

## **UNESCO and UNIDROIT: a Partnership against Trafficking in Cultural Objects**

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### **1. INTRODUCTION**

The subject of illicit traffic in cultural objects arouses high emotions – nor were these lacking in negotiations for the new UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Strong feelings sometimes distort the view of those affected by them: during the eight years of active negotiation various views were expressed about the relationship between UNESCO and UNIDROIT on this topic which were quite mistaken. For example, it was said by some that the initiative for a UNIDROIT Convention on the topic was a manoeuvre by “art importing” countries to weaken the UNESCO Convention. Others thought that the negotiations were a kind of extension of the UNESCO Convention at the behest of the “exporting” States. Some thought that the UNESCO Convention of 1970 and the developing UNIDROIT text were incompatible, and many were curious as to the views of UNESCO on it.

The reality was quite different to any of these assumptions. It was at UNESCO’s request that UNIDROIT took up the matter of illicit traffic in cultural movables.

Illicit traffic is an enormously complex problem. UNESCO knew this very well since it had been active against the practice since its early days.

The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention) 1954 controls the removal and illegal export of cultural property from occupied territory. There are currently 73 States Parties to the Protocol, including a number of European States with substantial art markets and collecting interests such as Belgium, France, Germany, the Netherlands and Switzerland. In view of the amount of cultural property taken in recent conflicts in Afghanistan, Cambodia, from the occupied area of Cyprus, from Iraq, Kuwait and territories once part of the former Yugoslavia, this Protocol remains highly relevant. Already this instrument raised important questions of both public and private law: indeed it was the insistence of some States on maintaining the separation between public and private law which led to the relegation of the repatriation provisions to a Protocol, rather than their inclusion in the main text of the Convention.

In 1970 the General Conference of UNESCO adopted the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 which deals with theft and illegal export generally. There are currently 82 States Parties to that Convention. During the negotiations the differences in private law between systems which protected the “good faith” acquirer

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and systems which, at least in theory, held that no good title could be transferred by a thief, could not be resolved. Yet this loophole, created by differences between legal systems, could easily be exploited by traffickers to their advantage, and to the detriment not only of owners of cultural property, but also to scholarship and systematic protection of the heritage.

Because this question of private law could not be resolved by UNESCO, which does not have a mandate in matters of national law, UNESCO could observe that, over many years, the 1970 Convention, even if every State were to adhere to it, would not resolve the problem. There are many elements in the problem of illicit traffic which are simply not directly manageable by the organizations working on illicit traffic, such as impoverished local populations looting their heritage, corruption in administrations, or the involvement of organized criminal elements. Several reports had, however, isolated aspects of private law, which, it was thought, might have a noticeable impact on the passing of illegally acquired cultural objects into the licit trade.

The most important of these aspects was the protection of a purchaser legally presumed to be *bona fide* in many systems of law<sup>1</sup>. An early draft of the 1985 European Convention on Offences Relating to Works of Art of the Council of Europe included a provision requiring restitution of cultural property after a criminal act. Restitution could be refused only where third parties had acquired rights in such objects but this was subject to the limitation that they must have been in good faith, and criteria, based on the provisions previously developed by UNIDROIT<sup>2</sup> and rather similar to those now appearing in Article 4(4) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Convention were included. This provision was, however, dropped from the final text – evidence again that mixing public and private law elements discomfited States<sup>3</sup>.

## 2. THE DEVELOPMENT WITHIN UNIDROIT

In 1982, consultants were commissioned by UNESCO to consider ways to improve national legal control of illicit traffic in cultural property. They made a number of Recommendations. One of these was that an expert body in private law should be en-

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<sup>1</sup> Chatelain, J., Means of Combatting the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC (Commission of the European Communities), Doc. XII/757/76-E (1976) 114; Fraoua, R., *Le trafic illicite des biens culturels et leur restitution* (Editions universitaires, Fribourg) 1985, 179; Rodotà, S. "Explanatory Memorandum" in Council of Europe, *The Art Trade* (1988) 8; O'Keefe, P.J. and Prott, L.V., National Legal Control of Illicit Traffic in Cultural Property (UNESCO, Paris); *Law and the Cultural Heritage: Vol. III – Movement* (Butterworths, London) 1989, 648; Reichelt, G., "Second Study Requested from Unidroit by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property and in the Light also of the Comments Received on the first Study" (UNIDROIT 1988 – Study LXX-Doc.4, Rome), 39; see also (1988) *Uniform Law Review*, 53.

