

THE UNIDROIT CONVENTION

A SHARED VISION AND A JOINT RESPONSIBILITY

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Everybody has in mind examples 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, and not only in the Latin American and Caribbean countries. While such works are indeed at times returned to source – 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 the national rules and regulations in force fall short of providing a satisfactory defence.

The UNIDROIT Convention¹ 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.²

This contribution will confine itself to an outline of what has been done so far to ensure the effective implementation of the Convention, with a particular emphasis on Latin America and the Caribbean, to date, look at what has been achieved and explore the outlook for the future.

Efforts to date ...

Since the Convention was adopted, UNIDROIT has been at pains to respond to requests for information and at times to allay what must be called the legitimate anxieties of some.

... at governmental level

The 1995 UNIDROIT Convention seeks to establish an international co-operation mechanism involving both the sources and the destination countries 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.

In a national context, the UNIDROIT Secretariat has on occasion been contacted or invited to take part in consultations to investigate the case for or against the UNIDROIT Convention against the backdrop of national law and the national cultural environment. UNIDROIT has prepared an Explanatory Report on the Convention to assist in the understanding of the provisions.³ All the preparatory documents so as the Acts and Proceedings of the diplomatic Conference at the conclusion of which the Convention was adopted are available on the UNIDROIT website.⁴ UNIDROIT has also welcomed lawyers from Governments in Rome with its Scholarship Programme to study the Convention.⁵

Needless to say, the 1995 UNIDROIT Convention 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 of course the relationship between the 1995 UNIDROIT Convention and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and several articles have been devoted specifically to the question of how the two Conventions can complement each other⁶ but one does not replace the other. Another important relationship to consider is between the UNIDROIT Convention and the 1993 Commonwealth Secretariat's



Venezuela's Dancing Devils of Corpus Christi, element inscribed in 2012 in the Representative List of the Intangible Cultural Heritage of Humanity
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Scheme for the Protection of the Material Cultural Heritage, which would bind many States from the Caribbean.

Moreover, UNIDROIT attended a number of national and regional workshops organised by the local authorities and UNESCO (sometimes jointly with other organisations such as the Istituto Italo Latino Americano (IILA)) on the fight against illicit traffic in cultural objects. These workshops were attended by national civil servants and specialists in the field of cultural heritage. UNIDROIT has been participating in these workshops for many years now⁷ in order to present the 1995 Convention, and in the process has strengthened its links with certain countries in Latin America (among others Ecuador in 1996, Mexico City in 2006, 2009, 2012 and 2013, Buenos Aires in 2009 and 2012, Lima 2012) and the Caribbean (among others Grenada in 1997, Cuba in 2005 and Saint Lucia in 2012).

Finally, the President of UNIDROIT convened the first meeting to review the practical operation of the 1995 UNIDROIT Convention, in accordance with Article 20 of the Convention, which took place at the UNESCO Headquarters in Paris on 19 June 2012.⁸ The meeting provided an opportunity to explain which international claims mechanisms are available for cultural property outside the international instruments so as to better understand the benefits offered by the 1995 Convention mechanisms and to assess the Convention's impact beyond the number of ratifications/accessions. It also gave States a chance to exchange views on their experiences, to compare practices and to discuss any difficulties encountered in implementing the Convention. International experts made presentations to assist States Parties and not Parties to the Convention in their discussions. If several Latin American countries attended the meeting, UNIDROIT was unable to attract the countries of the Caribbean at this meeting.

... and involving the specialists

The UNIDROIT Secretariat is approaching practitioners in the art world who have both a political and a commercial case to put and the language. Yet their support is vital in persuading 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.

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, INTERPOL, UNODC, ICOM and so on. It is worth noting at this juncture that all those organisations have been extremely supportive of the UNIDROIT Convention and have been instrumental in publicising it among their members worldwide.

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. 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.

The regional workshops 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. Much emphasis is also given 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.

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?

State of implementation

The Convention was adopted in Rome on 24 June 1995 and entered into force on 1st July 1998. Thirty-three States are Parties to the Convention as of 1st August 2013.⁹ The Convention is open to ratification or accession by States which are not Member States of the Organisation (which is the case for most of the Caribbean States).

Most Latin American countries are already Parties to the 1995 Convention (Argentina, Bolivia, Brazil, Colombia, Ecuador, Paraguay and Peru,) so as some Central American countries (El Salvador, Guatemala, and Panama). Honduras has finalised the internal procedure and is about to deposit its instrument of accession with the Italian Government, Depositary of the Convention. After the regional workshop held in Saint Lucia in December 2012, the Secretariat has sought for action in the Caribbean and hope that steps are being taken. Several other States have taken the decision to accede and are working at it.

