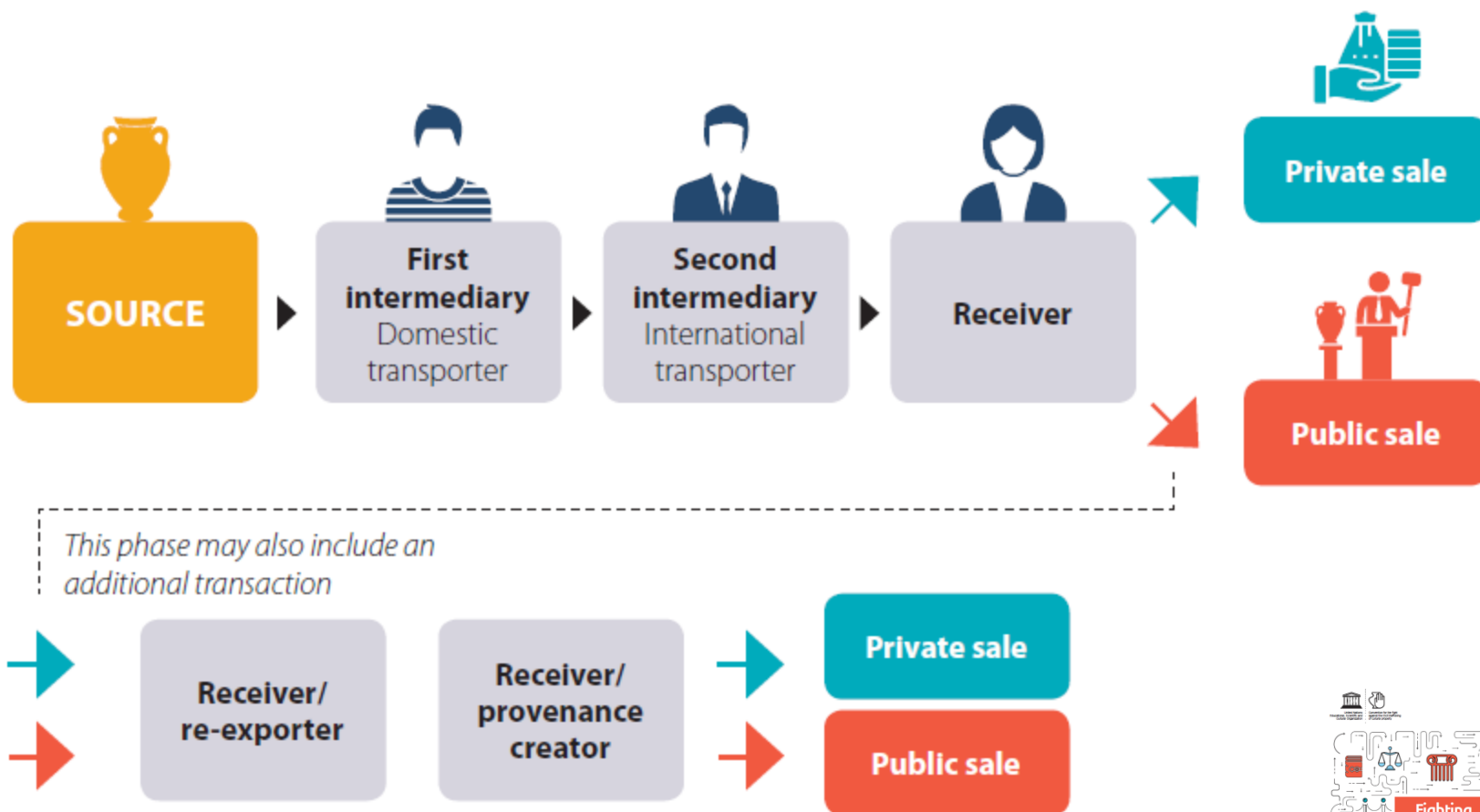
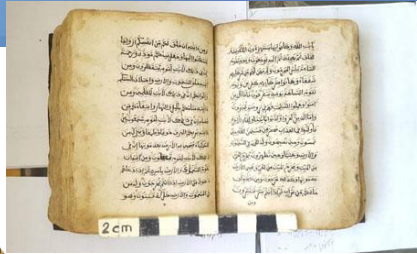


A TOOLKIT FOR EUROPEAN JUDICIARY
AND LAW ENFORCEMENT

A POSSIBLE SCENARIO FOR THE ILLICIT FLOW OF CULTURAL PROPERTY





Restitution / return

=

sensitive and complex issues which involve
conflicting yet legitimate interests



OUR HERITAGE
IS NOT FOR SALE

DON'T TAKE PART IN THE THEFT
AND ILLICIT TRADING OF ANTIQUITIES



November 2014

The Analytical Support and Sanctions Monitoring Team publishes the **report S/2014/815** on 14 November 2014, on the threat posed by the Islamic State in Iraq and the Levant and the Al-Nusrah Front for the People of the Levant.



