

## The Unidroit Convention on Cultural Property : State of Play and Prospects for the Future

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### INTRODUCTION

When troops marched into Kinshasa on Saturday, 27 May 1997, looting came hard on their heels. Besides the presidential palace, the headquarters of the Zaire Institute of National Museums was searched from top to bottom, much of the collection smashed and many items removed in accordance with what appears to have been a carefully laid plan. The most valuable pieces, well-known through exhibitions and art publications, simply disappeared into thin air. For his part, the President of France was offered as a birthday present from his staff a statue of a ram strangely resembling that belonging to a site in Mali, a country which enforces a total ban on the export of *objets d'art*. Some embarrassment, to put it mildly, ensued in France, while positive shock waves of emotion flooded Mali.

These are just two recent incidents which bring home to all involved the urgent need for action to stay the escalation of art theft and the illegal export of works of art. While such works are indeed at times returned to source – for example, the two Angkor treasures handed over to their rightful owners in Paris on 17 March 1997, in a move very much in keeping with the ethical and legal standards defended by UNESCO and its 1970 Convention – it is only too evident that both the available human and financial resources and the national rules and regulations in force fall woefully short of providing a satisfactory defence.

The Unidroit Convention on Stolen or Illegally Exported Cultural Objects, which was adopted in Rome on 24 June 1995, is one instance of how States are attempting to put a stop to this illegal trade. Yet experience shows that it is one thing to adopt an international Convention and quite another to implement and enforce it. In legal terms, international efforts to protect and safeguard the national cultural heritage from such plunder can really only be described as co-operation "up to a point", with most of those involved belonging to the group of art exporting countries.

The Unidroit Convention sets out to remedy this state of affairs, yet it continues to be the object of passionate and at times violent debate often sparked off by false rumours and misinformation. One problem is that not many of its detractors are really familiar either with the text or its objectives. Certainly it would seem to be high time especially for art dealers to drop the rhetoric and undertake an in-depth study of the text, whose provisions, it is true, can only be properly understood if measured against the present state of the law in this area. This is a point which has been amply stressed and extensively commented by Professor Pierre Lalive (*cf. ULR/RDU 1996-1, pp. 40-58*).

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This article will confine itself to an outline of what has been done so far to ensure the effective implementation of the Convention to date, look at what has been achieved and explore the outlook for the future.

### **I. EFFORTS TO DATE ...**

Since the Convention was adopted, Unidroit has been at pains to respond to straightforward requests for information and at times to allay what in all fairness must be called the legitimate anxieties of some. At the outset, States were its main target, one of Unidroit's objectives being "to prepare gradually for the adoption by the various States of uniform rules of private law" (Article 1 of the Unidroit Statute). However, the introduction of more effective legislation, even in cases where not too great an effort is required to strengthen existing enforcement mechanisms, is by no means easy, and the fact is that the administration of cultural affairs does not always feature very high on governments' list of priorities. That is why a campaign to persuade the art world itself is so important, since governments will be loath to legislate without its support.

#### **... at governmental level**

The 1995 Unidroit Convention seeks to establish an international co-operation mechanism involving both the exporting and the importing countries (extended international co-operation) on the premise that, once cultural property has been moved to their respective territories, any system to secure the return of such property will stand or fall by these countries' willingness to take action, principle or no principle. In adopting this approach, the Unidroit Convention does not, of course, address the very real fundamental conflict of interests between parties, and indeed does not claim to do so. Its approach, rather, is a pragmatic one, an affirmation that however real the conflict, there is yet concrete ground for co-operation, including the legal mechanisms to make it work. The Convention has no ambitions beyond this and indeed in its Preamble acknowledges that it does not of itself offer a solution to all the problems raised by the illegal art trade, but merely points the way to an international process of co-operation.

These initiatives have focused concurrently on the national, regional and international level, in an attempt to wean States away from the hitherto purely national approach to the problem and encourage them gradually to steer a more open course towards extended co-operation.

