

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On

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INTRODUCTION

On 1 July 1998, the *UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects* 1995 (the 1995 UNIDROIT Convention) came into force. This instrument was a departure for UNIDROIT from its more usual commercial subject matter. Although it is certainly connected with the art trade, which is a very significant commercial interest, it was the first time that UNIDROIT as an organization dealt with heritage issues.

Partly because this was unusual for UNIDROIT and partly because many of the countries with major heritage issues were not members of UNIDROIT, it was early seen as quite controversial. The initiative for UNIDROIT to work in this area came from UNESCO. At the request of its Member States, UNESCO had had a committee of experts look at the progress of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 (the 1970 UNESCO Convention). They recommended that some of the aspects of private law, such as time limitations on legal actions and the misuse of defences based on “good faith”, which the 1970 Convention had not been able to deal with, should be dealt with by an organization which specialized in harmonizing national laws. Such an organization might be UNIDROIT or an institution specializing in private international law. UNESCO consulted with UNIDROIT and with the Hague Conference on Private International Law. Ultimately these two Organizations decided that UNIDROIT should undertake this work.

After three meetings of experts, appointed in their individual capacities, from 1988 to 1990, a draft was prepared to be put to a committee of experts nominated by their governments. Four sessions were held from 1991 to 1994. The volatile nature of heritage negotiations quickly became apparent. Since I was representing UNESCO as an Observer, I was approached during these

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meetings by some governmental experts with diverging suspicions of some kind of conspiracy. Certain representatives of countries which were net losers of cultural objects suggested that UNESCO should not be encouraging UNIDROIT in this work, since it was inspired by a desire to weaken the protections of the 1970 UNESCO Convention – UNIDROIT was then seen by those countries as basically a European-oriented institution. On the other hand, the suggestion was made by a representative from one of the countries which was a net acquirer of cultural objects that the UNIDROIT process was a manoeuvre by developing countries to achieve, by means of a new convention, provisions which they had been unable to achieve in the 1970 Convention! I found myself assuring delegates that UNESCO had itself inspired the process. It was designed to improve certainty of title and remedy the existing chaos in the law which would help acquirers and dealers, while at the same time ensuring the return of heritage items which had been stolen, clandestinely excavated, or (in some cases) illegally exported, which would assist States of origin in preserving their heritage.

The 1970 UNESCO Convention had been negotiated in a highly political context. Its provisions were an amalgamation of different drafts and its drafting far from the ideal of lucidity. The UNIDROIT Convention was very carefully drafted by the expert group and the inter-governmental negotiations had the advantage of some of the very best experts in private international law and an extremely good drafting committee. Despite the difficulty of reaching compromise positions, its text is crystal clear. This has served to alarm some readers who are not specialized in this area. For example, clear statements can only be rightly understood if one sees how they fit into existing legal rules – rules which it is clear some of the detractors of the Convention did not know.

I. – RECEPTION OF THE CONVENTION IN 1995

The reaction to the text of the Convention was extraordinary. The wildest assertions were made. To counter these in a reasonable way it was necessary to prepare a statement contradicting the various errors that were being made. This was adapted especially to different legal systems when questions were raised, mainly by the dealer community, in relation to their own national legal system. Here is the general template, drawn up about 1997, which sought to answer a selection of arguments which appeared in the popular press and art trade publications:

Objection: The Convention is incompatible with Western legal principles.

Answer: It reflects the mature study by many Western legal experts over at least 20 years (including studies by the European Union and the Council of Europe). Its provisions reflect the ICOM Code of Ethics, tests of good faith in some existing systems (such as the Swiss), the return of stolen objects (as in the Common Law).

The most controversial items are those on time limitation of actions. Here it was most difficult to find a compromise. Objects in many public collections in Civil Law countries are inalienable: some other legal systems do not have any concept of limitations. The hard-fought compromise reflected in the Convention is closer to the view of legal systems which do not have rules on inalienability and have relatively short periods of limitation.

O: The courts will be drowned by suits.

A: In three years since the adoption of the European Directive, not one single case has been brought, despite its applicability to art-rich source countries such as France, Greece, Italy, and Spain. The problems of proving the identity of an object with one known to have been in the source country at the relevant date are formidable in the case of theft, and more so in the case of clandestine excavation. The cost of legal proceedings in “art market” States is a strong deterrent in all cases except those where the evidence is absolutely clear and the value of the object warrants the expense.

O: The Convention will lead to the destruction of existing collections.

A: The Convention is not retroactive and will only affect objects stolen or illegally exported after the entry into force of the Convention for both countries concerned.

O: It will hinder international exhibitions for fear of claims.

A: Reputable museums already apply the ICOM Code, not to exhibit objects for which a good provenance is not available or which have been illegally exported.

O: It will change radically the rules as to confidentiality between dealer and client.

A: Cultural property is the last major valuable asset which can be traded without fully checking the title and the only one where concealment of provenance is defended. This has enabled its use for laundering money from criminal activities and attracted activity by organized international criminal groups.

O: *The very survival of the art-dealing business is at stake, as is the continuation of all collecting activities.*

A: The Preamble to the Convention makes clear that the exchange of cultural property (by trade, loan, etc.) is “of fundamental importance”. The figures for the art trade show that it is not endangered. The damage being done by illicit excavation and theft all over the world and documented by experts is, to the contrary, of very serious concern.

O: *It requires wholesale enforcement of a source country’s export controls.*

A: The requested State will have regard only to the limited classes of illegally exported objects in Article 5(3) and the determination whether an object meets these criteria is by the court of the requested State.