UN Security Council



CHARTER OF THE UNITED NATIONS
CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION



LEGALLY BINDING FOR ALL UN MEMBER STATES



February 12, 2015

adopted the **Resolution 2199** that condemns the destruction of cultural heritage and asks Member States to adopt measures to **counter illicit trafficking** of antiquities and cultural objects from Iraq and Syria and **allow for their safe return** to the Iraqi and Syrian people.

December 17, 2015

United Nations Security Council adopted

Resolution 2253, which builds on Resolution 2199 by highlighting the **importance of developing strong relationships with the private sector** in countering the financing of terrorism, the laundering proceeds of crime, and **strengthening due diligence processes**.

March 24, 2017,

United Nations Security Council adopted *Resolution 2347*

Condemns the unlawful destruction of cultural heritage, including the destruction of religious sites and artefacts, and the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, notably by terrorist groups



7. Encourages all Member States that have not yet done so to consider ratifying the **Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and its Protocols**, as well as other relevant international conventions;

11. Urges Member States to develop, including, upon request, with the assistance of UNODC, in cooperation with UNESCO and INTERPOL as appropriate, **broad law enforcement and judicial cooperation** in preventing and countering all forms and aspects of trafficking in cultural property and related offences that benefit or may benefit organized criminal groups, terrorists or terrorist groups

19. Affirms that the mandate of **United Nations peacekeeping operations**, when specifically mandated by the Security Council and in accordance with their rules of engagement, may encompass, as appropriate, assisting relevant authorities, upon their request, in the **protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts**, in collaboration with UNESCO, and that such operations should operate carefully when in the vicinity of cultural and historical sites;

20. Calls upon **UNESCO, UNODC, INTERPOL, WCO and other relevant international organizations**, as appropriate and within their existing mandates, to assist Member States in their efforts to prevent and counter destruction and looting of and trafficking in cultural property in all forms;



KATHMANDU, NEPAL, 2015



SOUTH GATE OF SEUL, REPUBLIC OF KOREA, 2008

DESTRUCTION/DAMAGE



NATURAL

INTENTIONAL

THEFTS

LOOTING

ILLICIT TRAFFICKING

INTERNATIONAL
COOPERATION

PREVENTION

RESTITUTION

RESTITUTION

RETURN

NATIONAL LEVEL

LACK OF HARMONISATION

1970 UNESCO CONVENTION

1995 UNIDROIT CONVENTION



PARTNERS

LEGAL AND PRACTICAL TOOLS
RAISING AWARENESS AND CAPACITY OF BUILDING

European Parliament resolution of 30 April 2015 on the destruction of cultural sites perpetrated by ISIS/Da'esh (2015/2649(RSP))



G. whereas the **UNESCO Convention** on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted on 17 November **1970**, and the **UNIDROIT Convention** on Stolen or Illegally Exported Cultural Objects, adopted on 24 June **1995**, are **essential instruments for strengthening protection of the global cultural heritage**;

18. **Calls on the Member States** which have not already done so **to ratify the UNESCO Convention** on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of **1970**, the **UNIDROIT Convention of 1995**, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the Second Protocol thereto of 1999;