Consultations are proceeding apace in some States of destination with no fixed timetable and still less indication as to the likely outcome. 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 since their own legislation on the protection of cultural property is quite sophisticated already and relies in part on highly effective bilateral arrangements.

Some source States have complained about the weaknesses of the Conventions in this field and the fact that States of destination have not joined the 1995 UNIDROIT Convention, in particular because of the opposition of the art market. 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 (in Switzerland, in the Netherlands and in United Kingdom in particular). But on the other end, the museum world is likewise making itself heard, and ICOM, on various occasions urged all Governments to become a Party to the Convention. This kind of call has since been faithfully

reproduced in the final declarations and recommendations of the General Assembly of the United Nations¹⁰ and 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.


Another important element which may lead at more accessions to the 1995 Convention by European States is the decision taken in May 2013 by the European Commission to revise the 93/7/EEC Directive.¹¹ Many European States, although not Parties to the 1995 Convention, borrowed principles, concepts and rules from it when they transposed the Directive into their domestic legislation –, and some of its relevant provisions have now been proposed as a modification of the Directive (on time limitations and due diligence for example). The discussions are currently underway and the revised Directive should enter into force in 2015.

The use of the Convention as a benchmark for due diligence evaluation

The principle adopted in the 1995 Convention whereby payment of compensation to the acquirer would be subject to proof that he/she exercised “due diligence” at the time of acquisition (Article 4(1)), together with a large definition of “cultural object”, has been considered as the major step to fight illicit traffic in cultural objects. The “definition” of due diligence given by the Convention (Article 4(4)) has shown the influence of the 1995 Convention in national legislations, case law and in the discussions at European level regarding the revision of the 1993 EU Directive.

Some States, although not Parties to the 1995 Convention, have implemented the 1970 UNESCO Convention, going beyond the requirements of that Convention by drawing inspiration from the 1995 Convention, in particular the concept of due diligence. In fact, the Government of the Netherlands has chosen to implement the 1970 UNESCO Convention “in part on the good elements of the UNIDROIT Convention and in particular Article 4(4) of the 1995 Convention”.¹² The same is true for Switzerland.¹³

Conclusion

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 traditional knowledge of the shamans Jaguars of Yurupari, Colombia 2011 © Sergio Barlettsman, ACAP, Fundación Gaia Amazonas, 2006

Notes

¹For the text of the Convention, see <http://www.UNIDROIT.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>

²This is a point which has been amply stressed and extensively commented long ago by Professor Pierre Lalive (cf. ULR/RDU 1996-1, pp. 40-58).

³Explanatory Report drafted by the UNIDROIT Secretariat at <http://www.UNIDROIT.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf>. Ms Lyndel Prott has also published a Commentary on the 1995 UNIDROIT Convention with IAL, <http://www.ial.uk.com/UNIDROIT.php>

⁴Preparatory documents at <http://www.UNIDROIT.org/english/conventions/1995culturalproperty/study70-archive-e.htm> and Acts and Proceedings at <http://www.UNIDROIT.org/english/conventions/1995culturalproperty/1995culturalproperty-acts-e.pdf>

⁵Scholarship Programme at <http://www.UNIDROIT.org/english/legalcooperation/scholarships.htm>

⁶See, among others, some articles published by Lyndel Prott (cf. Unif. L. Rev./Rev. dr. unif. 1996-1, pp. 59-71 and Unif. L. Rev./Rev. dr. unif. 2009, pp. 215-237).

⁷For all the training courses attended by UNIDROIT since 2000 to explain the 1995 Convention, see Appendix IV of the information document prepared by the UNIDROIT Secretariat for the first meeting of the special committee to review the operation of the Convention (19 June 2012) at <http://www.UNIDROIT.org/english/conventions/1995culturalproperty/1meet-120619/dc8-cs01-03-e.pdf>

⁸<http://www.UNIDROIT.org/english/conventions/1995culturalproperty/1meet-120619/pres-e.pdf>

⁹For the list of States Parties to the Convention, see at <http://www.UNIDROIT.org/english/implement/i-95.pdf>

¹⁰The latest Resolution dates back 12 December 2012 (A/67/L.34)

¹¹93/7/EEC Directive on the return of cultural objects unlawfully removed from the territory of a Member, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:074:0074:0079:EN:PDF> (and modifications in 1997 and 2001).

¹²Explanatory Memorandum of the Dutch 1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act, p.3. Cf. new Article 3:87a of the Netherlands Civil Code.

¹³Cf. Swiss Federal Act on the International Transfer of Cultural Property (CPTA) of 2003, in particular Article 16 and 24.