same goods. Above all, it seems to us that the following points cannot be neglected when dealing with requests for judicial assistance, since it is still frequent today that a party requesting the return of archaeological goods, is, on the one hand expected to prove both the provenance and the ownership of the objects, and on the other, to prove when they were illicitly excavated. The first two points -which do in truth have some merit-, are always countered either by producing experts' certificates or other elements aimed at satisfying probatory requirements concerning the provenance of the artifacts; or, with regard to ownership, as is prescribed in the legislation of the country of origin of the goods. In fact, the *lex rei sitae* or *lex loci* have to regulate the attribution of the same goods (see also article 2 of the UNESCO Recommendations, 5 December 1956), precisely because it is the normative source which concerns the first acquisition.

The other points are, if not "specious", nonetheless resolvable by simple conclusive logical deductions. Even though, de facto, no inventory and/or data banks will ever be able to catalog objects which come from clandestine excavations, precisely because they have not undergone any checks of any kind; the fact that they are not catalogued, is always a sign of probable illicit acquisition. But there is more. For objects of considerable cultural and economical value, the very fact that the artifact has neither been studied nor published in any of the customary scientific publications is another element which points to its clandestine, and therefore illegitimate, acquisition and to its illicit exportation.

To put it differently, the worldwide globalization of knowledge and interests -therefore widespread and not only in scientific circles- allows one to assume that any noteworthy acquisition, if it is legitimate, will necessarily have been published, and before that, will have been subjected to comparative studies. In absence of such scientific certification and information, it becomes evident that the archeological artifacts considered are illicitly owned, that they were recent clandestine discoveries, and that they should therefore be sanctioned by the international and national norms which have, for several decades, been obligatory.

To continue to confute this, demonstrates distinct insensitivity towards the problem of clandestine excavation. It means not taking into account the norms which regulate this matter, nor their finalities. But, above all, it requires some kind of *diabolical proof (probatio diabolica)* which is much more severe compared to dozens of other situations in which the so-called *fanciful probabilities* are quite beside the point.

One can therefore legitimately conclude that every time archeological objects of unknown provenance and acquisition appear on international or national markets, the transactions regarding the objects are and must be regarded as illegitimate. Not only *de jure condendo,* but also on the basis of the positive legal (national and international) systems. We must also stress that the very uncertainty of a cultural object's provenance appears to be one of the indicators which points towards its clandestine nature (statistically 70% of archeological artifacts possessed by private collectors, *dealers* and museums, are of unknown provenance). This, we repeat, is because the typologies and comparative references have been codified, and nothing which is culturally significant would appear to have been overlooked, to the point of not even recognizing its dating and origin.

It follows that the holders of such objects of dubious provenance could be held responsible for the following penal conduct: clandestine excavation and/or embezzlement, or handling or even laundering of stolen goods. And if the goods have been transferred into a foreign territory, crimes of illicit exportation and illicit importation into the country of destination, whenever the latter should offer protection to the culture of other nations. Moreover, one should consider the fact that today, it is possible for the Authority from which restitution is being requested to honor the legal measures of another State by process of assimilation. At the same time it should recognize that *a public international policy* has indisputably been drawn up in this matter.

One can conclude, that the return of cultural goods to their country of origin -or before that, the prevention of their illicit exportation- not only gratifies the community by recuperating and/or preserving part of its personal memory and identity, but it also represents a contribution towards furthering dialogue between cultures. Furthermore, we should stress that the value of cultural goods increases not only because of their aesthetic qualities, but their intrinsic value (*in beauty and truth*) increases only when they are in their own natural and social environment. When cultural goods are out of context, they lose their "soul", both objectively and in the eyes of viewers. And even more so, they lose in the eyes of experts, who can very well satisfy their legitimate cultural and research interests by being able to have them on loan. This is envisaged in many normative sources, in particular, in the Nairobi UNESCO Recommendations of the 26th November 1976.

All of these practices can concretely be realized since they are based on common international norms, ratification of which involves all States. This ratification is necessary so as not to be culturally isolated, because otherwise those states would be out of the circuit of loans and exchanges and of other possible options (on this see decision No. 508/2000/CE of the European Parliament and of the Council, taken on the 14th February 2000, which confirms the necessity of favoring cultural exchanges so as to increase the diffusion of knowledge and to stimulate cooperation and creativity).

In addition, thanks to these loans and exchanges, no one on the other side -that is, the criminal side- can continue to think of gaining all those economic advantages that today accompany their trafficking of cultural goods, including their illicit profits which today obviously incentivate clandestine excavations and/or the decontextualization of archaeological artifacts, with all the destruction that we are forced to see every day. Illicit activities, which, as has been demonstrated statistically, increase the appetites not only of those who traffic in authentic works of art, but also of those criminals, who, because of the elevated demand, produce ever-more perfect and more abundant fakes.

We can therefore remark that, albeit with extreme difficulty and often taking far too long, sensitivity and international opinion regarding the illicit circulation of cultural goods is changing. Harmony can be found in this matter, by assimilating different legal systems, and by honoring the imperative norms of the country of origin. It therefore becomes possible to envisage a final unified result in this matter, that is, the creation of uniform legislation.