

# RESEARCH ARTICLES

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## The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive<sup>1</sup>

**Abstract:** This article aims to present the two main international conventions on the fight against trafficking in cultural property, and show how the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects remedies the main weaknesses of the 1970 UNESCO Convention on the Means Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, while building on its strengths. The 1995 UNIDROIT Convention, by virtue of its international private law approach to the matter of the illegal trade in stolen or illegally exported goods, has provided the basis for European developments in the field. The international principles already established in the preparatory works to the 1995 Convention are reflected, firstly, in the wording of Council Directive

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93/7/EEC, and have been subsequently incorporated into Directive 2014/60/EU. In addition the use of the UNIDROIT Convention has become a benchmark for the evaluation of due diligence.

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## Introduction

Following the spoliations of cultural property perpetrated during World War II, the international community was ripe for paying increased attention to the safeguarding of national treasury in wartime. To prevent future diasporas of cultural property *pendente bello*, in 1954 the Convention for the Protection of Cultural Property in the Event of Armed Conflict was signed at the Hague (1954 Hague Convention).<sup>2</sup> Over the years, as a result of continuous discussions among states, various types of instruments have been brought to bear: from simple declarations to recommendations and international conventions.

Despite the variety of instruments used, it is important to focus attention on those considered the archetypes in their specific fields of action, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: the 1970 Convention)<sup>3</sup> and the later UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: the 1995 UNIDROIT Convention)<sup>4</sup>.

Yet experience shows that it is one thing to adopt an international convention and quite another to implement and enforce it. In legal terms, for a considerable period of time the international efforts to protect and safeguard national cultural heritage from plunder could be described as really only co-operation “up to a point”, with most of those involved belonging to the group of art exporting countries. The 1995 UNIDROIT Convention sets out to remedy this state of affairs, yet it continues to be the object of passionate and at times even virulent debate, often sparked by false rumours and misinformation, because many of its detractors are not really familiar with either the text or its objectives. In addition the provisions of the 1995

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<sup>2</sup> 14 May 1954, 249 UNTS 240. Importantly, the First Protocol to the 1954 Hague Convention (14 May 1954, 249 UNTS 358) places a duty upon States Parties to seize cultural property imported from occupied territories and return it at the close of the hostilities. It also introduces an early return mechanism, which provides the right to indemnity from the former occupying state to any good faith holder. Further see P.J. O’Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, Institute of Art and Law, Leicester 2000, p. 10.

<sup>3</sup> 14 November 1970, 823 UNTS 231.

<sup>4</sup> 24 June 1995, 34 ILM 1322.

UNIDROIT Convention can only be properly understood if measured against the state of the law in this area at the time of its adoption, and the benefits it brings as a complement to the 1970 UNESCO Convention.

The present article is intended to briefly present the 1970 UNESCO Convention and show the weaknesses of the text in terms of restitution and return of stolen or illegally exported cultural objects, in order to better understand how the 1995 UNIDROIT Convention built on that instrument to develop new principles, among which the due diligence test has become a benchmark for the evaluation of due diligence even beyond this Convention, in particular in the European Union (EU).

## The 1970 UNESCO Convention

The 1970 Convention was the first international instrument for the protection of cultural heritage during peacetime. It sets out important measures for preventing and prohibiting the illegal import, export and transfer of ownership of cultural property. It is symbolically built on “three pillars”: the first concerns preventive measures at the national level aimed at effectively combating illicit trafficking in cultural property; the second addresses the issue of restitution; while the third deals with cooperation among states.<sup>5</sup>

Under the first pillar, states are encouraged to undertake a number of preventive measures to combat the illicit import, export and transfer of ownership of cultural goods. The given measures include creating draft laws<sup>6</sup> and regulations and a national system for taking inventory and compiling a list of national cultural property.<sup>7</sup> The objects concerned must be “*specifically designated*” by the state and belong to one of the categories listed in Article 1 in order to benefit from the protection afforded by the 1970 UNESCO Convention.<sup>8</sup>

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<sup>5</sup> S. Delepierre, M. Schneider, *Ratification and Implementation of International Conventions to Fight Illicit Trafficking of Cultural Property*, in: F. Desmarais (ed.), *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage*, ICOM International Observatory on Illicit Traffic in Cultural Goods, Paris 2015, pp. 130-132.