In some cases, national civil servants have contacted the Unidroit Secretariat prior to drafting the reports which serve as a basis for national consultations to decide whether or not to ratify or accede to the Convention. The questions asked and the arguments put forward have had both legal and political implications. Many international organisations prepare exhaustive memoranda or reports on whatever convention is drawn up under their aegis, and the Unidroit Secretariat will be no exception to this rule. It has plans for a fairly succinct guide to interpreting the provisions of the Convention which can only benefit from the questions raised in the wake of its adoption. The Acts and Proceedings of the diplomatic Conference at the conclusion of which the Convention was adopted may be obtained from the Unidroit Secretariat, in English or in French.

In a national context, consultations sometimes take place alongside inter-ministerial meetings to investigate the case for or against the Unidroit Convention against the backdrop of national law and the national cultural environment. This has been the case for example in Switzerland, the Netherlands and France (all three signatory States), and the Unidroit Secretariat has on occasion been invited to take part in these talks.

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Needless to say, the Unidroit Convention on Stolen or Illegally Exported Cultural Objects is hardly the sole international legal instrument devised for the purpose of combating illicit trade, and one of the tasks falling to the Unidroit Secretariat is to explain where the Convention fits in and how it may be used to supplement other such instruments. A case in point is the relationship between the Unidroit Convention and the Commonwealth Secretariat's Scheme for the Protection of the Material Cultural Heritage adopted by the Meeting of Commonwealth Justice Ministers in 1993, a relationship which the Unidroit Secretariat was invited to elucidate at the meeting of Commonwealth Justice Ministers in Kuala Lumpur in May 1996. By and large however, this type of work is shared by Unidroit and UNESCO which, in the person of Ms Lyndel Prott, Head of the International Standards Section of the Cultural Heritage Division, has been a staunch supporter of the Unidroit initiative from the very outset. Ms Prott has proved a prolific writer on the subject of the Unidroit Convention, and one of her articles is devoted specifically to the question of how the Unidroit Convention and UNESCO's own 1970 Convention can complement each other in the future (*cf. ULR/RDU 1996-1*, pp. 59-71).

Moreover, UNESCO and the International Council of Museums (ICOM) both organise (sometimes conjointly) regional workshops intended to improve the way in which the 1970 UNESCO Convention is implemented. These workshops are attended by national civil servants and specialists in the field of cultural heritage. Unidroit has been participating in these workshops for some years now in order to present the 1995 Convention, and in the process has strengthened its links with certain countries in Latin America (Ecuador, 1996), Central Africa (Zaire, 1996) and the Caribbean (Grenada, 1997). Another such workshop is planned in Lebanon towards the end of 1997 for the benefit of the Arab countries. These events tend to highlight the need for these countries to draft appropriate national legislation as a first step towards accession to the existing international Conventions.

Thinking along similar lines, in 1996 the European Cultural Heritage Ministers asked the Council of Europe to initiate a political dialogue between States on the subject of illicit trade in cultural property. The participating delegations made a political commitment to formulate a common strategy against illicit trafficking in cultural property, to work out an effective consultation procedure between States and all those involved in the fight against illicit trade and to prepare the ground for the signature, ratification and implementation of the existing legal instruments, primarily the Council of Europe Conventions, the 1970 UNESCO Convention and the 1995 Unidroit Convention. The significance of this initiative cannot be overstated, and the Unidroit Secretariat intends to throw its full weight behind it since, on the one hand, it will involve all 51 States of what is now known as Greater Europe and because, on the other hand, while Unidroit's technical expertise in drawing up such instruments is unchallenged, what is sometimes lacking is the political support needed to see that they are implemented. Once the preparatory talks are over, Government representatives will meet to take stock and Culture Ministers will subsequently adopt such political texts as are deemed necessary. The Council of Europe's Cultural Heritage Division has moreover invited Unidroit to collaborate on a programme of technical assistance to help Governments draft the relevant domestic legislation, particularly in Eastern Europe, and promote the ratification of cultural conventions.