O: *The exporting countries should control offences against cultural property.*

A: Not even States with state-of-the-art technology and relatively good resources such as the Netherlands, the United Kingdom or the United States are able to prevent major art thefts and looting on archaeological sites. Recent examples are well-known. Can one seriously expect countries which are some of the poorest in the world to spend a higher proportion of their income on the supervision of even more vast archaeological sites when their population is in dire need of food, shelter and education?

That being said, UNESCO has been working for 50 years with developing States to help them draft adequate legislation, to protect their important sites, to develop their museums, to inventory cultural property and, more recently, to train their cultural, police and customs officials. Illicit traffic is a very complex problem which must be tackled on all fronts and cannot be solved without international collaboration. Poverty and conflict are immediately exploited to deplete cultural property. Should not the international community seek to prevent that?

O: *It is impossible for dealers and buyers to know what the export controls of foreign States are.*

A: They have already been published in a Handbook by UNESCO, available free of charge, and UNIDROIT is planning to put them on line.

O: *The Convention requires the return of a stolen cultural object.*

A: This objection is made by those in non-Common Law countries where return of a stolen object is not the normal rule, as it is in Common Law (English-speaking) countries. The “*caveat emptor*” rule should increase the care taken by purchasers to ensure that they are not purchasing illegally traded cultural objects.

In the exceptional case of cultural heritage objects, they are not replaceable by money or in kind, since they are unique.

O: *“Reasonable” compensation will be decided by the law of the source country.*

A: This is not true. It is the court where the suit is brought that will decide.

O: *The definition of cultural objects is too broad.*

A: Theft is a criminal act, and there was general agreement that the Convention should apply to all stolen cultural property. The definition is limited in respect of illegally exported cultural objects. When it was decided to have an enumerative, rather than a brief (four-line) general description, the categories of the UNESCO Convention were chosen because 85 States¹ are already party to that treaty and many already have legislation based on it. The definition will be applied by the court where the suit is brought.

O: *It will be possible to claim objects when they appear on exhibition or sale and, unless the owner can produce formal proof that he owned it before the entry into force of the Convention, he will not be able to resist its return.*

A: Proof that the object is stolen must be brought to the satisfaction of the judge in the country where the object is located or where the owner is resident.

O: *A good faith collector may be accused of receiving stolen goods.*

A: This is a criminal charge not authorized by the Convention. The Convention is concerned only with civil law and the resolution of the proper location of cultural objects.

O: *The Convention overturns the principle “innocent till proven guilty”.*

A: This is a principle of criminal law which is not affected by the Convention. The test in civil claims is the same under the Convention as it is now – *i.e.* the balance of probabilities. In many countries, judges already require evidence of reasonable enquiries before allowing a defence of “good faith”.

Of course, most of these objections were framed in far less temperate language. My object in rephrasing them was to try to keep the discussion on a rational level and to reduce the use of fear as a form of persuasion.

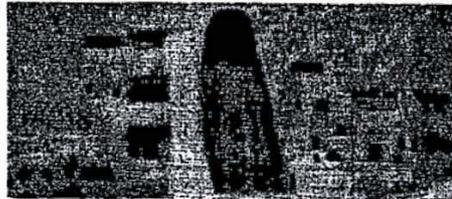
¹ As at 1 March 2009 there were 116 State Parties.

ALARME !

La convention Unidroit : L'art gravement menacé.

Louable dans son intention, qui est la lutte contre le vol et l'exportation illicite d'objets culturels, la Convention Unidroit contient des dispositions qui débouchent sur un nationalisme culturel dont les ravages ont été mal appréciés. Au nom de ses conceptions et de sa législation propres, chaque État serait en mesure de réclamer la restitution d'œuvres d'art, en obéissant à des motivations qui peuvent être d'ordre idéologique ou religieux ou simplement électoraliste. Contrairement au but affiché par cette convention, des procédures de restitution pourront être entreprises sans souci réel de sauvegarder un patrimoine culturel, excluant ainsi toute contribution à un partage universel de la connaissance et de la compréhension entre les peuples.

**Mesdames et Messieurs les gouvernants,
vous ne voudriez pas que la France ratifie cette convention
sans en avoir mesuré tous les aspects pervers.**



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This advertisement appeared in *Le Monde*, Paris, 3 April 2000, when ratification of the Convention was being considered in France. A leading French expert in cultural heritage law, welcoming the 1995 UNIDROIT Convention as the most effective instrument in developing the law of restitution, has commented:

“It is to be hoped that more States ratify this instrument. France is committed to this process, which has unfortunately been impeded by very strong resistance on the part of market professionals, who often use the argument of absence of good faith to criticize this essential tool for reform of the art market and that of cultural property in general.”²

The “destruction of the art trade” factor has been dismissed by the United States Court of Appeal, deciding that the property of foreign States should be protected in the United States:

“Although we recognize the concerns raised by Schultz . . . about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it ‘creates an insurmountable barrier to the lawful importation of cultural property into the United States’. Our holding does assuredly create a barrier to the importation of cultural property owned by a foreign government. We see no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home. The *mens rea* [knowledge of wrongfulness] requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the N[atational] S[tolen] P[roperty] A[ct] will protect the property of sovereign nations.”³

The extraordinary passion and inaccuracy with which the campaign to prevent ratification of the 1995 UNIDROIT Convention was waged has been summarized nowhere better than by Professor Pierre Lalive, the eminent Chairperson of the Committee of the Whole at the intergovernmental negotiations for the Convention:

“A good example of this is the campaign by one James F. Fitzpatrick (e.g. in ‘The Misguided Quest: the clear case against UNIDROIT’⁴), a strange diatribe full of errors, which drew the criticism from an outstanding expert on the question,

² M. CORNU, “The Concepts of Original Heritage and Adoptive Heritage in French Legislation”, *Witnesses to History: Documents and Writings on the Return of Cultural Objects* (forthcoming, UNESCO (2009)).