<sup>6</sup> Article 5(a) of the 1970 Convention refers to the creation of draft laws and regulations “designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property”.

<sup>7</sup> Article 5(b): “To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions: [...] (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage.”

<sup>8</sup> Similarly to the 1970 Convention, the 1939 “Project for an International Convention” (*La Protection des collections nationales d'art et d'histoire. Essai de réglementation internationale*) made by the Office International des Musées (OIM) considers only objects having an archaeological, paleontological, historical or

The second pillar relates to the restitution of stolen and illegally exported cultural objects and it reaches into domestic rules governing the transfer of property.<sup>9</sup> In particular, Article 7(b)(ii) of the 1970 UNESCO Convention provides that an object of cultural property stolen from a museum or a religious or secular public monument must be returned to the state from which it was removed. Restitution can only be claimed if the object, listed in the institution's inventory, was imported after the Convention entered into effect in both of the State Parties involved. By means of the same subparagraph, "*an innocent purchaser*", or anyone who can claim a valid title to the stolen cultural property, has the right to fair compensation.<sup>10</sup> In this regard it should be noted that the Report of the Special Committee of Experts, which finalized the text, spoke of compensation being paid "*to a bona fide purchaser*", so that it seems that this should be interpreted as "innocent".<sup>11</sup>

The main thrust of the third pillar regards international cooperation to control the import, export and trade in cultural property. While the text of the 1970 UNESCO Convention was primarily designed to be implemented through national legislation, states are free to sign bilateral agreements to further extend the scope of its provisions (Article 5).

## The weaknesses of the 1970 UNESCO Convention

The 1995 UNIDROIT Convention arose from a reflection on the need for the harmonisation of private law topics touched upon in the 1970 UNESCO Convention<sup>12</sup> and beyond. Among all the issues raised concerning the 1970 UNESCO Convention, the central one was the impact of the text on the existing different rules of

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artistic interest. According to Article 1 of the mentioned draft Convention, the nature of the interest could only be evaluated by States Parties. M. Frigo, *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges*, "Recueil des Cours de l'Académie de la Haye" 2014, Vol. 375, p. 139; De Visscher Ch. et al., *Commentaire*, in: *Art et archéologie: recueil de législation comparée et de droit international*, Vol. 1, Office International des Musées, Paris 1939, pp. 88 ff.

<sup>9</sup> P.J. O'Keefe, op. cit., p. 62. See also Article 7(b)(ii) and Article 13(b) of the 1970 Convention. Under Article 13(b), (c) and (d), national services are asked to cooperate to facilitate the return of lost or stolen cultural property, enabling the rightful owner to bring an action for recovery of the object concerned.

<sup>10</sup> As argued by Frigo, the provision has a limited sphere of application referring not to the generality of the cultural property (addressed by Article 1), but only to those property referred to in subparagraph (b)(i). M. Frigo, op. cit., pp. 267, 273.

<sup>11</sup> To substantiate the position took by the Report, the Secretariat draft originally used the Latin phrase *bona fide*. However, when Article 7 was revised on the draft proposal of the United States the phrase *bona fide* was dropped, because it appeared not to be a term of art in the Common Law. P.J. O'Keefe, op. cit., p. 67.

<sup>12</sup> The final text of the 1970 Convention, as agreed by Frigo, is softened compared with the preliminary draft, the initial peremptory gives way to more flexible formulations that refer to domestic law. To name a few, Articles 5 and 10 ("as appropriate for each country") and Article 7 ("consistent with national legislation"). M. Frigo, op. cit., p. 256.

national law concerning the protection of a good faith purchaser. Albeit the provision set out in Article 7(b)(ii) was drafted with the Civil Law rules in mind, the final text, “watered down” by progressive amendments,<sup>13</sup> seems unable to precisely address the scheme of any existing system of law.

Generally, given that any form of control over the movement of cultural goods was reserved to states, the same material difficulties that existed before the entry into force of the 1970 UNESCO Convention would continue to persist until a uniform system of identification and return was ensured.<sup>14</sup>

To overcome these issues, a committee of experts was set up in 1983 to respond to the criticisms, which arose even during the drafting of this Convention. However, since 50 states were already parties to it and preparations were well advanced for its ratification by several other states, an *ad hoc* revision of the 1970 UNESCO Convention was considered to be inappropriate. Therefore the committee envisaged the concrete possibility of adopting a protocol to cover some of the most crucial issues of private law that hindered the recovery/return of cultural objects illicitly transferred.