#### **... and involving the specialists**

The Unidroit Secretariat is treading new ground rather gingerly here, since unlike the inter-governmental bodies with which it is used to deal, practitioners in the art world have both a political and a commercial case to put and the language they speak is less familiar to the Secretariat. Yet their support, indeed their unreserved commitment, will be vital in persuading

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Governments to legislate at all, and it is a fact that the Convention's more hostile detractors have tended to be certain categories of market operators, such as dealers and collectors, often misinformed both as to the content and goals of the Convention.

Operators often complain that they were not consulted, or at least not sufficiently heeded, by the authorities involved in drafting the Convention, and they seem reluctant to accept the fact that they are not now being asked for advice on how to amend the text but rather to accept or reject it outright, since no reservations or optional clauses are permitted. Unidroit is given an opportunity to meet these professionals and to set their minds at rest in the framework of meetings organised by other international fora such as UNESCO, INTERPOL, the Council of Europe, ICOM and so on.

Since much of the hostility is expressed in highly emotional terms, it is essential that the case for the Convention be argued by both sides on strictly rational grounds if trade in cultural property is to rid itself of its present unsavoury elements. All parties, Governments and private operators alike, must learn to curb such excesses of language and conduct, the only result of which is to arouse resentment and to buttress old prejudice. Governments, for example, should acknowledge that not all art dealers and art collectors are crooks and rascals. Dealers and collectors for their part should give a wide berth to objects which have manifestly been unlawfully traded although their precise origin is unclear. It would certainly help if each party could gain some insight into the pressures with which the other party has to contend.<sup>1</sup>

The Council of Europe is currently organising an international conference on illicit trade in cultural objects whose prime aim is to bring together all market operators. Sectoral meetings are being called in the run-up to the conference to identify the more sensitive issues at stake in each category of the trade and to bring home the importance of the Unidroit Convention among the legal instruments available. The categories targeted by these meetings include auctioneers, museums, the Church, dealers, customs officers and the police. It is perhaps worth noting at this juncture that INTERPOL has been extremely supportive of the Unidroit Convention and has been instrumental in publicising it among police forces worldwide.

The regional workshops organised by UNESCO and ICOM also offer a choice forum for meeting museum directors from all over the world and to expound to them the provisions of the Convention, stressing in particular the fact that if the Convention seeks to promote greater diligence on the part of buyers, this is no more than is already required of them by their respective codes of practice. ICOM has always been at pains to point out that its work has consistently been geared to promoting a transparent code of practice, museum directors being called upon to form the front line in the fight against illicit trade, by scrupulously observing certain rules in judging the objects proposed to them. ICOM approved such a Code of Professional Ethics in the museum world in 1986, which sets forth in no uncertain terms the rules that museums must respect with regard to acquisitions and restitutions. This code has been translated into twenty-one languages and has been widely distributed. Much emphasis is also given in these workshops to the importance of databases on stolen objects and of inventories, and indeed to the problems encountered on archaeological sites, all of which are issues addressed by the Unidroit Convention.

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<sup>1</sup> Cf. P. O'KEEFE, "Feasibility of an international code of ethics for dealers in cultural property for the purpose of more effective control of illicit traffic in cultural property", Report written on behalf of UNESCO, CLT-94/WS/11, p. 1.

## II. WHAT HAS BEEN ACHIEVED?

What, then, has been achieved so far and how, if at all, has the outlook changed in the wake of the various initiatives deployed by the Unidroit Secretariat, either on its own or in conjunction with other bodies and organisations? There is, of course, still a long way to go, but is it too soon to speak of a success or to determine whether there is at least some room for optimism?