³ *United States v. Schultz*, 333 F.2d 393 (2d Cir. 2003) at 410.

⁴ *Journal of Financial Crime*, July 1996, 54.

R. Crewdson, a professional art market lawyer, that he was not attacking 'the UNIDROIT Convention but a monster of his own imagining'. In the same vein, L. A. Lemmens, the Secretary-General of The European Fine Arts Fair (TEFAF), saw fit to write: '... a dealer at a fair in any UNIDROIT country could be bankrupted by accusations from any visitor claiming that the dealer is handling stolen goods. Under UNIDROIT regulations, such accusations can lead swiftly to confiscation of paintings and objects even if his innocence is proved'.⁵ Likewise, the second Basel Antiques Fair was marked by the inclusion of 'a scathing preface' on the UNIDROIT Convention in its catalogue⁶ and the inception of 'fierce lobbying ... to ensure that the Convention is not ratified by Parliament' !

This phenomenon is all the more curious because those countries and circles with the greatest wealth in terms of art objects (hence the most vulnerable to the staggering rise in thefts) might have been expected to applaud the strengthening of legal protection for the dispossessed owner. Such reinforcement, which can only be achieved through international collaboration, is even more keenly awaited since, as matters now stand, the likelihood of recovering an item of stolen cultural property is, according to the specialists, only 12 to 20%.

It is very striking to see how often the opponents of the Convention skirt the issue of the protection of the owner, public or private, whose goods have been stolen, to focus almost exclusively on the fate, which they find appalling, of the buyer of cultural property of dubious provenance, who is required to show that he has indeed taken reasonably necessary precautions in order to obtain fair compensation when returning the stolen item. How else can such one-way concern be explained, other than by the fact that these critics always see themselves, maybe subconsciously, as having to be in the shoes of the buyer wanting to increase his collection, and never those of the owner who is the victim of a theft?

Whether through obvious bias or involuntary blindness, some commentators have even claimed that the UNIDROIT Convention is 'unenforceable', maintaining either that the national courts of the Contracting States lack jurisdiction, or that there will be damaging consequences for art collectors and dealers. These are gratuitous statements which, moreover, betray a singular lack of understanding of the scope of international conventions, in particular with regard to international mutual assistance (in that the final and binding decision always rests with the country to which the request is made).

While the UNIDROIT Convention is basically very simple, both in terms of its structure and its principles, it still relates, as we have seen, to a particularly complex area, that of conflict of laws, involving comparative civil law on sale and transfer of ownership, the application of foreign public law and the traditional systems of international mutual legal assistance. It follows that an

⁵ XXI Art Newsletter No. 15, 19 March 1996, 2.

⁶ *Le Monde*, 29 October 1996.

adequate knowledge of these areas of the law is an absolute precondition for any understanding of the Convention and, therefore, for any informed criticism.”

Past history and further developments have disproven the alarmist sentiments expressed. The kind of objections being made echoed similar objections made against the 1970 UNESCO Convention and also against European Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (the Directive). In both cases, dire predictions were made of the detrimental (indeed “disastrous”) impact on the art trade of any effort to control illicit traffic through international legal instruments. In neither case did that prove to be an accurate prediction. In the case of the European Directive, it was insisted that it should be assessed after three years in force to see what had been the impact on the market. The European Commission has in fact made a survey on three occasions. So little litigation was found to report in these surveys that it decided to lengthen the periods between the reports. Does this mean that the Directive is completely ineffective? It was never intended that the Directive, which is in fact based on an early draft of the 1995 UNIDROIT Convention, would have a dramatic effect on the art trade. What does seem to have happened is that dealers and purchasers who are presented with evidence that a cultural object does not have a good provenance do not now wait for litigation to commence, but come to an agreement to return, or to compensate a purchaser who returns. This is an entirely beneficial effect, since it avoids costs for all parties and ensures that cultural objects which have been illicitly traded go back to the proper holder – a real deterrent to individuals used to dubious transactions. And even these cases seem to be few in number.

But extreme statements continue to be made whenever rules are developed to try to hinder unethical dealings in the trade. Consider this reaction to the recent decision of the High Court in England in *Iran v. Barakat*⁷ which decided for the return of objects being offered for sale by a dealer in London:

“After the judgment Favez Barakat, the owner of the gallery, said: ‘This means that the Iranian government could claim every Persian item at the British Museum, and that doesn’t make any sense’. Such proclamations are patently ridiculous, and sadly indicative of the absurd exaggerations which follow a ruling like this. The British Museum will not be emptied of its Persian collection

⁷ *Islamic Republic of Iran v. Barakat Galleries Ltd* [2007] EWCA Civ 1374.

because of this decision; rather antiquities dealers are unable to sell new and illegally excavated objects from Iran.”⁸

II. – EDUCATING THE PUBLIC

Apart from the need to counter misinterpretations based on ignorance or even wilful misunderstanding, it was important to undertake an educative effort to get across the content of this Convention. This is not the place to expound on the substance of the Convention. There is a detailed, article-by-article commentary for those who are interested.⁹ However, I will expound two provisions to illustrate another educational effort made by UNESCO.

There were two tasks for the UNIDROIT Convention. The first was to update international norms to current archaeological and museological best practice. The second was to harmonize very diverse national norms.

1. Updating the standards

Professional practice was by 1995 clearly against the extraction of antiquities from their context, because it inevitably caused the loss of very important data from stratification. From the former days of competitive national treasure-hunting by English, French and German explorers in the nineteenth century, more scientific approaches had been developed. Early attempts to formalize the new standards in international agreements, such as the abortive Treaty of Sèvres in 1920¹⁰ and the *UNESCO Recommendation on International Principles Applicable to Archaeological Excavations* 1956, had not succeeded in creating inter-State obligations. The Recommendation had, however, set out some minimal standards.

