

**UNESCO AND UNIDROIT - COOPERATION IN THE FIGHT AGAINST ILLICIT TRAFFIC
IN CULTURAL PROPERTY**

**Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention
on Stolen or Illegally Exported Cultural Objects**

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UNESCO Information Note

Complementarity between, and functioning of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

International trafficking in cultural property is an increasingly universal problem, affecting, to various extents, even countries traditionally seen as “importing” countries and necessitating international regulations (binding¹ and non-binding²). Consequently, UNESCO recommends its Member States to consider for ratification, possibly at the same time, both the UNESCO (1970) and UNIDROIT (1995) Conventions.

At present (1 June 2005) **107** States are Party to the 1970 UNESCO Convention³, and **25** States are Party to the 1995 UNIDROIT Convention⁴.

To facilitate consideration of these two Conventions, their complementarities and functioning are briefly illustrated as follows :

I) Policy Aspects

1) Philosophy :

Both Conventions fight *illicit* trade in art and cultural property⁵, an increasingly universal problem, while leaving prosperous the *licit* trade therein.

- a. They
 - i. are **not retroactive** - they apply between States Parties after their entry into force;
 - ii. cover **only objects of illicit provenance** (theft and/or illicit export);
- b. It is also in the interest of the market and trade to distinguish carefully *licit* from *illicit* trade of cultural property.

¹ As Conventions and Protocols vis-à-vis their respective States Parties. (See www.unesco.org/culture/laws/illicit)

² UNESCO also elaborated the International Code of Ethics for Dealers in Cultural Property (available under http://portal.unesco.org/culture/en/ev.php-URL_ID=13095&URL_DO=DO_TOPIC&URL_SECTION=201.html)

³ Up-dated list available under : <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E>

⁴ Up-dated list available under : <http://www.unidroit.org/english/implement/i-main.htm>

⁵ See UNESCO Convention (Art.1) and UNIDROIT Convention (Art. 2 and its Annex)

2) *Consideration for ratification* :

Both Conventions should ideally be considered for ratification and for those States that have not yet joined either, this should be done at the same time (for instance, the Governments of New Zealand and Afghanistan are currently undertaking this), to **optimize**:

- a. the political momentum achievable at national level in the fight against illicit traffic;
- b. their legal and practical implementation at national level.

3) *Protected interests* :

- a. *Any victim of theft* : restitution of *stolen* objects under the 1970 UNESCO and 1995 UNIDROIT Conventions certainly protect the dispossessed owner's interests, be it an individual, legal entity or State;
- b. *Any State Party suffering from illicit export* : The 1995 UNIDROIT Convention also protects the interest of States Parties that lose cultural property due to their *illicit export*, which often turns into definitive export (and definitive loss of the object for the country of origin and the local accessibility to scientists and the public) *inter alia* if the object is bought abroad or the exporter fears seizure in case of re-import under the exporting country legislation;
- c. This is *not* to say that the 1995 UNIDROIT Convention merely assimilates theft and illicit export; indeed the two regimes are distinct and in the latter different conditions are to be met ⁶.

4) *Legal nature*:

As they are **uniform law** international instruments ⁷, both Conventions:

- a. prevent, within their scope of application and for private law issues (such as ownership), some common features of litigation under private international law:
 - i. the complications and time-consuming exercises of determining the (foreign) applicable law finding out its content and interpreting it;
 - ii. the uncertainties in the outcome of the claim, depending on the applicable law;

knowledge of the law (generally of the country of origin) remains common practice for criminal law (such as definition of stolen property) and public law (such as definition of illicit export) issues;

- b. make **more predictable** in their outcome, **less expensive** and **less time-consuming** litigation⁸ or requests for return or restitution under the Conventions as compared to cases where the Conventions do not apply.

⁶ See in particular Art.5, 3.

⁷ Differently from private international law conventions (on the applicable law).

⁸ This technical term (carrying on a lawsuit) does not necessarily reflect requests addressed through the diplomatic channel under the UNESCO Convention (Art.7, b) ii).

II) Operational Aspects

1) Purposes and Domains:

- a. The 1970 UNESCO Convention covers both :
 - i. **prevention** of illicit traffic (setting-up proper national services⁹, adopting legal and administrative measures¹⁰, introducing an appropriate export certificate¹¹, obliging antique dealers to maintain a register recording the origin¹², public awareness arising through educational means¹³).
 - ii. **recovery phase** :
 1. restitution of stolen inventoried cultural objects¹⁴;
 2. if consistent with the laws of the State Party concerned, admitting actions for recovery of stolen objects, and cooperating in facilitating the restitution of illicitly exported objects¹⁵.
- b. Differently, the 1995 UNIDROIT Convention arriving 25 years after 1970 and assuming better national prevention schemes¹⁶, focuses on the **recovery phase** and sets uniform rules and conditions for
 - i. restitution claims on stolen cultural objects¹⁷;
 - ii. return claims on illicitly exported cultural objects¹⁸.

2) Scope (*ratione materiae*)

Both Conventions share the **same definition** (relevant importance¹⁹ and categories²⁰) of cultural property.

⁹ Art.5.

¹⁰ Articles 6, b); 7; 8 etc.

¹¹ Art.6, a.

¹² Art.10, a).

¹³ Art.10.

¹⁴ Art.7, b) ii.