The experts also suggested that UNESCO cooperate with the International Institute for the Unification of Private Law (UNIDROIT),<sup>15</sup> due to the expertise UNIDROIT had developed in the course of drafting the Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB) during the 1960s.<sup>16</sup>

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<sup>13</sup> Article 7 is based on the proposal included in the late United States alternative draft (which replaced the Secretariat’s proposal contained in its draft). The original Article 7 was complementary to Article 6 by requiring importing states to treat cultural property as an illegal import. P.J. O’Keefe, *op. cit.*, p. 57.

<sup>14</sup> For instance, *importing* states showed some reticence in setting rules for a restrictive regime upon the circulation of cultural goods involving amendments to existing internal laws. M. Frigo, *op. cit.*, p. 281.

<sup>15</sup> The difficulties encountered by Member States with respect to the implementation of the 1970 UNESCO Convention were discussed at the Consultation on Illicit Traffic of Cultural Property, held in Paris (UNESCO Headquarters), from 1st to 4th March 1983. On that occasion, delegates from civil law countries particularly stressed the difficulty encountered when obliging a *bona fide* purchaser of a cultural object to hand it over to a state, even against compensation. To guarantee international uniformity and cooperation on the subject, the experts adopted a number of Recommendations, one of these stating that “an expert body in private law should be encouraged by UNESCO to prepare a Convention dealing with the most difficult issue of private law which facilitated the passage of illegally acquired objects”. L.V. Prott, *A UNESCO/UNIDROIT Partnership Against Trafficking in Cultural Objects*, “Uniform Law Review” 1996, No. 1, p. 60.

<sup>16</sup> The draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables ([LUAB, 1974] “Uniform Law Review” 1975, No. 1, p. 79) contemplated the acquisition for value of movables in general, and tied in closely with two other UNIDROIT instruments, the Hague Conventions on international sale adopted in 1964 (Convention relating to a Uniform Law on the International Sale of Goods [UILS], 1 July 1964, 834 UNTS 107, Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods [ULFIS] 1 July 1964, 834 UNTS 169). In this context, and bearing in mind the aim of improving certainty in international commercial transactions, LUAB endorsed the principle of the validity of acquisition *a non domino*. This draft, which was endorsed by the UNIDROIT Governing Council in 1974, never made the grade as an international instrument for lack of consensus due to the very large number of objects covered (all corporeal movables).

In the end the idea of a protocol to the 1970 UNESCO Convention was abandoned in favour of drafting a new international private law convention under the auspices of UNIDROIT, which was adopted in 1995.<sup>17</sup>

## The 1995 UNIDROIT Convention

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects deals with the main weaknesses of the 1970 UNESCO Convention, while building on its strengths. Its scope and provisions appear clear and carefully drafted and the text is self-executing, leaving no space for fragmentary national implementations. Also, states are no longer entitled to the *electio* of cultural objects to which the new convention applies, as a state designating of an object as important is not a requirement for its protection. The ultimate objectives of the text are to expedite procedures for the restitution or return in cases of theft or illegal export of cultural goods<sup>18</sup> and, above all, to reduce illicit trafficking by encouraging gradual but fundamental changes in the behaviour of all actors in the market.

The number of objects for which there is an obligation to provide restitution, previously extremely limited according to Article 7(b)(ii) of the 1970 UNESCO Convention,<sup>19</sup> is broadened by the 1995 UNIDROIT Convention to encompass a much larger number of objects (Article 1 and Annex). Among the cultural property addressed by the 1995 UNIDROIT Convention, the text considers archaeological artefacts taken from excavations (Article 3(2)), which are not mentioned in the 1970 UNESCO Convention unless inventoried.<sup>20</sup> Article 7(b)(i) of the 1970 UNESCO Convention refers only to cultural property stolen from a museum or a religious or secular public monument or similar institution and documented in their inventories.

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<sup>17</sup> See the text of the convention on the UNIDROIT website at: <http://www.unidroit.org/instruments/cultural-property/1995-convention> [accessed: 1.12.2016].