A persistent problem in the discussions was the treatment of antiquities which had been illegally excavated. Should they be treated in the same way as antiquities which had been stolen? This question also related to that of owner-

⁸ Comment by D. FINCHAM, <<http://illicit-cultural-property.blogspot.com/2007/12/iran-wins-barakat-appeal.html>>, accessed 13 August 2008

⁹ L.V. PROTT, *Commentary on the UNIDROIT Convention 1995* (Institute of Art and Law, Leicester, U.K) (1997).

¹⁰ The text contained an Annex to s. 421 on the control of excavations and was signed by Turkey, France, Italy and the United Kingdom. The text is available at <<http://www.hri.org/docs/sevres/part13.html>>. It was never ratified and was replaced by the Treaty of Lausanne in 1923, but the Antiquities Law 1924 in the British mandate of Iraq was subsequently based on its provisions.

ship. While some States took ownership of undiscovered antiquities, others did not. The 1956 Recommendation included a provision that a State should:

“[d]efine the legal status of the archaeological sub-soil and, where State ownership of the said sub soil is recognized, specifically mention the fact in its legislation.”

That States *should* take ownership of undiscovered antiquities in order to ensure proper control of excavations met strong objections from some States. Nor was it clear that they would enforce ownership rights of other States even if clearly asserted.

The debate was intense in some national jurisdictions. For example, in 1977, the possessors of illegally excavated Mexican antiquities argued in the case of *US v. McClain*¹¹ that United States courts should not enforce the ownership of a foreign State, conferred by that State’s own statute, unless that State had also had the object in its possession. The argument was not resolved in that jurisdiction until 2003 when it was held, in the case of *United States v. Schultz*, that a United States court should so recognize and enforce a foreign State’s ownership claim.¹² By 1988, when a working group of experts began to study these issues for UNIDROIT, there was an understanding of the extraordinary damage being done to the archaeological heritage. The rapacity of foreign markets gave an incentive to local populations, created by collectors in foreign countries and their intermediary dealers, to fossick in archaeologically rich sites, a problem exacerbated by the non-enforcement of export prohibitions of countries of origin by States of import.

Article 3(2) of the UNIDROIT Convention resolves this dilemma. It provides that:

“... a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, where consistent with the law of the State where the excavation took place.”

Such a statement does not reveal the preceding confused and detrimental effect of national decisions which did not take this view.

In 1998 UNESCO held a seminar, at the invitation of the Chinese authorities, in Beijing, on international conventions for the protection of cultural heritage in order to familiarize cultural heritage administrators with them. At that time, the Cultural Heritage Division of UNESCO had no

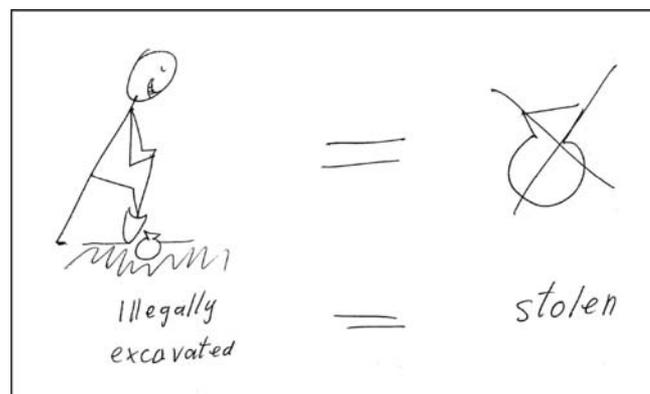
¹¹ *United States v. McClain* 545 F.2d 988 (5th Cir. 1977) at 994.

¹² *Supra* note 3.

experience of running such seminars in China, though it had done so in a number of regions. It was clear that this rule would be of utmost importance to China because of its fantastically rich archaeological heritage, in particular important burial sites dating from every dynasty.

How to get this message across? I was in charge of the International Standards Section of the Cultural Heritage Division of UNESCO. As this was the first time we had worked in China, which had only recently opened up to the wider world, we did not know how much Chinese administrators would know of the international conventions or the background against which they had been drafted. Furthermore, the organizers of the seminar had invited, at our suggestion, specialists from museums, from customs administrations and from their national security service which performs police functions in China. They selected two representatives from each of China's 30 provinces. There was therefore a huge range of qualifications and skills among participants. Security and custom officers and museum curators from big cities such as Shanghai were already well aware of the problems and had considerable experience in them – but they were not necessarily lawyers. Were representatives from outlying provinces such as Inner Mongolia and Tibet equally experienced? We spoke in English with sequential translation into Chinese. We did not know at that stage how much English would be understood directly and how well speakers from distant provinces would be able to understand concepts we were trying to propound in English, or even in Mandarin, if they had never met them before.

In these circumstances, I decided to try to get the message across and perhaps enliven the discourse for the audience by using cartoons. Using white sheets of paper on a board and a black texta colour I sketched out the basic provisions of the UNIDROIT Convention one by one. Article 3(2) was presented thus:



In one respect, at least, this presentation was successful, since it secured the undivided attention and good humour of the participants despite their habits of drinking tea and chatting during presentations (which they had been used to receiving in written form beforehand). This example illustrated the function of the 1995 UNIDROIT Convention to endorse the “best practice” of archaeologists, which was respect for the laws of the State where the object was excavated, and the rule as to recognizing foreign claims of ownership. As mentioned above, this important principle has now been endorsed by judges in the United States ¹³ (in 2003) and the United Kingdom ¹⁴ (in 2007).