TWO SCENARIOS

Claim of an international character



A CULTURAL OBJECT IS **STOLEN**



FROM A **PRIVATE OWNER/
WORSHIP PLACE / STATE**

RESTITUTION CLAIM

Ex. The object was acquired by a person in good faith

OFFENCE

WHO CAN CLAIM

ACTION

PROBLEM



A CULTURAL OBJECT IS
ILLEGALLY EXPORTED



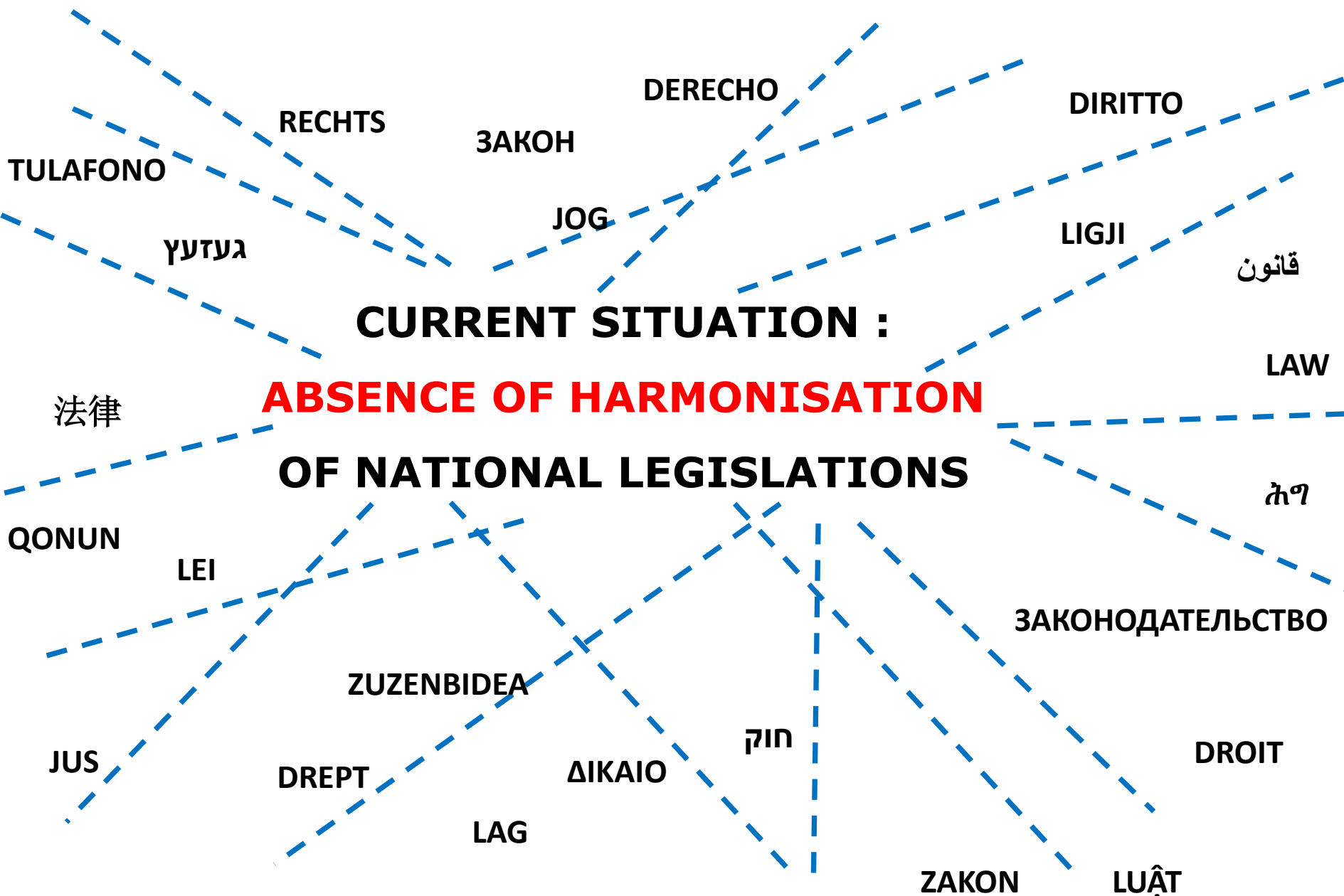
FROM **STATE X**

RETURN CLAIM

Ex. The object has been licitly imported in a third State



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE



Uniform law

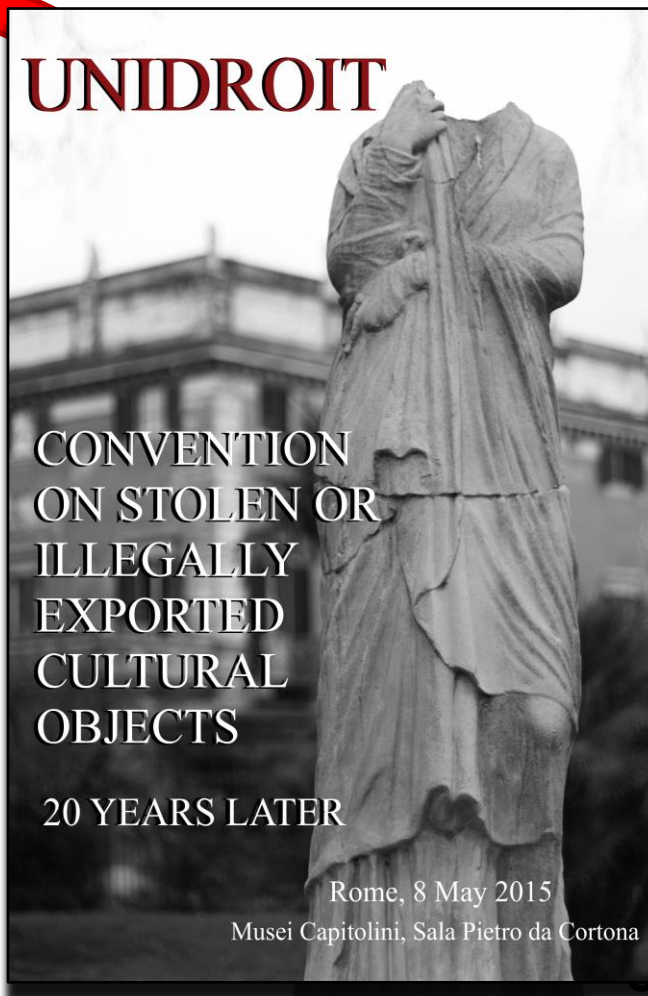


What characterize UNIDROIT conventions is the **method of elaboration** followed: in particular the importance of the **participation of experts in the drafting**, the minimization of the diplomatic interests, the debate being placed rather on the level of the influences of the common law rights or civil rights - these controversies are themselves mitigated in the sense that **one seeks rather practical solutions** than conservative rules.

Choice of subjects requiring a **transnational solution** and **no longer simply the determination of a national law competent** to regulate disputes that transcend borders.

In the **1995 UNIDROIT Convention** in particular this means that a pragmatic solution has been found for “good faith” between two conflicting but legitimate interests = **due diligence**

"REMEDYING WEAKNESSES, BUILDING ON STRENGTHS"



Return of
illegally
exported
cultural
objects

Restitution of stolen cultural objects

Article 3(1)

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