### **State of implementation**

The Convention was adopted and opened to signature in Rome on 24 June 1995. Ten States signed on that occasion: Burkina Faso, Cambodia, Côte d'Ivoire, Croatia, France, Guinea, Hungary, Italy, Lithuania and Zambia. By 30 June 1996, the date until which the Convention remained open to signature, Bolivia, Finland, Georgia, the Netherlands, Pakistan, Paraguay, Peru, Portugal, Romania, the Russian Federation, Senegal and Switzerland had likewise become Signatory States, bringing the total to twenty-two. The signature of an international treaty implies that States agree with the text of the treaty and signals their intention to accede to it upon ratification.

Two States have already done so. Lithuania and Paraguay ratified the Convention on 4 April and 27 May 1997 respectively. Peru has completed the ratification procedure and is preparing shortly to deposit the instrument with the depositary, the Italian Government. However, non-signatory States are by no means excluded. They have the option of becoming parties to the agreement by acceding to it, as China did on 7 May 1997.

The talks which must be held at the national level between the ministries involved and representatives of the art market before Governments can take a stand on ratification or accession are at various stages of progress. Some countries, such as Austria, Germany, Greece and Japan, are understood to have decided not to ratify for the time being. Austria, Germany and Japan are having trouble mainly with Chapter III on illegal exports and the definition of the concept of cultural property, whereas Greece deems the Convention not to go far enough in protecting the States of origin of cultural objects, primarily because no provision has been made for retro-active application. It is interesting in this connection to note that Greece was the only country to vote against the adoption, in 1993, of the EC Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, and that Germany abstained; neither country has to date incorporated this directive into its national legislation. The United Kingdom for its part has so far failed to come to terms with Chapter II on stolen property and besides has to contend with fierce opposition from the art market. However, the outcome of the latest general election and the U.K.'s brand-new decision to return to the UNESCO fold may have a positive spin-off for the Unidroit Convention as well.

Other countries have taken a more impartial stand and consultations are proceeding apace with no fixed timetable and still less indication as to the likely outcome. France, for example, which has only just ratified the 1970 UNESCO Convention – a move not unconnected with the advent of the Unidroit Convention – continues its scrutiny of the latter. Switzerland, the Netherlands and Finland have set up special working groups to study the Convention and are slated to take a decision within the next few months. The Holy See is currently revamping its 1828 legislation on cultural matters and is not due to examine the case for acceding to the Unidroit Convention until that task is completed. The United States are waiting for the European States to take a decision first, having become the wiser since they ratified the 1970 UNESCO Convention only to find the leading European importing States declining to follow suit, much to the detriment of that Convention's impact. To some extent, the United States can afford to wait

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since their own legislation on the protection of cultural property is quite sophisticated already and relies in part on highly effective bilateral arrangements.

Italy, whose Government is the depositary of the Unidroit Convention, is well along the path to ratification, the relevant Bill being ready and waiting only for a slot in the overloaded parliamentary timetable (besides which Italy still has to adopt the Act incorporating the European directive). Hungary is putting the final touches to its domestic legislation and the Hungarian Parliament is expected to vote ratification of the Convention by the end of the year. The Russian Federation for its part is still adapting some of its national laws before ratifying in the next few months. The Convention is also due shortly to be presented to the Argentinean and Brazilian Parliaments, which are expected to come out in favour.

The Parliamentary Assembly of the Council of Europe has instructed one of its members to prepare a report on the Unidroit Convention as a guide to adopting recommendations to the member States of the Council of Europe. A most promising draft report has in the meantime been produced, urging member States to accelerate the ratification/accession procedure and asking those States which decline to do so to explain why. The Central American Parliament, of which Guatemala, El Salvador, Nicaragua, Honduras and Panama are members, is now investigating the possibility of acceding to the Convention as a body. A favourable report has already come out in this connection and the next parliamentary session is scheduled for October 1997 in Guatemala City.

Under Article 12(1), the Convention will enter into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession. Accordingly, the Convention is currently only one Contracting State short of entry into force, and if the scenario outlined above is anything to go by, it is not too far-fetched to look forward to the Convention's coming into force in the relatively near future.