2. Harmonizing national laws

An example of the function of harmonizing different national laws was the standardization of the rules concerning the acquisition of cultural objects. The rule in the 1995 Convention stated:

“The possessor of a cultural object which has been stolen shall return it.”
(Article 3(1))

This was already a change in the law for a number of States. In the first place, the purchaser was in some cases protected by a presumption of good faith which enabled him to assert good title. In addition, even in cases where the rightful owner could manage to retrieve the object, in many cases he would be required to pay compensation. How to change this practice?

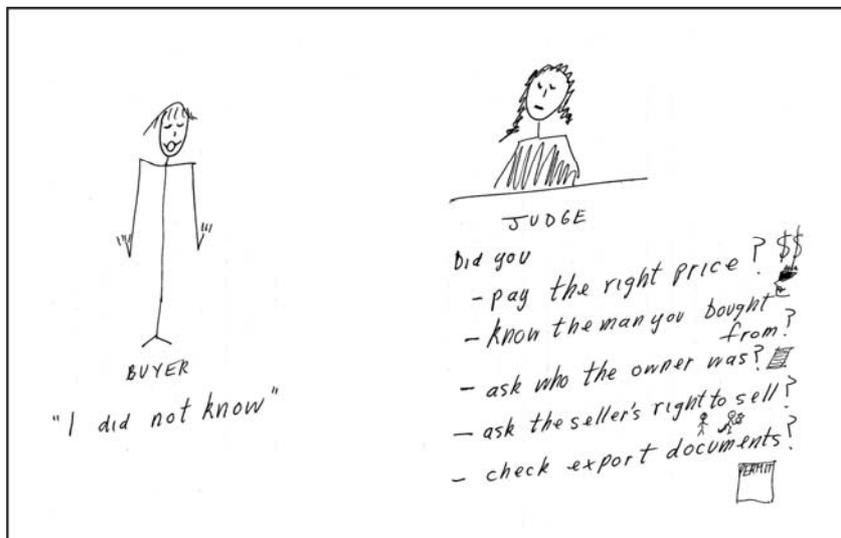
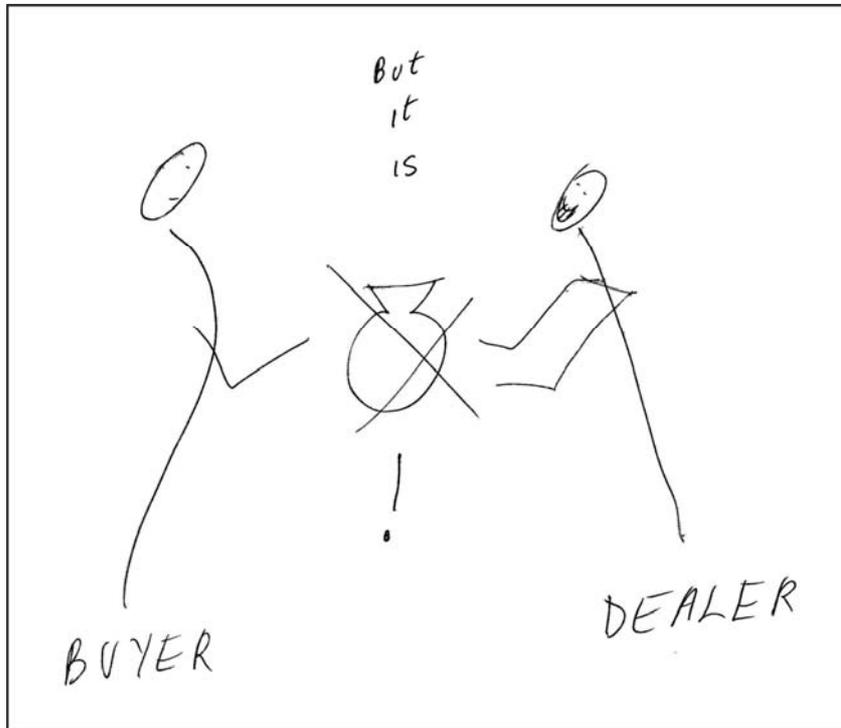
One way would be to “moralise” the market. In the art market it was a normal practice to make no enquiries as to provenance and previous legal status.

Whereas any other luxury item sold on the international market, whether a racehorse, an island or a luxury motor vehicle, would normally see the buyer requiring evidence of title before the purchase, this did not occur with works of art sold at auction or, in many cases, through dealers. This practice provided an easy opportunity for laundering stolen or illegally exported cultural objects. The text of the 1995 UNIDROIT Convention provided an incentive for both dealers and purchasers to use diligence in enquiring into the earlier transactions relating to the object. To illustrate this situation I used cartoons.

The second cartoon was meant to cover the ground of the factors which would be taken into account by a judge in assessing due diligence (Article 4(3)).

¹³ *US v. Schultz*, *supra* note 3.

¹⁴ *Islamic Republic of Iran v. Barakat Galleries Ltd*, *supra* note 7. The Court of Appeal upheld the appeal of Iran against the decision of Gray, J. in the High Court in 2007.



Using cartoons might seem to be a rather primitive way of getting the message across. However, such was the reaction to the adoption of the Convention and its initial signing by a number of States that a major education campaign was needed in many countries.

III. – THE FUTURE OF THE CONVENTION

Detractors of an international agreement often suggest that it has failed because it is not going to achieve enough ratifications to be effective. This has been said of the 1970 UNESCO Convention, for example, as late as 1994 when it already had 80 States Parties and, according to one commentator:

“Other than for its symbolic importance and the inspirational language in its preamble, it is now generally considered to be a failure.”¹⁵

Of course, the same is being said of the 1995 UNIDROIT Convention. As at 27 January 2009, it has 29 States Parties. Does this mean that it is a failure?