<sup>2</sup> O'Keefe and Prott, study cited n. 1, 123-130.

<sup>3</sup> There is a discussion of this effort in Prott, L.V. and O'Keefe, P.J. *Law and the Cultural Heritage: Vol. III – Movement* (Butterworths, London) 1985, 676-682. The Convention has not entered into force.

couraged by UNESCO to prepare a Convention dealing with the more difficult issues of private law which facilitated the passage of illegally acquired objects<sup>4</sup>.

This Recommendation was adopted by a Meeting of Experts held in 1983 at UNESCO<sup>5</sup>. In 1984 UNESCO asked UNIDROIT to work on the rules of private law applicable to illicit traffic in cultural objects in order to complement the 1970 UNESCO Convention. UNIDROIT was familiar with the problems of unifying law concerning the transfer of movables as it had published a Draft Uniform Law on the Protection of the Bona Fide Purchaser of Corporeal Movables in 1968. UNIDROIT began by preparing two expert reports<sup>6</sup> on the subject. Subsequently, three meetings were held, in 1988, 1989 and 1990, of a Study Group of Experts who prepared the text of a Preliminary Draft. This Study Group of Experts comprised legal experts from various legal systems and from "exporting" as well as "importing" countries, including experts with special experience in issues of illicit traffic and legal trade in cultural objects, and included two consultants to UNESCO.

The text which the experts prepared was studied at four sessions of a meeting of governmental experts held in Rome in May 1991, January 1992, February 1993 and September-October 1993. The final text was adopted at the Diplomatic Conference held at the invitation of the Italian Government in Rome from 7-24 June 1995. UNESCO was closely involved in all of these negotiations, which it attended as an Observer. UNESCO's interest was to see that any instrument resulting from UNIDROIT's efforts remained compatible with the UNESCO Convention, to reassure its Member States that the 1970 UNESCO Convention would continue to be applied, to encourage them to take part in the work underway within UNIDROIT and to provide its experience and information on the illicit trade for the benefit of the participants. It is fair to say that UNESCO had a key role in the discussions, firstly because of its experience as the only international organisation with a Convention of world-wide application on the topic and secondly, because it represented a wide range of interests, since its Member States included those with major problems of loss of heritage, others with long traditions of collecting and dealing, and yet others which had both.

### **3. A COMPARISON BETWEEN THE UNESCO AND UNIDROIT CONVENTIONS**

Although directed at the same problem, it is evident that there are differences between the texts which are worth examining.

#### *Definition of cultural objects*

The categories of cultural objects covered by the two Conventions are exactly the same (the definition in the Hague Protocol is expressed in more general terms, but is basically similar). Care has been taken to ensure that the categories of cultural objects

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<sup>4</sup> Prott and O'Keefe, study cited n. 1, 155-130.

<sup>5</sup> Consultation on Illicit Traffic of Cultural Property (Paris, 1-4 March 1983) UNESCO Doc. CLT/CH/CS.51/4 Recommendation 4.

<sup>6</sup> Reichelt, G., "International Protection of Cultural Property" (1985) *Uniform Law Review* 43; "International Protection of Cultural Property (Second Study)" (1988) *Uniform Law Review*, 53 – study cited n. 1.

listed in the UNIDROIT Convention were exactly the same as those in the 1970 UNESCO Convention so that the two Conventions could work together and States could become party to both.

However, there is an important difference in the way that the two Conventions operate. The UNESCO Convention is basically founded on a philosophy of government action. It therefore requires cultural objects to have been "designated" by the State requesting return.

This left a private owner without recourse if the State had not "designated" the object concerned or if the State did not wish to take action. There are many countries where political philosophy strongly endorses minimal government action, especially in cultural matters, preferring to leave maximum liberty to citizens to organise their affairs in their own way. This meant that States with this political philosophy, which either did not designate cultural objects at all, or designated an extremely small number, had little incentive to become party to the UNESCO Convention since they could not see their museums or private citizens receiving much benefit from it.

The UNIDROIT Convention, being a scheme under private law, is largely dependent on private action and reflects this in the definition, for it does not require that a cultural object be "designated" by the State for it to be covered by the Convention. Accordingly cultural objects stolen from private homes, from all kinds of religious buildings, from private collections which are not registered with the State and from traditional communities, can all be claimed back, even though the State has neither registered nor designated them.