<sup>18</sup> The 1995 Convention does not provide any autonomous definition of theft, hence it is left to the court of the state seized of the complaint to apply its own law or such other applicable law, in accordance with its rules of private international law. P.J. O'Keefe, *op. cit.*, p. 61 and L.V. Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995*, Institute of Art and Law, Leicester 1997, pp. 31-33.

<sup>19</sup> The restitution mechanism established by the Article 7(b)(ii) of the 1970 Convention applies only to cultural objects illegally exported after the entry into force of the Convention and to cultural property stolen from a museum or a religious or secular public monument or similar institution belonging to another State Party to the Convention and proven to appertain to the inventory of that institution. See: M. Frigo, *op. cit.*, p. 273.

<sup>20</sup> The inclusion of archaeological artefacts in the 1970 Convention could only be inferred through an extensive interpretation of Article 9, as was done by certain states (United States and Japan). Others regard them as covered by the obligation generated by Article 3 of the 1970 Convention (Australia, Canada). L.V. Prott, *Commentary...*, p. 75; M. Schneider, *Protection and Return of Cultural Objects – The Interplay of Law and Ethics*, in: L.V. Prott, R. Redmond-Cooper, S. Urice (eds.), *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe*, Institute of Art and Law, Buih Wells (UK) 2013, p. 127.

No reference is made to cultural property clandestinely excavated and unlawfully exported. Article 3(2) of the 1995 UNIDROIT Convention fills this *lacuna*.

Article 3(1) of the 1995 UNIDROIT Convention enshrines the principle that the purchaser of a stolen cultural object must return it, whatever the circumstances. This principle is coupled with the possibility of compensation for a buyer who can prove that he/she acted “*with due diligence*” (Article 4(1)).<sup>21</sup> Therefore the 1995 UNIDROIT Convention compels *the buyer* to check an object’s *provenance* in order to be able to obtain compensation, as he/she will be obliged in any case to return a stolen object.

At the same time, the possessor of an illegally exported cultural object is entitled to payment by the requesting state<sup>22</sup> of a fair and reasonable compensation in cases where he/she “neither knew nor ought reasonably to have known at the time of the acquisition that the object had been illegally exported” (Article 5(1) and (2)).

Once it had been decided to adopt the principle whereby the payment of compensation to the acquirer of a stolen object would be contingent upon proof that he/she exercised “due diligence” *in contrahendo*, it became necessary to explain this concept in order to offer guidance – both to possessors to enable them to know what to do and to judges in order to properly assess the possessor’s behaviour, in accordance with the principle of legal certainty. Given the widely differing interpretations between national legal systems over the concept of “good faith”, the drafters decided to avoid the term in order to ensure a consistent application of the Convention’s text and its unique terms.<sup>23</sup> They decided that the concept of “due diligence” would be a sophisticated way of dealing with the differing national laws on protection of *bona fide* purchasers. The elements of “due diligence”, listed in Article 4(4), are illustrative, as indicated by the word “including” which precedes their enumeration; hence they are not exhaustive and not alone determinative.<sup>24</sup>

<sup>21</sup> The Convention reverses the burden of proof for *due diligence*, which is no longer presumed to exist but must be proven by the possessor. This constitutes a departure from the rule in force in various legal systems which rely on a presumption of good faith, even though some civil law systems already in some instances shift the burden of proof. M. Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, “Uniform Law Review” 2001, No. 3, p. 516.

<sup>22</sup> Under Article 5(1) only a Contracting State can request the court of another Contracting State to order the return of a cultural object illegally exported from its territory.

<sup>23</sup> Article 4(1) and (4) of the 1995 Convention: “(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object. [...] (4) 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 circumstances.”

<sup>24</sup> M. Schneider, *Protection and Return...*, p. 129.