In fact, international agreements which make serious changes to the existing rules always tend to take a long time to be fully adopted by a substantial number of States. Conventions which achieve very high numbers of Member State ratifications, such as the *UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage* 1972 and the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* 2003 tend to be conventions which the States do not find place onerous obligations on them or, indeed, already encapsulate their existing rules or practice. Conventions which make serious changes to rules or practice are much more demanding. They usually require the making of new legislation. In fact, a State may wait until it is doing a basic reorganization of all its legislation on the subject matter before it attempts ratification. This has been the case, for example, with New Zealand which had been working on a revision of its law relating to antiquities for years. When it finally managed to adopt that legislation it also took into account its need to ratify the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, both of which it has now ratified (the former in 2007 and the latter in 2006).

The fact that a State has signed a convention but not ratified it has also been suggested as an indication that something is wrong with the Convention.

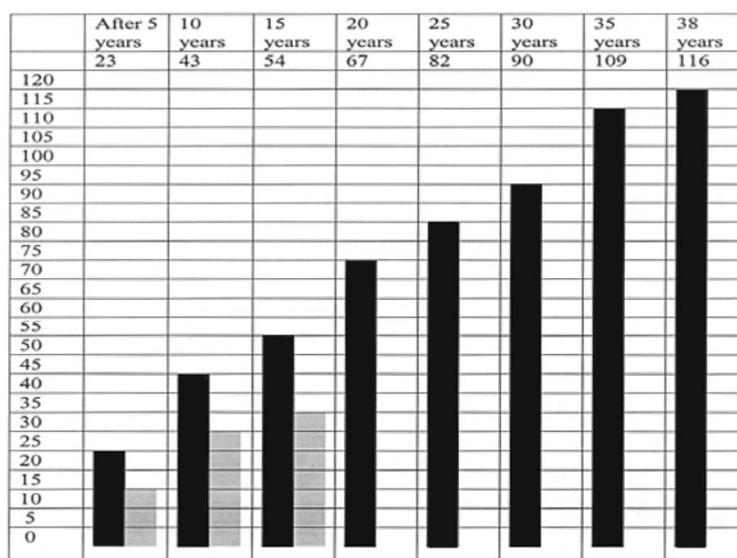
¹⁵ J. MERRYMAN, in: “The Nation and the Object”, 3 *International Journal of Cultural Property* (1994) 61, 63 reprinted in J.H. MERRYMAN, *Thinking About The Elgin Marbles: Critical Essays On Cultural Property, Art And Law* 158, Kluwer (London, Dordrecht) (2000).

This is rarely the case. It may be that for political or other reasons of State, a State takes a long time to ratify a convention, but this does not mean that the convention was seen as wrong or unadoptable. For example, both the United States and the United Kingdom signed the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 in that very year. However, the United States only ratified the Convention in 2007 – a lapse of 53 years. The United Kingdom has not yet ratified it although it has announced that it will do so and has been taking the necessary internal steps to enable this to happen. This Hague Convention, I would argue, is one of the most important international agreements made during the 20th century. Although its take-up has been slow it now has 122 States Parties. This is a very significant part of the international community and includes States of many different interests, including those who have military forces employed in other countries likely to be affected by the provisions of the Convention.

So, slowness of general adoption is not a sign of a Convention's failure. It may indeed be a sign of the Convention's importance, simply because it has significant obligations for States or affects various different divisions of government and requires considerable internal reorganization to be effective. Far better that new legislation or administrative arrangements be taken first than to have a hasty ratification only to discover that it is not, and perhaps cannot be, properly implemented. It may also be the case that it is necessary to wait for public attitudes to mature.

In any event, the rate of participation in the Convention is not so slow as to create alarm about its ultimate adoption.

The graph below shows the rate of accession to the 1970 UNESCO Convention over the 38 years of its existence and the 1995 UNIDROIT Convention over the 13 years of its existence. It can be seen that the accumulation of participating States, allowing for the fact the UNIDROIT is a much smaller Organization, is running at about the same rate. UNESCO had 109 Member States in 1970 (193 today) while UNIDROIT had 57 Member States in 1995 (63 today). In both cases, the number of parties to the Convention exceeded half the number of Member States within the first 15 years (in the case of UNIDROIT, this figure includes 9 States Parties who are not members of UNIDROIT). This is hardly a scenario of disaster.



■ UNESCO 1970 Convention / ■ 1995 UNIDROIT Convention

It is perhaps regrettable that eleven signatory States have still not ratified the Convention. These States are Burkina Faso, Côte d'Ivoire, France, Georgia, Guinea, the Netherlands, Pakistan, Russia, Senegal, Switzerland and Zambia. Clearly, the government at that time authorized the signature but has not proceeded to ratification after 13 years. The reason in the case of the "art market" States is certainly the strong opposition made by the art trade. Nonetheless these States were so concerned by the increasing looting of sites and certain scandals in their art markets, which revealed serious disrespect for lawful acquisition of cultural objects, that since 1995 they have become party to the 1970 Convention (the Netherlands' ratification has not yet been lodged but the process is under way). In part this is due to a consideration within the dealer community that the 1970 Convention would be less damaging to their interests than the UNIDROIT Convention. It is difficult to say whether this will be the case. For example, litigation for theft of cultural property may be brought by the original owner in a civil case under the UNIDROIT Convention, but civil actions for stolen goods are usually available in any event. Because of the expense, the difficulty of assembling evidence and the need to cope with a foreign legal system, the number of cases which will be brought by a private

citizen, or even by a foreign government in a civil action created by the UNIDROIT Convention, may be seriously diminished. Under the 1970 Convention, however, the government concerned may apply to another government to take action and this action is generally at the expense of the requested government.¹⁶

Where such a vociferous, well-financed and adamant case is made against a Convention, it needs strong support from governments, lawyers and experts in the subject matter, as well as from the Secretariat responsible for it. The dealers' lobby was indeed extremely well-financed, as the use of advertisements in major newspapers shows. Governments in all countries are susceptible to the persuasions of such affluent lobby groups.