Article 4(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.

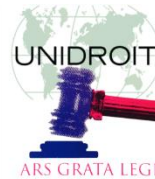
Article 4(4)

Criteria to determine “due diligence”

Return of illegally exported cultural objects

Article 5(1)

Removal **of the object ... contrary to the law of the requesting State regulating the export of cultural objects, and**



Article 5(3)

The export significantly impairs a scientific or historic interest, [...] or the **object is of significant interest for the requesting State**

Article 6(1-3)

Compensation to the possessor who did not know the object was illegally exported / **physical return**

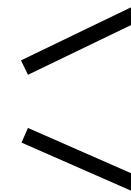
Criteria for due diligence – Article 4(4)

4) In determining whether the possessor exercised due diligence, regard shall be had to all the **circumstances of the acquisition**, including

✓ the **price** paid



✓ The **character** of the parties



SAATCHI ART
Sotheby's
The Metropolitan
Museum of Art
GAGOSIAN

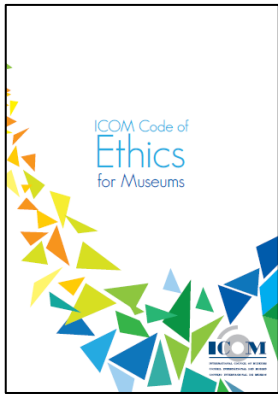


✓ whether the possessor consulted any reasonably accessible **register** of stolen cultural objects

✓ whether the possessor consulted any **other relevant information** and documentation which it could reasonably have obtained,



✓ whether the possessor consulted accessible agencies or took **any other step** that a reasonable person would have taken in the circumstances



The 1995 Convention **complements the due diligence rules** drafted by museums and dealers – rendering them binding - and promotes trust in the international trade.