The criteria set by Article 4(4) come from a re-elaboration of the factors taken into account by Article 7(2) and (3) of the LUAB.<sup>25</sup> Elements such as “all the circumstances of the acquisition”, “the character of the parties”, and “the price paid” have to be considered together with other criteria when acquiring a cultural object. By referring to the special character of the parties, the Convention incentivizes substantial improvements in the practice of market players involved in the sector, particularly the practices of professionals such as art dealers, museums and auction houses, increasing their responsibility.<sup>26</sup>

The Convention goes further. It introduces the possibility for the dispossessed owner to bring an action before the competent foreign court to claim the restitution of a *stolen* object, while the 1970 UNESCO Convention deals with the same problem only by means of an administrative procedure and state action.<sup>27</sup> In this sense the two texts are complementary.<sup>28</sup> In cases of *illegal export*, it is only the state from which the object was illegally exported that can request a court or other competent authority to return it (Article 5(3)).<sup>29</sup>

While the 1970 UNESCO Convention makes no mention of specific prescription periods for initiating actions, but refers the question to domestic laws, the 1995 UNIDROIT Convention contains detailed rules concerning prescription periods for commencing actions for the restitution of stolen cultural property and the return of illegally exported cultural property. These actions are subject to a limitation period of three years from the time when the applicant knew the location of the object and the identity of the possessor and, generally, of fifty years from the time of the theft or the export (Articles 3(3) and 5(5)). No time limitation is set out in the 1995 UNIDROIT Convention for commencing an action in cases of specific important categories of stolen objects (archaeological objects, public collections, and sacred or communally important cultural objects belonging to

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<sup>25</sup> Article 7 of the LUAB: “(2) The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case. (3) In determining whether the transferee acted in good faith, account shall, inter alia, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor’s acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded.”

<sup>26</sup> L.V. Prott, *Commentary...*, p. 48.

<sup>27</sup> P.J. O’Keefe, *op. cit.*, p. 19.

<sup>28</sup> L.V. Prott, *Commentary...*, p. 15.

<sup>29</sup> The requesting state is required to prove the violation of its legislation prohibiting the export and to establish that the removal of the object from its territory impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community; or establishment that the object is of significant cultural importance for the requesting state.



and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use) (Article 3(4), (5) and (8)).<sup>30</sup>

## The influence of the 1995 Convention beyond ratifications – The use of the Convention as a benchmark for the evaluation of due diligence

Various instruments elaborated by UNIDROIT have provided real guidance in the areas of law they cover, and this is definitely the case with respect to the 1995 UNIDROIT Convention. In fact, some states which are not parties to the 1995 Convention, but have implemented the 1970 UNESCO Convention, are going beyond the requirements of the 1970 instrument and drawing inspiration from the 1995 UNIDROIT Convention, in particular regarding the concept of due diligence.

Beyond their mandatory implementation by the States Parties to the 1995 UNIDROIT Convention, the principles expressed in the text, especially the notion of “due diligence”,<sup>31</sup> have already been adopted or recognised by the jurisprudence of states that are not parties to this Convention, and in some cases even incorporated into national legislation, such as in the case of Switzerland (Articles 16 and 24 of the Federal Act on the International Transfer of Cultural Property of 2003, or CPTA)<sup>32</sup> and the Netherlands (new Article 3:87 of the Dutch Civil Code). These two states signed the 1995 UNIDROIT Convention but have not ratified it, mainly due to resistance from the principal representatives of their internal art market.<sup>33</sup>

<sup>30</sup> Insofar as stolen objects are concerned, Article 3(4) provides a possible limitation to 75 years or more.

<sup>31</sup> The due diligence standard, together with its criteria, are thought to “sanitise” or “moralise” the art market. The old presumption of good faith was abandoned so that a vendor can only be declared an *ipso facto* purchaser in good faith if he/she has complied with the duty of diligence in the broadest sense.

<sup>32</sup> Kulturgütertransfersgesetz [Swiss Federal Act on the International Transfer of Cultural Objects of 20 June 2003], AS 2005, pp. 1869 ff., as amended. Under CPTA of 2003, the general duty of diligence (Article 24), which obliges the transferor of cultural objects to meet certain standards of behaviour, is defined so as to meet specific cases, such as when the transferor is a dealer or an auctioneer (Article 16). See *Study on Preventing and Fighting Illicit Trafficking in Cultural Goods in the European Union*, Final Report, October 2011, CECOJI-CNRS, <http://www.europeanhistorichouses.eu/wp-content/uploads/2013/06/Study-on-preventing-and-fighting.pdf> [accessed: 1.12.2016]. See also, B. Widmer, *La mise en œuvre de la Convention de l'UNESCO de 1970 en Suisse par la loi sur le transfert des biens culturels*, in: *La Convention UNESCO de 1970 et sa mise en application: Etat des lieux et perspectives*, Colloquium organised by the Swiss Commission for UNESCO in cooperation with the Federal Office of Culture, Zurich – Saint Gallen 2011, p. 164.