In this context, it is particularly important that the voices of other interest groups are represented and that the international organizations themselves promote these Conventions. UNESCO promotes the 1995 UNIDROIT Convention along with the 1970 Convention, regarding them as complementary. One might perhaps ask whether UNIDROIT, with its emphasis on commercial and transport issues, has given its sole cultural convention the major exposure and promotion that it deserves.

Finally, it should be noted that even governments of States which are not yet party to the Convention are taking note and using some of its provisions. Swiss legislation, for example, has implemented the "30 year rule" on limitations. The Irish Law Reform Commission has recommended accession to the Convention. The British Advisory Panel on Illicit Trade in Cultural Objects Report in December 2000, which recommended ratification of the 1970 UNESCO Convention, has this to say about the 1995 Convention:

"The UNIDROIT Convention has certain conspicuous virtues.

It gives a direct right of recovery to legal and natural persons from whom cultural objects have been stolen, without imposing any need for government to intervene. By prescribing the remedy of 'return' in cases of theft, it avoids questions as to whether (under general principles) damages are an adequate remedy, or whether the claimant qualifies for specific delivery . . . Accession to the UNIDROIT Convention grants access to a recovery scheme which could substantially stem or reverse the national outflow of stolen cultural objects from the UK. It allows certain valuable options: for example, the power either to grant or deny compensation to possessors who are compelled to return objects. It provides for the avoidance of overlap with other instruments so that, for

¹⁶ For example, the Canadian government spent some CAN\$300,000 to meet the litigious requirements of return of textiles to Bolivia.

example, it could be excluded from the field of the EU Directive. It deals expressly with objects gained from the illicit excavation of sites, a field of particular concern because of the problem of context and of damage to the historical record. We agree with the Select Committee that the UNIDROIT Convention is (in general) efficiently drafted, most of its ambiguities and lacunae being remediable by resort to local legal doctrine, or by resourceful redrafting or interpretation in keeping with the spirit of the Convention. Subscription to the UNIDROIT Convention would signal to both domestic and overseas interests a national determination to curb the unlawful removal of cultural objects.”

The Panel nonetheless received objections to British accession, mainly because of the possibility, relating to existing provisions in English legislation under the Sale of Goods Act 1979, that dealers would be obliged to keep records for lengthy periods of time to avoid liability. This argument was based on the speculative example that a claimant museum, which should reasonably have known the location of the object and the identity of the possessor, but remained ignorant because it failed to take reasonable steps to discover those matters, might sue for return after 48 years. Despite the Panel’s proposing an interpretive declaration which would have solved this problem,

“[r]egrettably several members of the Panel did not find this formulation sufficiently reassuring to allay their concerns or to persuade them to withdraw their objection to the UNIDROIT Convention.”¹⁷

The Panel concluded:

“On balance, we advise that these considerations, taken in conjunction with the alternative measures which we propose elsewhere in this Report, militate against the adoption of the UNIDROIT Convention under the present circumstances.”

This is hardly an outright rejection of the Convention and clearly leaves the way open for a later accession.

IV. – DEVELOPMENTS SINCE 1995

One difficulty which has dogged efforts to get international rules and national rules harmonized to control illicit dealings in cultural objects has in the past been the strict division, particularly in civil law systems, between public and private law. This dogged the efforts before the Second World War to adopt such rules, as can be seen from the reports of Charles de Visscher.¹⁸ It

¹⁷ Ministerial Advisory Panel on Illicit Trade, Report (Department for Culture, Media and Sport, London), December 2000, 22-24.

¹⁸ C. DE VISSCHER, “La Protection internationale des Objets et des Monuments historiques”,

affected the drafting of the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954, as certain States insisted that the provisions on return of cultural property be relegated to a Protocol since they affected private law matters and should not be included in an international convention of public law: this arrangement would enable them to become party to the Convention without accepting the provisions of the Protocol. It rose again in relation to the 1970 Convention, where efforts to deal with time limitations were discarded on this ground. Another effort was negated on the basis of this argument: the 1985 *European Convention on Offences relating to Cultural Property*,¹⁹ which has never come into force.

However, the last 50 years in international law and, more specifically, in European law, have seen more and more intertwining of “public” and “private” law. There are few areas of national law which are not now affected by international legal rules. Family law, contract law, property law – all these are now subject to overriding international rules, freely adopted by national States. Human rights law in particular has had a great impact on national law. Although cultural rights are relatively undeveloped compared to civil, political, social and economic rights, they are ripe to advance and this, too, will have an impact in the implementation of rules to protect cultural objects. The difficulty of certain delegates at the negotiations for the 1995 UNIDROIT to understand the provisions sought by Australia, Canada and the United States on the special needs of indigenous communities is unlikely to be repeated since the adoption of the United Nations General Assembly’s *Declaration on the Rights of Indigenous Peoples* in 2007. Thus, certain developments in the international community generally contribute to the better understanding of cultural heritage issues.

Revue de droit internationale et de législation comparée (1935), revised edition translated into English by the United States Department of State and published as *International Protection of Works of Art and Historic Monuments*, Publication 3580 (Department of State, 1949).