#### *Scope of Convention*

At the time when the UNESCO Convention was drawn up in 1970, the question of its scope gave rise to serious problems. According to Article 3 of that Convention

"The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."

This was interpreted by a number of States as requiring the return of all designated stolen cultural objects, and all designated illegally exported cultural objects. States which had historically had a large trade in cultural objects were unwilling to accept such a broad scope. The United States, which was anxious to achieve a Convention which it could sign, managed to find enough support to ensure the insertion of Article 7, which provided a specific procedure for the return of designated stolen cultural objects only where they belonged to "a religious or secular public monument or similar institution" and were "documented as appertaining to the inventory of that institution" As far as illicit export was concerned, general measures would be taken to discourage museums from acquiring illegally exported cultural property (Art. 7) and, according to Article 9, specific emergency action would be taken in certain cases. The United States implementing legislation has provided for import bans in such circumstances, but the State concerned has to prove that there is a specific danger. The bans are for a limited period of time and, with one exception, for a particular type of cultural object from a particular area. Such bans have been introduced at the request of Bolivia, El Salvador, Guatemala, Peru and Mali.

In implementing these restrictive provisions of Articles 7 and 9 the United States has given no effect to Article 3 which one commentator regarded as "mysterious"<sup>7</sup>.

Certain other States with important art markets have not so far become party to the UNESCO Convention. One aspect of their reluctance to do so seems to have been unwillingness to accept the broad interpretation of the scope of the Convention based on Article 3. It should be noted though that Australia and Canada, both of whom have art markets, have been prepared to return all stolen and all illegally exported cultural objects and have so provided in their implementing legislation.

Against this background the provisions on the scope of the UNIDROIT Convention are particularly interesting and important.

Much had happened in the intervening 25 years. In the first place a tidal wave of theft of cultural objects had swept over wealthy as well as poorer countries. The losses from museums, private collections, country houses and churches, even in countries which had traditionally seen themselves as "art market" States, had become so serious that they were prepared to consider more drastic action in respect of stolen cultural objects: in fact to accept that all such stolen cultural objects should be returned. This change was also partly due to a change of attitude in these countries engendered by the 1970 UNESCO Convention and UNESCO's work to sensitise the populations of those countries to the enormous damage to humanity's heritage by removal of cultural objects from their context. Another factor was the efforts of UNESCO, of ICOM (International Council of Museums) and of informed professionals such as archaeologists and anthropologists, to illustrate the ways in which stolen objects were filtering into the licit trade, thus implicating well-meaning collectors and museums in the damage. The Study Group of Experts thus found considerable support for provisions that would create a duty to return all stolen cultural objects found in international trade. This rule is now clearly stated, beyond any possibility of misinterpretation, in Article 2(1) of the UNIDROIT Convention:

"The possessor of a cultural object which has been stolen shall return it."

However the situation was different in the case of illegally exported cultural objects. Many States with vigorous art markets had never enforced the export controls of other States, these being regarded as foreign public laws, and much legal opinion in 1970 supported the view that a State was not required in its courts to give effect to foreign public laws. The view was also clearly voiced in the United States at the time of the drafting of the 1970 UNESCO Convention, that some States forbade the legal export of all cultural objects from their territory, and recognition and enforcement of such laws would cut off the legal trade completely<sup>8</sup>. They were not prepared to accept such a situation.

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<sup>7</sup> Bator, P.M., "An Essay on the International Trade in Art", 34 *Stanford Law Review* 275, 377.

<sup>8</sup> See for example the views of Abramson, R.D. & Huttler, S.B., "The Legal Response to the Illicit Movement of Cultural Property", 5 *Law and Policy in International Business* (1973) 972; Bator, P.M., article cited n.6 and Merryman, J. and Elsen, A.E., "Hot Art – a Re-Examination of the Illegal International Trade in Cultural Objects" in International Institute of Higher Studies in Criminal Sciences, *The Penal Protection of Works of Art* (1983) 151.