<sup>33</sup> The practice of ratifying the UNESCO Convention and implementing internal legislation according to both the UNESCO and the UNIDROIT Conventions, without adopting the latter instrument, has been called “the Convention of 1970 plus option”. For instance, the Government of the Netherlands chose not to ratify the 1995 Convention, but to become party to the 1970 UNESCO Convention and to base its implementation in part on the positive elements of the UNIDROIT Convention, as explained by Professor Lee, K.G., speaker at the round table on the influence of the 1995 Convention at the First meeting of the special committee on the practical operation of the UNIDROIT Convention, held in Paris, UNESCO Headquarters on 19 June 2012.

## The influence of the 1995 Convention on Council Directive 93/7/EEC

In the early 1990s the European Union started work on a new instrument on the illicit circulation of national treasures after the establishment of the single market. Though operating under commitments of the 1970 UNESCO Convention, the drafters followed the path set out by the ten years of preparatory works of the 1995 Convention.<sup>34</sup> The latter – at the time of the *draft* Convention – served as a basis for the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.<sup>35</sup> The Directive, together with the previous Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods<sup>36</sup> (later replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008<sup>37</sup>) originally aimed to supplement the protection afforded by fragmentary national rules prior to the establishment of a single European market.<sup>38</sup>

In truth, Council Directive 93/7/EEC did not seek to combat illicit trafficking, but rather to facilitate the return of certain cultural goods illegally removed from the territory of a Member State, thereby contributing to the safeguarding of national cultural heritage.<sup>39</sup> It applied to “*national treasures possessing artistic, historic and archaeological value*” (Article 1 and Annex) unlawfully removed from the territory of a Member State (Article 2) after 1 January 1993, hence its scope of application was restricted to the cultural goods listed in the Annex. The return mechanism of these objects was supplemented, pursuant to Article 9, by the provision of compensation for careful purchasers.

Unlike the 1995 UNIDROIT Convention, which definitively reversed the burden of proof and put it on the possessor, Council Directive 93/7/EEC left it to national legislation to decide the matter (Article 9(1) and (2)).<sup>40</sup> In addition, no definition of “due care and attention” was given by the text of that Directive, which instead referred to the legislation of the requesting Member State. Actions for restitution between Member States were subject to a one-year prescription period from the time when the requesting state became aware of the location of the cultural object and of the holder’s identity.

<sup>34</sup> *Study on Preventing...*, p. 204.

<sup>35</sup> Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.03.1993, p. 74.

<sup>36</sup> Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, p. 1, as amended.

<sup>37</sup> Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), OJ L 39, 10.02.2009, p. 1.

<sup>38</sup> The Single European Act of 28.2.1986 (SEA) (OJ L 169, 29.06.1987, p. 1) provided that all internal controls had to disappear in the community on 1 January 1993 in order to establish a *single market*.

<sup>39</sup> *Study on Preventing...*, p. 204.

<sup>40</sup> *Ibidem*, p. 250.

These restrictive conditions for the exercise of Council Directive 93/7/EEC impaired its application. Furthermore, its proximity to the 1995 UNIDROIT Convention could have raised problems in those states belonging to the European Union which were simultaneously State Parties to the 1995 UNIDROIT Convention. Because of this possible conflict of laws, the 1995 UNIDROIT Convention provides explicit regulations with respect to its relationship with the internal rules of regional organisations (Article 13(3)), stating that any Contracting State, which is already a member of an organisation of economic integration or a regional body which has rules on matters governed by the Convention, can declare its intention to apply such internal rules rather than the provisions of the 1995 UNIDROIT Convention.<sup>41</sup>

Nevertheless, in practice several concrete areas were treated differently by the Directive and the 1995 UNIDROIT Convention, and thus the choice between one of the two instruments remained. In theory at least, the possibility to obtain the return of illegally exported goods was greater by means of the Convention than through Council Directive 93/7/EEC.<sup>42</sup> For instance, the Directive had a shorter time limit for commencing an action for recovery, and the categories of goods for which a Member State could request return were considerably more limited compared to provisions of the Convention.<sup>43</sup>

