



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE



United Nations  
Educational, Scientific and  
Cultural Organization



Convention for the fight  
against the illicit trafficking  
of cultural property



## EXPLANATORY NOTE OF THE SCIENTIFIC PROGRAM FOR THE MEXICAN SEMINAR TO BE HELD FROM 21 TO 23 MARCH 2013

### THE ANTECEDENTS

- A. The UNESCO Convention of 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property was ratified by Mexico who is consequently a state party to the Convention.
- B. There are several aspects that have not been solved upon the approval of the 1970 UNESCO Convention. One of these is the case of article 7 ii B, which attempts only the initial outlay of a solution to the conflict opposing the third party acquirer *a non domino* to the dispossessed owner, who is generally the state of origin.
- C. The absence of rules capable of guaranteeing a reliable legal framework has been left to UNIDROIT at the request of UNESCO, who undertook the development, within the framework of its activities, of an international instrument to ensure the extremely complex relations between the third party acquirer *a non domino* and the dispossessed owner; generally the country of origin.
- D. To that effect, following a laborious and risky road, but thanks to a significant engagement by UNIDROIT, the Convention on Stolen or Illegally Exported Cultural Objects was approved during a diplomatic conference organised by the Italian government in Rome, on 24 June 1995 under the auspices of UNIDROIT. This Convention has not only overcome the legal gaps, but has also created a new paradigm in the combat of illicit trafficking of cultural property.

- E. It has been rightly said that the two conventions represent the two sides of a single coin, because the 1995 UNIDROIT Convention completed the development of some of the basic notions of the 1970 UNESCO Convention. That explains why both Conventions should be ratified simultaneously.
- F. There is a large consensus to the effect that international conventions, as well as their complementary protocols, require, for the elaboration of their subsequent approval, a high economic and financial input. In addition, once they are approved, a long process of ratification by states is necessary. There is also a consensus to the effect that international conventions describe an evolving process due to changes in the international art commerce and hostilities that fuel the black market. It is critical to ensure for the understanding of the notions of the Conventions that future mechanisms are developed.
- G. One certain experience demonstrates the advantages of the UNIDROIT Cultural Convention. Through a common UNESCO/UNIDROIT project, a model law regulating the relation between the state and its cultural archaeological heritage has been developed (*Model Provisions on State Ownership of Undiscovered Cultural Objects*).

This model law has been approved by the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* of the UNESCO, as well as by the Governing Council of UNIDROIT. The drafting and approval of a model law of such importance clearly demonstrates the following points:

- i. That international co-operation between two prestigious international organisations such as UNESCO and UNIDROIT is possible and can be a success.
- ii. That the absence of solutions or of the actualisation of fundamental notions of international instruments may be overcome through the development of a diverse mechanism of *soft law*, which is more flexible to be employed, and tools such as operational directives, model legislation and legislative guides, to be furnished by *ad hoc* technical committees.
- iii. Through such mechanisms, which have been called intermediary or interface legislation, between the international conventions and domestic legislation:
  - a. - The costs of elaboration, of revision, and of possible approval of international conventions or protocols are substantially reduced.
  - b.- It is possible to update the basic notions of international conventions.
  - c.- Mechanisms of legality are provided, which make the international conventions more effective.

- H. Certain countries of origin complain that some particular international conventions, specifically the 1970 UNESCO Convention, are ineffective. These countries argue that this Convention should be revised or at the very least a protocol must be drafted to complete it. The lack of effectiveness of the 1970 UNESCO Convention stems from multiple factors but, in wishing to overcome it, it must be noted that some of them are attributed to the countries of origin:
- a. When international conventions are ratified, particularly the 1970 UNESCO Convention, there is in some cases, and on certain specific points, a contradiction in the internal environment between the convention and domestic legislation.
  - b. The domestic legislation is frequently drafted ambiguously or frankly in an obscure manner, which does not facilitate its precise comprehension by nationals of the country concerned as well as by foreigners; this is one of the arguments constantly advanced in the international jurisdiction when refusing the restitution of cultural property.
- I. Finally, there are basic notions of the 1970 UNESCO Convention that deserve more reflection, not only legal, but cultural, to make them more operational.

## PROPOSALS

- A. The development of an intermediate or interface legislation between the 1970 UNESCO Convention and domestic legislation concerning the following fundamental notions according to the criteria set out below:
- i. Article 5 of the Convention, paragraph b, declares that the states' parties should establish and update, starting from a national inventory of protection, the list of important public and private cultural property whereof the exportation constitutes a considerable impoverishment of the national cultural heritage.

The concept of an inventory has been developed initially starting from the idea that, in other environments of legality, such canons respond to foundations distinct from those that are essentially cultural.

These criteria should not be developed on the basis of a general and abstract notion lacking operational elements. This seminar should discuss if other cultural criteria could contribute to developing operational directives of the recently approved Committee of the 1970 UNESCO Convention. The 1995 UNIDROIT Convention is a good example of this.

- ii. Article 7 describes the protection of cultural property coming from museums and similar institutions. The notion of museum has been transformed substantially over the last few decades. In order to provide greater protection and to adapt the 1970 UNESCO Convention to present realities, this seminar should contribute to the reflection of a new notion of museums, public or private or even private collections. It should encourage the development of model laws or directive lines, which could contribute to the work of the brand new committee, who should meet in July next year, once it is elected by the meeting of the state parties.
- iii. Article 13 refers inter alia to the criteria of inalienability and imprescriptibility. Those are fundamental notions to the defence of the national tangible cultural property.

This seminar should contribute to the drafting of criteria of inalienability and of imprescriptibility through uniform legislation or directive lines in national law, that enable a better enforcement of the 1970 UNESCO Convention of the state parties.

For that purpose, this seminar should suggest the appointment of an ad hoc experts committee under the authority of the UNESCO and UNIDROIT, similar to the one established in the UNESCO/UNIDROIT project, in cooperation with other international governmental bodies or Non-Governmental Organisations; its task being the drafting of model laws or directive lines that should facilitate the enforcement of the 1970 UNESCO and 1995 UNIDROIT Conventions.