However by 1995 there was again a considerable change in this view. Firstly, a number of legal developments had led, in several countries, to the recognition and application of certain foreign public laws<sup>9</sup>. Secondly, although representatives of "art market" States made it clear that they were not prepared to enforce laws which totally banned any export whatever, they were prepared to consider applying bans to those categories of objects which caused the most serious evident damage to the cultural heritage. Thirdly, during the course of the expert meetings on the UNIDROIT Convention, the European Union adopted a Directive and Regulation on the subject. It seemed, therefore, appropriate to re-examine attitudes towards enforcement of export control laws for countries outside the European Union.

How to describe the limited group of cases where export control would be enforced was a matter of some difficulty. The Study Group set out a set of interests which all States recognised should be protected. This statement, though it formed the basis of intense scrutiny at every subsequent discussion of the text, was in fact subject to only minimal change in the final version. Article 5(3) now provides for the return of an illegally exported cultural object if the requesting State establishes that its removal "significantly 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 establishes that the object is of significant cultural importance for the requesting State."

In comparison to the 1970 UNESCO Convention, therefore, the principle of return of all stolen cultural property (as many interpreted Article 3 of the UNESCO Convention) has been unambiguously adopted, a much wider class of objects than those returned by a State such as the United States which would only apply the Convention procedures to return objects which fell within Article 7(b) of that Convention. The UNIDROIT Convention clarifies a restricted class of illegally exported cultural objects which will be returned which is clearly narrower than the broad interpretation of Article 3 of the UNESCO Convention, but much wider than those objects covered by Articles 7 and 9 of the UNESCO Convention. Since no State with a major international art market had ever accepted the obligation of Article 3 as to all illegally exported cultural objects, this represents a considerable advance in practice.

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<sup>9</sup> Swiss Federal Law on Private International Law 1987; German Federal Law for the Reorganization of Private International Law 1986. See also the EEC Convention on the Law Applicable to Contractual Obligations (Rome) 1980 (Art. 7). For a full discussion of these changes see Prott, L.V., "Problems of Private International Law for the Protection of the Cultural Heritage", 217 *Recueil des cours* (1989-V) 282-300.

*Products of Clandestine Excavation*

A specially worrying group of cultural objects were those from clandestine excavations.

The interpretation of the 1970 Convention which restricted its provisions on return to inventoried objects stolen from a museum or similar institution (Art. 7(b)(ii)) clearly does not include objects from archaeological sites which, being clandestinely excavated, are not inventoried. Article 9 provides that a State "whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials" may call on other States Parties. The United States interpretation of this article has enabled protection of archaeological objects such as those from Mali, from Siphan in Peru and from Peten in Guatemala. Countries such as Canada, which return all cultural objects illegally exported from other Contracting States, would return products from illegal excavations, provided, of course, adequate proof can be brought of their origin and date of excavation.

After much discussion and many different proposals, the UNIDROIT Convention has regulated this matter in two ways. Firstly, Article 3 of the Convention states that "a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place". Secondly, the provisions of Article 5(3)(a), (b) and (c) clearly apply to objects from archaeological sites. Depending on the proof which can be brought, therefore, actions for the return of objects from clandestine excavations can be brought either according to the provisions on stolen objects, or those on illicit export.

Proof that an object has been clandestinely excavated may be difficult; proof that it has been illicitly exported may be simpler (e.g. by the mere fact that no application for an export certificate has been recorded).

*Procedure for claims*

While the Protocol to the Hague Convention gave no details of how claims could be formulated, it is clear that they would normally expect to be on a government to government basis. The UNESCO Convention provided for action by a Contracting State "at the request of the State Party of origin" and that requests for recovery and return should be made "through diplomatic offices" (Art. 7(b)(ii)).

The UNIDROIT Convention operates quite differently. It provides for a claim to be brought before a court or other competent tribunal (the latter phrase was included to cover certain administrative units which in some countries have been given power to decide on such claims). This means that a private owner may make use of the normal legal channels available in the country where the object is located in order to seek a court order for the return of a stolen object, and a State may take similar action for the return of an illegally exported cultural object.

*Time limitation of claims*

The question of time limitation of claims has always been a difficult one. On the one hand, States which were losing cultural property, especially where it was regarded as State property and therefore as inalienable and imprescriptible, have long regarded it

as unacceptable to exclude claims after a certain lapse of time. Some of these States do not in fact have the concept of time limitation of claims in their legal system.