In 2012, the European Parliament and the Council adopted Regulation No. 1215/2012 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters (which entered into force on 10 January 2015).<sup>44</sup> According to this Regulation, the owner of a cultural object (as defined in Article 1(1) of the Council Directive 93/7/EEC) which was unlawfully removed from the territory of a Member State should be able to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such cultural object in the court of

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<sup>41</sup> This so-called “disconnection clause” was inserted to enable those states which are members of economic integration organisations or regional bodies to declare that they will apply the internal rules of these organisations or bodies, and will not therefore apply, as between these states, the provisions of the Convention when the scope of its application coincides with that of those rules. Also, the drafters thought that the use of regional agreement was a suitable way of supplementing the 1970 Convention with provisions which may be appropriate to a specific region or grouping of states. At the end of the diplomatic Conference issuing the 1995 Convention, France made such a declaration on behalf of the members of the European Union. See L.V. Prott, *Commentary...*, p. 93; M. Schneider, *UNIDROIT Convention...*, p. 556; P.J. O’Keefe, *op. cit.*, p. 93.

<sup>42</sup> *Study on Preventing...*, p. 58.

<sup>43</sup> According to Article 1 of Directive 93/7/EEC, “a cultural object is an object classified as national treasures possessing artistic, historic or archaeological value, in line with national legislation of administrative procedures within the meaning of Article 36 of the Treaty” and belonging to one of the categories listed in the Annex, or not belonging to one of these categories but forming an integral part of public collections listed in the inventories of museums, archives, libraries’ conservation collections or the inventories of ecclesiastical institutions.

<sup>44</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1.

the place where the cultural object is situated at the time the court is seized, without prejudice to proceedings initiated under Council Directive 93/7/EEC. This rule was already in place in Article 8(1) of the 1995 UNIDROIT Convention.

## The influence of the 1995 Convention on Directive 2014/60/EU

After almost two decades of its operation, Council Directive 93/7/EEC proved to have had a minimal impact in combating illegal trade in cultural goods.<sup>45</sup> Thus the European Union decided to take measures to strengthen the fight against the illicit import and export of cultural goods. Among the possible options to do so was the ratification by the Union of both the 1970 UNESCO and 1995 UNIDROIT Conventions, or shaping a Union approach towards ratification by all Member States of the 1995 UNIDROIT Convention.<sup>46</sup> These options were taken into consideration, but abandoned during the initial stages of discussions on grounds of infeasibility. In the wake of international improvements, the proposal for recasting the Directive's provisions "*in the interest of clarity*" was welcomed and implemented.<sup>47</sup>

The Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 (recast) relating to the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (UE) No. 1024/2012, incorporates, almost twenty years later, several features of the UNIDROIT Convention.<sup>48</sup>

Directive 2014/60/EU incorporates several major improvements towards a more comprehensive protection of European cultural property. Firstly, it applies to cultural objects classified or defined as "national treasures" by Member States. The previous requirement that cultural property belong to either one of the categories *ex lege* provided in the Annex of Council Directive 93/7/EEC, or to a public collection (Article 1), has been waived. Also, cultural objects no longer have to comply with thresholds related to their age or financial value in order to qualify for return.

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<sup>45</sup> Study on Preventing..., p. 202.

<sup>46</sup> "A possible abrogation could be analyzed only in a context where all Members States would become parties to the UNIDROIT Convention. In such a context, benefits of the Council Directive 93/7/EEC for the return would be less than those offered by the Convention." European Commission Staff Working Document, Impact analysis Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing the Copernicus Programme and repealing Regulation (EU) No. 911/2010, SWD(2013) 189 final, p. 128.

<sup>47</sup> References to 4.2.2. Proceedings for return (Article 5), Third report on the application of the Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State; see Third Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Directive 93/7 on the return of cultural objects unlawfully removed from the territory of a Member State, Bruxelles, 30 July 2009, COM (2009) 408 final.

<sup>48</sup> Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a member state and amending regulation (EU) No. 1024/2012 (Recast), OJ L 159, 28.05.2014, p. 1.