¹⁵ Art.13, b) and c) ;

¹⁶ This assumption is based on the greater awareness of illicit traffic of cultural objects at the time of the adoption of the UNIDROIT Convention in comparison to 25 years before. However, practice worldwide shows a variety of national prevention schemes and degrees of tools, resources and therefore effectiveness.

¹⁷ Chapter II (Articles 3-4).

¹⁸ Chapter III (Articles 5-7).

¹⁹ Property or object "which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science". However, the UNIDROIT Convention has not retained the formula "specifically designated by each State" in Article 1, to facilitate a broader recovery of objects.

²⁰ (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine)

or of archaeological discoveries ;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manu-factured articles decorated by hand);

- a. This sets a uniform understanding of this notion and practically facilitates the work of administrations and professionals in all States Parties;
- b. The definition and categories adopted under both Conventions have proved broad enough to set a common language worldwide, and operationally are applied to the specific case not differently from what happens for most other definitions under domestic legislations.

3) *How may one claim restitution ?*

- a. The 1970 UNESCO Convention favours the international (inter-state) cooperation approach, and operates primarily through the diplomatic channel²¹, as well as courts (if consistent with the laws of the State Party concerned)²²;
- b. The 1995 UNIDROIT Convention has operational private law provisions, and restitution requests are brought before the court or other competent authority of the State Party where the cultural object is located²³. The parties may also agree to submit the dispute to another court or to arbitration²⁴.

4) *Who may claim restitution ?*

- a. Under the 1970 UNESCO Convention :
 - i. primarily a State Party through diplomatic channels²⁵;
 - ii. an individual or a legal entity when admitted by the law of the State Party²⁶;
- b. Under the 1995 UNIDROIT Convention :
 - i. A State Party or an individual or a legal entity owner in case of stolen cultural objects²⁷;
 - ii. A State Party in case of illicitly exported cultural objects²⁸.

5) *Within what time limit may one claim restitution ?*

- a. The 1970 UNESCO Convention does not set a time limit :

(ii) original works of statuary art and sculpture in any material;
 (iii) original engravings, prints and lithographs ;
 (iv) original artistic assemblages and montages in any material;
 (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
 (i) postage, revenue and similar stamps, singly or in collections;
 (j) archives, including sound, photographic and cinematographic archives;
 (k) articles of furniture more than one hundred years old and old musical instruments.

²¹ Art.7, b), ii.

²² Art.13, c).

²³ Art.8, 1.

²⁴ Art.8, 2.

²⁵ Art.7, b) ii. A different situation is considered under Art.13, d.

²⁶ Art.13, c).

²⁷ Chapter II (Articles 3-4).

²⁸ Chapter III (Articles 5-7).

- i. this is not necessarily required for requests through the diplomatic channel²⁹, the outcome of which may depend also on political circumstances;
 - ii. in the different framework of ordinary actions for recovery of lost or stolen items admitted by States Parties consistently with their laws a time limit may exist under the relevant domestic law³⁰.
- b. The 1995 UNIDROIT Convention has set clear time limits which strike a balance between the needs of legal predictability and facilitating the recovery by the original owner (case of theft) or interested state (case of illicit export)³¹.
- 6) *Consequences for the possessor if conditions for restitution under the Conventions are fulfilled :*
- a. The 1970 UNESCO Convention: the requesting State Party shall pay “just compensation” to an innocent purchaser or to a person who has valid title to that property³².
 - b. As the 1995 UNIDROIT Convention is a more recent and articulated instrument, it contributes to preventing possible abuse with presumed good faith in (non-derivative) acquisition of objects, and moralizing the art and cultural property market by setting various rules:
 - i. in case of **stolen** cultural property :
 1. The possessor of a stolen cultural object required to return it is entitled, at the time of its restitution, to payment of **fair and reasonable compensation** provided that the he/she neither knew nor ought reasonably to have known that the object was stolen and can prove that he/she exercised due diligence when acquiring the object³³.
 2. In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances³⁴.
 3. In the broader picture one should also bear in mind that, with reference to compensation, the possessor³⁵ and the claimant³⁶ may benefit from other provisions.

²⁹ Art.7, b) ii.

³⁰ In the framework of Article 13.

³¹ See Articles 3, (3-5), and 5 (5).

³² Art.7, b) ii.

³³ Art.4, 1.

³⁴ Art.4, 4.

³⁵ Art.4, 2 : Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.

³⁶ Art.4, 3 : Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.

ii. in case of **illicitly exported** objects :

1. The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reason compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported³⁷.
2. In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State³⁸.
3. In the broader picture one should also bear in mind that :
 - aa) The parties may agree to replace compensation³⁹;
 - ab) The requesting State covers the costs of returning the object without prejudice to the right to recover costs from any other person⁴⁰;
 - ac) The current possessor is not in a more favourable position than the former possessor⁴¹.

7) *Operation* of these Conventions is facilitated by integrative international tools, such as :

- a. INTERPOL offers a database of stolen cultural objects⁴².
- b. UNESCO has established a national legislation database on the protection of cultural heritage⁴³.
- c. UNESCO and the World Customs Organization have elaborated a model export certificate for cultural objects to be considered for adoption, in part or its entirety, by Member States.

³⁷ Art.6, 1.

³⁸ Art.6, 2.

³⁹ Art. 6, 3. Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State may decide:

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.

⁴⁰ Art.6, 4.

⁴¹ Art.6, 5. The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

⁴² See <http://www.interpol.int/>

⁴³ See www.unesco.org/culture/natlaws