The 1995 UNIDROIT Convention

An indispensable complement to the 1970 UNESCO Convention
in the protection of cultural heritage

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Sub-regional Symposium for the
Prevention of Illicit Traffic in Cultural Heritage in Southeast Asia, UNESCO Bangkok

19-21 November 2014
"Protecting, promoting and transmitting heritage"

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Strategic Objective 7 of the UNESCO Medium-Term Strategy (2014 – 2021) (Doc. 37 C/4)

“This will include providing assistance in the context of the heritage Conventions, enhanced through the recently created monitoring mechanisms under the 1970 Convention, which have demonstrated UNESCO’s enduring relevance in working to protect and prevent the pillage and illicit trafficking of cultural property that violates the expression of a community’s cultural identity.” (§ 69)
Preserving and promoting ASEAN cultural heritage
The ASEAN Declaration on Cultural Heritage, Bangkok, July 2000

1. National and Regional Protection of Asean Cultural Heritage (primary duty of States to identify and protect its cultural heritage; to guarantee such protection, each country shall formulate and adopt ... legal measures; definition of cultural heritage)

2. Protection of national treasures and cultural properties

8. Advancement of cultural heritage policy and legislation

13. Development of national and regional networks of Asean cultural heritage (inventories, databases...)
10. **Prevention of the Illicit Transfer of Ownership of Cultural Property**

ASEAN Member Countries shall exert the utmost effort to protect cultural property against theft, illicit trade and trafficking, and illegal transfer. As parties to this Declaration, ASEAN Member Countries shall cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site, or similar repositories, whether the stolen property is presently in the possession of another member or non-member country.

ASEAN Member Countries are urged to take measures to control the acquisition of illicitly traded cultural objects by persons and/or institutions in their respective jurisdictions, and to cooperate with other Member and non-Member Countries having serious problems in protecting their heritage by properly educating the public and applying appropriate and effective import and export controls.
ASEAN-Committee on Culture and Information (COCI) work program

Protecting the Cultural Heritage

**Objectives**

- Develop guidelines suitable to ASEAN to inform the development of national legislation
- Develop / modify national legislation to protect and preserve the cultural heritage of each country

**Actions**

- Encourage development of complementary legislation in each country that recognizes and affords protection of significant cultural heritage
- Undertake an assessment and provide training in heritage aspects of international conventions as part of scenarios planning
UNIDROIT

✓ **Acronym** - International Institute for the Unification of Private Law

✓ **Intergovernmental organisation** - HQ in Rome, founded in 1926

✓ **63 member States** (Indonesia)

✓ **Fundamental objective** - “harmonising and co-ordinating the private law of States ... and prepare for the adoption by various States of uniform rules of private law”

✓ **UNIDROIT** - over **eighty** studies and drafts prepared (many resulted in international instruments)
UNIDROIT Headquarters 2013
Protection of cultural property - A shared vision and a joint responsibility

UNESCO

UNIDROIT

WCO

INTERPOL

UNODC

ICOM

and other NGOs

National legislation

Bilateral agreement

International convention

Code of ethics
International claims for the restitution and return of cultural objects outside the framework of international conventions

International claims for the restitution and return of cultural objects within the framework of the UNIDROIT Convention
International claims for the restitution and return of cultural objects outside the framework of international conventions

- claims by the owner victim of theft
- claims by a State in the event of illegal export
Claims by the owner victim of theft

- Interests of trade: protection of the good faith acquirer
- Interests of the owner: time limitation to claim as from identification of the acquirer
- Intermediary system: time limitation to claim as from the day of theft

Conflict between the dispossessed owner and the good faith acquirer
Law applicable to claims by the owner

Issues of ownership depend on the law of the place where the object is situated but at which moment in time?

- on the day of the claim
- on the day when the object was acquired
- on the day when the object was stolen
No unification of national laws = uncertainty of the result
Claims by a State in the event of illegal export

Principle
No extraterritorial recognition of the national laws prohibiting export

But new trends in doctrine and caselaw
National export law – no compulsory recognition abroad
The starting point – the foundations of a genuine international law of cultural property and in enunciation of certain values and principles

But with some recognised weaknesses for restitution - it raises a number of important private law questions such as its impact on the existing rules of national law concerning the protection of the good faith purchaser, without solving them because it refers the solution to national legislations

The 1970 Convention needs an implementing legislation – it seems that many States have not enacted specific legislatives measures to implement the Convention
1970 UNESCO Convention

- Prevention
- Restitution

International Cooperation
UNIDROIT has brought a new piece to the “mosaic” at the request of UNESCO