Secondly, because Member States and institutions encouraged alignment with the three-year prescription period provided for by Article 5(5) of the 1995 UNIDROIT Convention, the time-limit for bringing return proceedings has been extended from one to three years after the Member State became aware of the location of the cultural object and of the identity of its possessor or holder, and to thirty, in any event, after the illicit export of the object concerned (with the possibility to extend the period to seventy-five years for certain categories of objects). The extension of the previously shorter period so as to be in line with UNIDROIT's time-limit (Articles 3 and 5) aims principally at facilitating the return and discouraging the illegal removal of national treasures.<sup>49</sup>

Among the new Directive's most significant features is its reversal of the burden of proof regarding the exercise of due diligence, which is put on the possessor, as well as its elaboration of the criteria for "*due care and attention*". Both the principle and the criteria are "taken" almost word for word (with the addition of the phrase "the authorisations from removal required under the law of the requesting Member State", inasmuch as Directive 2014/60/EU applies the same criteria to illegal exports as the 1995 UNIDROIT Convention only in cases of theft), from Article 4(4) of the 1995 UNIDROIT Convention.<sup>50</sup> As a result, the 1995 UNIDROIT Convention actually ends up appearing more "indulgent" in its treatment of acquisitions of illicitly exported cultural objects than the recast of the Directive 2014/60/EU.

However, the above-mentioned "de-connection clause" described in Article 13(3) of the 1995 UNIDROIT Convention, by virtue of which "Contracting States [...] members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisation or bodies", has its *raison d'être* for precisely issues such as this. Curiously enough, as of this moment only seven EU Member States (out of 14 Member States of the European Union which are parties to the 1995 UNIDROIT Convention) have made such a declaration and will therefore apply the Directive 2014/60/EU when it comes to dealing with illegally exported cultural objects. One could ask what will happen in the other seven Member States in case of a claim for return?

<sup>49</sup> Between 2009 and 2011, the working group *Return of Cultural Goods*, set up by the EU Commission, revealed that the Member States were unanimous in feeling that the one-year period for bringing proceedings under the Directive was not sufficient. On this ground, the period for initiating proceedings has been extended for three years. *Study on Preventing...*, p. 202.

<sup>50</sup> For sake of comparison, Article 10(1) and (2) of Directive 2014/60/EU reads as follows: "(1) Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object. (2) In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances."

## Conclusions

As recognised in the Preamble of the 1995 UNIDROIT Convention, the goal of this instrument is to “contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all”. The 1995 UNIDROIT Convention is part of an efficient network in this fight,<sup>51</sup> and its implementation should be accompanied by other effective measures for protecting cultural property.

The Convention does not by itself provide a solution to all the problems raised by illicit trade in cultural property, but has initiated a process that will enhance international cultural co-operation while safeguarding a proper role for legal trading and inter-state agreements for cultural exchanges. It is therefore crucial that the private sector take an active role. The application of international conventions, especially the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, is the keystone to an effective international campaign against illicit trafficking in cultural property. It is essential to encourage states to become parties to them and to universalize these Conventions in order to create the common foundation that has proved so difficult to achieve.

The elaboration of the 1995 UNIDROIT Convention benefitted from the change of attitude of those states – both states losing objects and states acquiring objects – which wish to better protect their cultural heritage from new threats. After the adoption of this Convention, the art trade successfully pressured some governments not to ratify it and many art market states became parties to the 1970 UNESCO Convention instead. But such an evolution would not have occurred in the absence of the 1995 Convention, and the change of attitude in those states is a continuing process.

In conclusion I would offer the reminder that “a convention seeking legally binding solutions should not start from the maximum hopes of those who stand to gain, but from an acceptable minimum, through understanding and political pressures, for the alleged losers.”<sup>52</sup> The question that remains to be answered in this case is who are the winners and who are the losers?

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<sup>51</sup> See, *inter alia*, the Conclusions of the 13<sup>th</sup> Meeting of the INTERPOL Expert Group (IEG) on Stolen Cultural Property Lyon, France, 8-9 March 2016, <http://www.interpol.int/Crime-areas/Works-of-art/Conferences-and-meetings> [accessed: 1.12.2016].

<sup>52</sup> Prof. Detlev Christian Dicke, University of Freiburg (Switzerland) at the 13<sup>th</sup> Colloquy of European law on International Legal Protection of Cultural Property, Delphi, 20-22 September 1983.

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