¹⁹ CETS No. 119. Cyprus, Greece, Italy, Liechtenstein, Portugal, Turkey signed it but none have ratified. This excellently drafted Convention, drawn up by the committee of governmental experts under the authority of the European Committee on Crime Problems, should be looked at anew in view of subsequent developments. Text available at <http://209.85.173.132/search?q=cache:vD8BJ2du9E0J:conventions.coe.int/Treaty/en/Treaties/Word/119.doc+text+european+convention+119&hl=en&ct=clnk&cd=1&gl=au&lr=lang_en|lang_fr|lang_de>; Explanatory report by the Secretariat at <<http://conventions.coe.int/Treaty/EN/Reports/HTML/119.htm>>. One explanation given to me orally was that the drafters were experts in criminal law and were accused of not having expertise in civil law matters such as restitution. This seems strange, since one of the experts was Jean Chatelain, then legal adviser to the French museums and an expert consulted by UNIDROIT.

Another recent development was the exposure of the degree to which some major museums were aware of the wrongful excavation of the objects they were acquiring.²⁰ The Italian legal action against a dealer (Giacomo Medici) and a respected curator (Marion True of the J. Paul Getty Museum in Los Angeles) has been well publicized. Documents found in the warehouses from which major museums had been supplied recorded the real and the pretended provenance of items kept in the warehouse. The Getty, the Metropolitan Museum in New York and the Boston Museum of Fine Arts have all returned material to Italy. This development clearly negates the argument of the dealers that illicit traffic was a minor problem in an overwhelmingly honest and honorable trade. The extent of the warehouses and the records kept by Medici were sufficient proof of intentional, long-term profiteering from illegal excavation and trading.²¹ It surely strengthens the hand of national governments to employ every means at their disposal, including the UNIDROIT Convention, to clean up their art markets, to protect rightful owners, and to cooperate with source countries to act against the illicit trade.

V. – THE INFLUENCE OF THE CONVENTION

It is worthwhile to track the impact of a Convention irrespective of the number of ratifications it has received in its early days. Here, it is useful to look at the experience of the 1970 UNESCO Convention. In 1978, the United Kingdom, in its initial consideration of that Convention, decided that it would not become a party. It argued that the principles it embodied could be equally well dealt with by a code of practice to be administered by the dealers and auction houses active in the United Kingdom. This was adopted in 1984. In fact, over a period of years, it became obvious that even when a breach of the principles embodied in the code of practice had occurred, the trade was unwilling to take action against the offender. The House of Commons Select Committee produced a report on “Cultural Property: Return and Illicit Trade (1999-2000)” on the organization of the art trade. It recommended that the United Kingdom become party to the UNIDROIT Convention. The government then established its own ministerial Advisory Panel on Illicit Trade in Cultural

²⁰ See, for example, letters cited in “The Marion True trial, Rome. Getty letters analysed”, *The Art Newspaper* No. 199 (February 2009), which appear to indicate knowledge by one of the curators of the illicit origin of three antiquities before the Getty acquired them in 1984 from a private collection.

²¹ P. WATSON / C. TODESCHINI, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, from Italy's Tomb Raiders to the World's Greatest Museums* (Public Affairs, New York, 2006). Medici's conviction is still subject to appeal.

Objects to look into the issues raised by the Parliamentary Committee. As mentioned before, it came to the conclusion that the United Kingdom did in fact need to become party to an international convention on the question of illicit traffic, but it recommended that that Convention should be the 1970 Convention. One argument which had earlier been relied on by the government was that legislation would be required to implement the 1970 Convention. A closer look at the real obligations of the Convention and the existing United Kingdom legislation determined that it already had sufficient powers under existing legislation to do the things required by the Convention. However, in any event, as a result of the work of these two committees, the government decided to make it a criminal offence in the United Kingdom to deal with illegally exported cultural objects. This is not specifically required by either of the Conventions and was a reaction to a number of scandals in the London art market. There can be no doubt that the change of attitudes wrought first by the 1970 Convention and further by the 1995 Convention has had a very considerable impact on attitudes in that country.

The principles of the Convention are also reflected in decisions taken by judges in a number of jurisdictions in countries which have not become party to the Convention. As previously mentioned, the American case of *US v. Schultz* and the English case of *Iran v. Barakat* are examples of this, both of them requiring that foreign laws giving proprietary rights to the State must be respected. Also important was the Swiss case in 1997 concerning a painting stolen from Grasse in France and found in Switzerland, where a court of criminal jurisdiction insisted on its return to France since the onus of proof of good faith on the accused had not been met.²²

Ground-breaking conventions such as the 1970 and 1995 illicit traffic conventions may have enormous impact on public attitudes. They enter into the complex development of international law which is influenced by such instruments, by decisions of national courts, by technical developments, by advancing standards of professional conduct along with media coverage of social and political developments which show the necessity, and indeed, sometimes the inevitability of developing new rules.

CONCLUSION

With this perspective, what can we foresee for the 1995 UNIDROIT Convention? Recalling that it took 25 years before public attitudes had

²² *L. v. Indictment Chamber of the Canton of Geneva*, First Public Law Division, 1 April 1997, appeal under administrative law ATF (Federal Court Orders) 123 II 134.

sufficiently matured to enable drafting of the UNIDROIT Convention in 1995 to deal with issues such as limitations and good faith (which had been proposed in the 1970 Convention but could not then be adopted), it is not unreasonable to suggest that another 25 years from 1995 may see an equally strong change in views.

One possibility would be that by 2020, it will be possible to look at this complex of problems again. By then, the 1970 UNESCO Convention may be closer to universal adoption and the UNIDROIT Convention may be very widely adopted also. Perhaps, in that case, it may be possible to draft a single convention incorporating the good drafting of the UNIDROIT Convention and its private law provisions with better drafted provisions of public law from the 1970 Convention, and to have even higher standards for both. Perhaps it may even be possible to include the very careful provisions on mutual assistance in criminal matters and the restitution issue closely associated with it (as shown by the Swiss case mentioned above) by including also the carefully formulated provisions of the *European Convention on Offences relating to Cultural Property* 1985.²³



²³ *Supra* note 19.