Private law aspects of the protection of cultural heritage

protection of the good faith acquirer, time limitations, court jurisdiction...
Careful compatibility and complementarity between the 1970 UNESCO Convention and the 1995 UNIDROIT Convention

Compromise
UNESCO 1970 (art. 1) and UNIDROIT 1995 (art. 2) share the same definition (importance and categories)

Article 2

.... cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

An important difference

objects must not be “specifically designated” by the State to benefit from the protection given by the 1995 Convention.
Two procedures

- **Restitution** of stolen cultural objects
- **Return** of illegally exported cultural objects
The restitution of stolen objects

UNESCO 1970

Article 7(b)(ii)

- Restitution of cultural property **stolen in a museum** or a religious or secular public monument or similar institution ...

- Provided that **such property is documented as appertaining to the inventory** of that institution

- States Parties undertake to take appropriate steps to... **return** any such property ... provided that the requesting State shall pay **just compensation** to an innocent purchaser...
The restitution of stolen objects
UNIDROIT 1995

The principle

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

Two accessory rules

› Time limitations to claim

› Right to payment of a reasonable compensation for the good faith acquirer
Right to payment of a reasonable compensation for the “good faith” acquirer

Notion existing in the 1st Protocol to the 1954 and 1970 UNESCO Conventions but no criteria (national law where good faith is often presumed)

UNIDROIT – severe conditions to admit “good faith”

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” (art. 4(1))
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,
- whether the possessor consulted any other relevant information and documentation which it could reasonably have obtained,
- and whether the possessor consulted accessible agencies took any other step that a reasonable person would have taken in the circumstances.
The return of illegally exported cultural objects

UNESCO 1970

The Convention contains no specific measures concerning the obligation for States to conform to other countries’ export laws

Art. 7(a): take measures to prevent museums from acquiring cultural property which has been illegally exported ...

Art. 9: in case of danger for the archaeological heritage States Parties undertake to participate in a concerted international effort to carry out the necessary concrete measures, including the control of exports ...

Art. 13(b): cooperation in facilitating the earliest possible restitution of illicitly exported objects to its rightful owner

...
The return of illegally exported cultural objects

UNIDROIT 1995

The principle

- Removal of the object … contrary to the law regulating the export of cultural objects (Article 5(1)), and

- The export significantly impairs a scientific or historic interest, […] or the object is of significant interest for the requesting State (Article 5(3))

The conditions for return

- Time limitations
- Compensation or other possibilities
Any State Party ..., whose cultural patrimony is in jeopardy from pillages of archaeological or ethnological materials may call upon other States who are affected (bilateral agreements)
Bilateral agreements

USA - Cambodia

- 1999 Emergency Action
- 2003 Bilateral Agreement
- 2003 Designated List
- 2008 Amended Extension
- 2008 Designated List
- 2013 Amended Extension

Belize, Bolivia, Bulgaria, Cambodia, Canada, China, Colombia, Cyprus, El Salvador, Greece, Guatemala, Honduras, Iraq, Italy, Mali, Nicaragua, Peru
Agreement between the Government of the Kingdom of Thailand and the Government of Cambodia

to combat against illicit trafficking and crossborder smuggling of movable cultural property and to restitute it to the country of origin

(14 June 2000)
5. The Participants will endeavor to identify and address common concerns regarding ASEAN-China cultural cooperation relative to multilateral and international conventions.
Illicit excavation = theft

......, 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 (Article 3(2))

No time limitation to action

[...] a claim for restitution of an object forming an integral part of an identified monument or archaeological site [...] shall not be subject to time limitations other than a period of three years [...]

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Preamble

DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, ...

Article 3(8)

... a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

Article 5(3)(d)

... the removal of the object from its territory significantly impairs one or more of the following interests:
(d) the traditional or ritual use of the object by a tribal or indigenous community,

Article 7(2)

the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.
No retroactive application

The Convention only applies to objects stolen or illegally exported after its entry into force

BUT

it *in no way* confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention

*nor* limits any right or claim outside the framework of the Convention for the restitution or return (bilateral agreement, agreements between institutions, UNESCO Intergovernmental Committee ...)
A shared vision and a joint responsibility- the UNIDROIT Convention

✓ An achievement which is solid and certain (best possible compromise on common, minimal legal rules)

✓ A base for the future (use of the Convention as a benchmark for due diligence evaluation)

A strong influence on national legislations and on case law also in countries not Parties to the Convention
Clause inserted in Executive programmes under cultural agreements signed between Italy and other States indicating that

“The Parties agree to cooperate in order to counter illicit trade in works of art with …. measures in accordance to the respective national legislations, and in accordance to the obligations ensuing the 1970 UNESCO International Convention and the 1995 UNIDROIT Convention…” if both States are Parties to the Conventions

“….., and taking into account the principles of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects” if the other States is not a Party to it.