This scenario, of course, is based on preliminary indications, but overall these seem fairly positive, not least since the art market itself is also sending out encouraging signals.

#### **The professional view**

Despite the efforts deployed by the Unidroit Secretariat and by its partners in this venture, the fierce debate raging – often unfairly – in the art world and the strong feelings it has aroused have found their way into the printed press. The pressure of adverse opinion is still very strong and the right to reply to some of the more negative articles has at times been denied. For example, some collectors in Switzerland blame the Unidroit Convention for the “flight” of an important collection of art to the United States of America where it is reputed to be “safer”. The European Fine Arts Foundation (TEFAF) say they will stop exhibiting in Basle and Maastricht if Switzerland and the Netherlands decide to ratify the Convention. On the bright side, however, efforts to defuse the row, more often than not triggered by a series of misunderstandings, seem to be paying off.

Those dealers hitherto most hostile to the Convention now appear more inclined to discuss things in an effort to understand what is going on, and those in favour of, or at least the most impartial to, the Convention are gradually beginning to speak out. France's auctioneers have admitted that their reservations are largely dictated by politico-commercial considerations and media image: they fear that if France were to ratify before its European partners do, the position of the French art market, already handicapped by high taxes and the right of stoppage, would be further weakened by its competitors' attempts to exaggerate the possibly adverse effect of the Convention on the French market.

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The museum world is likewise making itself heard, and ICOM, at its XVIIIth General Assembly in Norway in 1995, adopted a resolution expressing its gratification at “the decision taken [...] to adopt the Unidroit Convention” and urging all Governments to sign and ratify it. This particular resolution has since been faithfully reproduced in the final declarations and recommendations of the regional workshops, none of which has failed to observe that only international co-operation can put a stop to illicit trade and that this means ratifying the legal instruments currently at hand (thus, for example, the 1996 Kinshasa Declaration urging the governments of those States which had not yet done so to ratify the 1970 UNESCO Convention and the Unidroit Convention forthwith).

By the same token, Berlin’s museums have come out in favour of the Unidroit Convention and in a formal request to the German Government have asked it why it has not signed the Convention, enjoining it to commence consultations with a view to securing accession and stressing the benefits to be derived from the Convention. Likewise, some American museums have expressed interest in getting to know the Unidroit Convention better, and the American Association of Museums (AAM) is in fact organising a symposium next May to discuss the return of cultural property belonging to indigenous communities, with special emphasis on the way in which the Unidroit Convention modifies the prevalent legal position.

#### **CONCLUSION**

Once the Convention enters into force, Unidroit will re-focus its exertions to ensure that the Convention functions at it should. Article 20 empowers the President of Unidroit “at regular intervals, or at any time at the request of five Contracting States, [to] convene a special committee in order to review the practical operation of this Convention.” This is a way of facilitating implementation of the Convention while promoting greater harmonisation and uniform interpretation.

While the Convention certainly sets out to secure a higher incidence of restitution or return of stolen or illegally exported cultural property, its main thrust is nevertheless likely to be the reduction of illicit trafficking by fostering a gradual yet profound change in the behaviour of art market operators and by demonstrating that, while the task of protecting the cultural heritage must needs retain its own national flavour, it can and indeed must come to terms or better still, go hand in hand with inter-State solidarity. The only way to bring about such a change is through the medium of compromise, compromise which by its very nature cannot fully accommodate all parties on all points. However, a careful and above all objective scrutiny of the Unidroit Convention should satisfy readers that no one party is likely to suffer unduly.

The Unidroit Convention is the fruit of a sustained effort by jurists and lawyers to balance justice and realism and an attempt to lay the foundations of a workable system for the years to come. Experience warns us, however, that adopting a Convention is one thing, making it work is another. The Unidroit Secretariat will persevere in its mission to convince the unconvinced by allaying their fears, but it would be little short of tragic if its efforts were to be misunderstood by those who are involved, in a private or public capacity, in the preservation and protection of the cultural heritage.