On the other hand States with European style legal systems have a strong ideological commitment to time limitations on claims. In the first place, they regard such limitations as essential to ensure security of transactions, which can otherwise be called into question at any time, even in the remote future. Secondly, they believe that it works injustice to have to prove title many years after the original transaction, when documents have been lost and witnesses have died. For both these reasons, they believe that there should be a rule of "quiet title" after a certain lapse of time.

The Hague Protocol lays down no rule as to time limitations on claims, and at least one commentator has suggested that there is no such limitation<sup>10</sup>. Theft and war losses are, however, seen by most as a special case. The 1970 UNESCO Convention includes no rule as to time limitation for claims. However, each State Party implements the Convention in its own way. For those States which have done so by establishing customs offences as to illegal import (Australia, Canada, the United States), their own national rules as to time limitations on actions for customs offences would normally apply.

During the negotiations on the UNIDROIT Convention, a number of States with an important trade in cultural objects made it clear that some form of time limitation on claims would have to appear in the text if the Convention were to be acceptable to their Governments. The "exporting" States naturally wished these periods to be as long as possible.

A complex formula was finally reached after difficult and last-minute negotiations at the Diplomatic Conference. This can now be found in Article 3(3)-3(6) (stolen cultural objects) and Article 5(5) (illicitly exported cultural objects).

#### *Duty to return*

The Hague Protocol requires a Contracting State "to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory . . . either automatically upon the importation of the property or, failing this, at the request of the authorities of that territory" (Art. I(2)). At the close of hostilities the Contracting State is to return it "to the competent authorities of the territory previously occupied" (Art. I(3)).

The UNESCO Convention 1970 requires the State Party to the Convention "to take appropriate steps to recover and return any such cultural property" (Art. 7). In pursuance of this obligation, the United States authorities have seized certain property which has been imported into that country in defiance of an export ban. This seizure is notified to the country from which the cultural object came, and in several cases negotiations between the importers and the State of export have led to the return of the cultural property to that State. Canada has prosecuted a number of cases of illegal import under its implementing legislation and certain materials have been returned to countries of export. Such actions require a degree of commitment of the countries which are taking action against their own

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<sup>10</sup> Toman, J., *La protection des biens culturels en cas de conflit armé*, (UNESCO, Paris) 1995, 374.

citizens and others for the benefit of the countries of origin – such actions require financial and professional resources and are not always successful.

The UNIDROIT Convention provides that an owner (in the case of a stolen cultural object) or a requesting State (in the case of an illegally exported cultural object) may bring a claim before a court or other competent body for the return of the cultural object. This puts a responsibility on a Contracting State to provide for such a claim by legislation where it does not already exist and on the claimant to bring the necessary procedures for recovery. Once procedures for such claims are enforceable in the domestic law of a Contracting State, that State has to do no more than ensure the normal working of the procedure and the enforcement of decisions.

This provision is reassuring for States which have art markets with a very large volume of trade, who feared that the obligations under the UNESCO Convention 1970 might involve them in multiple and very expensive procedures on behalf of other States. However, it has caused concern to States which are losing large amounts of cultural property to such markets, since many fear that they will not have the financial resources to bring the claims themselves. The question of making adequate provision for such States in order to pursue their legal remedies is one on which UNESCO and UNIDROIT will be consulting to find solutions.

#### *Compensation and Diligence*

A major issue for all three instruments on recovery of cultural objects has been the rule in a number of legal systems which protect an acquirer of movable property who is a “good faith” purchaser. According to this rule, found in Article 2279 of the French Civil Code and in a great many other Civil Codes, “possession represents title”. Thus, even if goods were stolen, the original owner could not require that they be returned.

This rule does not apply in all systems, e.g. not in most English-speaking countries where a good title cannot be acquired to stolen goods (except in some exceptional cases created by statute). However the importance of the rule allowing the acquirer to achieve a good title to stolen goods in many countries has always created an obstacle to the return of cultural objects.

The Hague Protocol provided that the Contracting State whose duty it was to prevent the exportation of cultural property from the territory occupied by it “shall pay an indemnity to the holders in good faith of any cultural property which has to be returned”.

The 1970 UNESCO Convention provides that “the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title” (Art. 7(b)(ii). This provision was inserted to meet the concerns of States whose existing law protected the title of a *bona fide* purchaser.