(States not Parties to the 1995 Convention: Iraq, Rep. of Korea, Tunisia, Bosnia-Herzegovina, Pakistan, FYROM, Morocco, Ukraine, Uzbekistan, Vietnam, Mongolia, Russian Fed., India, Germany, Austria, Estonia, Malta, …)
2013 - The European Commission proposed to strengthen the possibility for restitution available to Member States since the current legislation is not proving sufficiently effective in achieving the recovery of unlawfully removed national treasures.

On 15 May 2014, the European Parliament and the Council adopted Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State.

The scope of the new Directive is extended to cover all cultural objects identified as "national treasures possessing artistic, historic or archaeological value", under national legislation or administrative procedures (Art. 2.1)

The Directive should thus cover objects ... whether they originate from regular or clandestine excavations provided that they are classified or defined as national treasures (Recital 9)
Recast of the European Directive

Most important changes

- Time-limit for initiating return proceedings
- Burden of proof ("good faith") on the possessor for the purpose of compensation
- Criteria for "due care and attention"

All "taken" from the 1995 UNIDROIT Convention
Directive 2014/60 (Article 10.2)

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.

UNIDROIT (Article 4(4))

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,
- whether the possessor consulted 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.
Increase the number of States Parties

- **36 States Parties**
  Afghanistan, Angola, Argentina, Azerbaijan, Bolivia, Brazil, Cambodia, China, Colombia, Croatia, Cyprus, Denmark, Ecuador, El Salvador, FYROM, Finland, Gabon, Greece, Guatemala, Honduras, Hungary, Iran, Italy, Lithuania, New Zealand, Nigeria, Norway, Panama, Paraguay, Peru, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden

- **2 new accessions** (waiting for the deposit of the instrument with the Depositary)
  Algeria, Bosnia-Herzegovina

- **Decision taken to become Party**
  Syria
ASPAC Member States - Parties to the 1970 and/or 1995 Conventions

1970 UNESCO Convention
Australia, Bangladesh, Bhutan, DPR Korea, India, Japan, Kazakhstan, Kyrgyzstan, Mongolia, Myanmar, Nepal, Pakistan, Rep. of Korea, Sri Lanka, Vietnam

Afghanistan, Iran, Cambodia, China, New Zealand

1995 UNIDROIT Convention

ASPAC Member States not Parties to the 1970 and 1995 Conventions

Turkmenistan
Brunei-Daruss. Indonesia Laos Malaysia Philippines Singapore Thailand
Thailand — in 2001, the accession to the UNIDROIT Convention was in process.

Vietnam — in 2006 the 1995 UNIDROIT Convention was identified as strategic for the national economy, translated into Vietnamese and published for dissemination to policymakers to facilitate the process of accession, and to the legal community for awareness on its importance.
UN GA Resolutions on Return and restitution of cultural objects to the countries of origin

54/90 (1999); 56/97 (2001); 58/17 (2003); 61/52 (2003); 64/78 (2009)

States reaffirm the importance of international conventions in this field (among which the 1995 UNIDROIT Convention) and invite countries not yet Parties to consider becoming Party

(Cambodia, Myanmar and Vietnam among sponsoring States)
Facilitate the understanding of the Convention


- **Explanatory Report**
  

- **UNIDROIT scholarship programme for lawyers**
Follow-up of the Convention

Paris, 19 June 2012

first meeting of the special committee in order to review the practical operation of the Convention (Art. 20)

Future meetings will be possibly linked to the new mechanism of supervision of the 1970 Convention
Advantages of the 1995 Convention lost by States not yet Parties to it

- **Self executing instrument** (UNIDROIT) v. National implementing legislation needed (UNESCO)
- **Definition** - combination of a large definition with the principle established in Art. 3 (1) of automatic restitution of stolen objects is probably the most important mean adopted to fight illicit traffic in cultural objects
- **Scope of the instrument** – avoid different interpretations
- Special rules developed on products of clandestine excavations (= stolen → automatic restitution)
- Right of an **individual owner to sue directly** in a foreign courts for objects stolen from him/her
- **Long Time limitations** of claims
- **Clear criteria for diligent acquirers** and limits to compensation to them
- Express provision making clear that **prior illegal takings are not thereby legitimised**
- **Additional source of jurisdiction** in private law (State where the object is located)
- **Compromise** → Application of all provisions = no reservations
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Ars grata legi