However, once again, much had changed since 1970 by the time the drafters of the UNIDROIT Convention began work. It had become recognised that the protection of the *bona fide* purchaser after a very short period (3 years in France), or immediately (Italy), together with the presumption in favour of *bona fides* in many legal systems, facilitated the passing of illegally acquired cultural objects into the licit trade. This was the more so since there was a general practice of not revealing the provenance of objects and of purchasers not making inquiries. For the specific case of cultural objects, therefore, most

States which had traditionally protected the *bona fide* purchaser were prepared to change their law.

Nevertheless some States felt that change in such a rule might involve constitutional problems since it was such a fundamental concept and that it would be politically very difficult to change unless provision was made for compensation. For this reason Article 4(1) of the UNIDROIT Convention does provide for a possibility of compensation, but strictly limited to those acquirers who made careful efforts to avoid acquiring stolen cultural property (Art. 4(4)).

#### *Preservation of more beneficial rules*

Those States which do not recognize title of a possessor, even "bona fide", to stolen objects, already had a rule which was more protective of cultural objects. To restrain the illicit trade the best rule would be to require the return of the cultural object. The rule that stolen and illicitly exported cultural objects should always be returned, and that no compensation would be payable, would clearly force collectors and dealers to take care not to acquire cultural objects of suspect provenance, and should thus help prevent the transit of illegally acquired cultural objects into the illegal trade.

In developing the rules of the UNIDROIT Convention it was determined that it should embody the minimal protective rules possible to achieve in 1995, but that States which already had more advantageous rules should retain them. This question had not been faced in either 1954 or 1970; but the UNIDROIT Convention clearly provides that a Contracting State may apply rules more favourable to the restitution or return of stolen or illegally exported cultural objects than provided for by the Convention. Countries which do not require compensation for the return of stolen cultural objects will, therefore, act fully in the spirit of the Convention in continuing to apply those rules.

#### *Retroactivity*

Neither the 1954 Hague Protocol, nor the UNESCO 1970 Convention, nor the UNIDROIT Convention are retroactive: i.e. they do not apply to cases which occurred before the entry into force of the legal instrument concerned. There had never been, at any time in the preparation of the procedures to draw up the UNIDROIT Convention, any prospect of starting negotiations for, let alone achieving, a convention which had retroactive effect.

The normal rule of international law is that treaties are not retroactive and an express provision to this effect is not necessary (there is none in the 1970 UNESCO Convention, which is clearly accepted as non-retroactive).

However, early versions of the UNIDROIT text included an express non-retroactivity clause. The omission of this clause at a later stage aroused the suspicions and misinterpretations of dealers, who suggested that the Convention was therefore intended to be retroactive. The omission of the clause had in fact been in response to concerns by the "exporting" States that the express non-retroactivity clause might be read by their national publics as legitimising prior takings. As many of those countries had lost their most important cultural property by war, punitive raid, or colonialism before 1995, such a possible interpretation would put them in a very difficult position.

The problem was solved by including Article 10. Paragraphs 1 and 2 specify non-retroactivity; paragraph 3 makes it clear that the status of prior transactions has not been changed by the adoption of the new Convention.

*Public law – private law*

The 1970 UNESCO Convention, like the 1954 Hague Protocol, provides a number of obligations of an administrative nature for Contracting States. In the case of the 1970 Convention, for example, States are required to establish national services for the protection of cultural property (Art. 5), to set up an export control system (Art. 6), to prohibit certain imports (Art. 7(b)(i)), to impose penalties (Art. 8) and to control trade in cultural property (Art. 10(a)).

Although some proposals were made during negotiations for the UNIDROIT Convention to require the establishment of administrative units or to create administrative duties beyond those which would normally apply in support of the courts or other competent bodies in the normal course of their resolution of private claims, the final text has not retained them, and is clearly limited to matters of private, not public, law.

#### **4. THE UNESCO AND UNIDROIT PARTNERSHIP**

It can be seen that careful consideration has been given to compatibility between the two Conventions. The difference between the government to government obligations and private law actions is reflected in the respective definitions. The different interpretations as to the scope of the 1970 Convention have been avoided in the UNIDROIT Convention by making it clear that it applies to all stolen cultural objects and a more restricted class of illegally exported cultural objects, assessed according to certain criteria. Special rules have been developed in the UNIDROIT text on the products of clandestine excavation, which should avoid disputes as to whether they are to be regarded as “stolen” or not. The government to government action which is provided in the UNESCO Convention is now complemented by the right of an individual owner to sue directly in a foreign court for objects stolen from him or her – a suit for which special rules limiting the right of compensation have been agreed. The difficult question of the time limitation of claims, which had not been resolved in the UNESCO Convention, is now, after very difficult negotiations, the subject of very precise rules in the UNIDROIT text. Whereas the UNESCO Convention speaks of “just compensation to an innocent purchaser or . . . a person who has valid title”, the UNIDROIT Convention establishes clear criteria for diligent acquirers and limits compensation to them. While countries which recognized the title of an original owner over that of someone whose possession derived from a theft could make a reservation to the UNESCO Convention in order to preserve that rule (as did the United States), it is clearly specified in the UNIDROIT Convention that rules more favourable to the restitution or return of cultural property may be applied. The UNIDROIT Convention includes an express provision on non-retroactivity and another making clear that prior illegal takings are not thereby legitimised.

Finally, the UNIDROIT Convention contains none of the public law provisions of the UNESCO Convention, and, while the UNESCO Convention does not deal with the jurisdictions of the courts or other appropriate authorities, the UNIDROIT Convention

creates an additional source of jurisdiction in private law enabling a claimant to bring a case in a State where an object is located and not only in the State of the domicile of the defendant. While the UNESCO Convention passed over controversial differences in legal systems in silence, thus giving rise to varying interpretations, the UNIDROIT Convention has grappled with them and has achieved rules which could not have been reached in 1970. From this it can be seen that UNESCO is satisfied that the new Convention will be complementary to the UNESCO Convention and that its precise and hard-won text should reassure States which remained aloof from the UNESCO Convention because they felt some of its provisions to be ambiguous.

UNESCO initiated the UNIDROIT project and has supported it, financially in the early stages and by participation in the later ones. It reported back consistently on progress of the negotiations to the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, at whose biennial sessions members of the UNIDROIT Secretariat participated. It translated the draft UNIDROIT text which was put to the Diplomatic Conference into Arabic, Chinese, Russian and Spanish<sup>11</sup>. At the last General Conference of UNESCO in October-November 1995, it reported on the success of the negotiations and included the final text of the Convention in its two original (English and French) versions and the four other languages of UNESCO.

UNESCO and UNIDROIT plan to continue collaborating in the work against illicit traffic. UNESCO holds useful material on national laws controlling export of cultural property and has published a summary of them<sup>12</sup>. At the request of the UNIDROIT Secretariat it will be placing this material at its disposal for the establishment of the planned UNIDROIT data base on national legislation. Members of the UNESCO Secretariat present information on the relationship between the two Conventions at the regional training sessions on the prevention of illicit traffic which it holds at regular intervals. It informs its Member States of the UNIDROIT Convention and encourages them to become parties to it. In its work with the media it emphasises the importance of this latest step in the fight against illicit traffic, and it participates in national information days and discussion sessions now taking place in a number of countries which are considering one or both Conventions.

It is also fair to say that, as a result of the work of UNIDROIT on illicit traffic and of UNESCO's publicity of it, many States which were not aware of the work of UNIDROIT on the harmonization of private law have now become aware of how essential this work is. UNIDROIT's long experience in collecting national laws and decisions will prove an invaluable adjunct to UNESCO's work in this area. The Secretariats will continue to exchange information and ideas on how to improve the participation in and effectiveness of these two Conventions.

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<sup>11</sup> Although these four languages are not official versions of the Unidroit Convention, they were provided in the other four languages of UNESCO in order to widen public knowledge and understanding of the text.

<sup>12</sup> Handbook of National Regulations concerning the Export of Cultural Property (UNESCO, Paris) 1988.

### *A UNESCO / UNIDROIT Partnership*

The close partnership between these two Organisations on this issue for more than ten years is an example of how two international organisations, with different mandates and perspectives, can unite to tackle a complex, damaging and critical situation to benefit the heritage of all.

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#### *Résumé*

*C'est à la demande de l'UNESCO qu'UNIDROIT a entrepris les travaux préparatoires qui ont mené à l'adoption de sa Convention sur les biens culturels volés ou illicitement exportés. L'article ci-dessus explique en quoi la coopération exemplaire entre ces deux organisations a permis de compléter le système conventionnel de l'UNESCO de protection du patrimoine culturel (en particulier les Conventions de 1954 et de 1970), et passe en revue les points essentiels de convergence entre ces différents instruments.*

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