It **formalises** what has long been taken for granted by serious collectors, museum professionals and art dealers: **the need to verify the provenance of a cultural object offered for sale.**



International Code of Ethics
for Dealers in Cultural Property
Code international de déontologie
pour les négociants en biens culturels



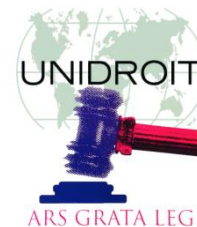
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IMPLEMENTATION AT THE NATIONAL LEVEL



Obligation to have a transposition law which implements the provisions of the 1970 Convention



Direct application (no need to have a transposition law)

Complementarity 1995 UNIDROIT Convention with 1970 UNESCO Convention



The Madonna of Mercy – Piero della Francesca

DEFINITION OF CULTURAL PROPERTY

Specifically designated by the State



Not specifically designated by the State

CLAIMANT

State



Theft: State + Private Person
Illegal Export: State

TIME LIMITATIONS

No rule
(national law)



Theft: Art. 3(3) to 3(6)
Illegal Export: Art. 5(5)

COMPENSATION

GOOD FAITH

DUE DILIGENCE

Art. 7 (b) (ii)
No definition
Burden of proof
depending on
national law



Criteria for "due diligence"
Art. 4(4) Burden of proof on
the possessor



PRODUCTS OF CLANDESTINE ARCHEOLOGICAL EXCAVATION

Art. 7 (b) (ii): ONLY cultural property stolen from a museum or a religious or secular public monument or similar institution (...) documented as appertaining to the inventory of that institution + Art. 9 calls on States Parties if patrimony is in jeopardy from pillage of archaeological materials .

Special Protection of Archaeological objects:

- Illicit excavation = theft (Art. 3(2))
- No time limitation to action
- Art. 5(3) (a) (b) (c)

2011 UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects



NON RETROACTIVITY



IMPLEMENTATION

National implementation law needed



Self-executing treaty

TRIBAL OR INDIGENOUS COMMUNITIES

Specific protection for objects used by tribal or indigenous communities

Uniform mechanisms in place but which procedure for international claims ?

Article 16(1)

Claims brought by a State may be submitted under one or more of the following procedures:

- (a) **directly to the courts** or other competent authorities of the declaring State
- (b) **through an authority** designated by that State to receive the claim and forward it to the court
- (c) through **diplomatic or consular channels**

Article 8(2)

Possibility to **bring the claim** before the courts or other competent authorities of the State **where the cultural object is located** (in addition to authorities otherwise having jurisdiction under the rules in force in Contracting States)

Recognition and enforcement of judgments



LAW



5. Mutual legal assistance and special investigative techniques



INVESTIGATION

6. Interagency cooperation



Chapter III

**Illegal
export**

Chapter II

Theft

Jurisdiction

Art. 8

Art. 8(3)

**Provisional, including
Protective, measures**



**COURT or other competent
authority**

Applicable law

Uniform rules !!

Art. 2

Definition

"Cultural object"

**Reasonable
compensation**

Art. 4(1)
Art. 6(1)

Due Diligence

Art. 4(4)
Art. 6(2)

**Time limitation
of actions**

Art. 3(3)-(5), (8)
Art. 5(5)

IMPACT OF THE CONVENTION



on EU instruments

from *mutual recognition* of national legislations (Directive 93/7/EEC of 15 March 1993) to a general tendency towards adoption of European *rules of uniform law* (Directive 2014/60/EU of 15 May 2014 and (Regulation 1215/2012 of 12 Dec. 2012)

Time-limit for initiating return proceedings

Burden of proof (“good faith”) for the purpose of compensation on the possessor

Criteria for “due care and attention”

THEFT

UNIDROIT
Article 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.

ILLEGAL EXPORT

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.

All “**taken**” from
the 1995 UNIDROIT Convention

**CURRENT PROPOSAL OF A
REGULATION FROM THE
EUROPEAN PARLIAMENT AND
THE COUNCIL ON IMPORT OF
CULTURAL GOODS**



Regulation N. 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(entered into force on 10 January 2015)

The **owner of a cultural object** as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State **should be able** under this Regulation **to initiate proceedings as regards a civil claim for the recovery**, based on ownership, of such a cultural object **in the courts for the place where the cultural object is situated at the time the court is seized**. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

= UNIDROIT Convention, Article 8(1)



THEFT

UNIDROIT

Article 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,
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- 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.

Possible EU legislative action

In order to address the four **areas of weakness of the EU legal systems** listed above, a set of measures for EU legislative action could be developed. Drawing upon the findings of the external expert study, this EAVA outlines the most far-reaching possible measures:

- (i) To overcome the first area of weakness – **no single definition of the term cultural property/object**, the EU could consider adopting the definition of cultural property of Article 2 UNIDROIT Convention in Art. 7(4) of Regulation 1215/2012 in order to create a sphere of harmonisation.
- (iii) To overcome the third area of weakness – **differing substantive law across the EU Member States**, [...] the EU could consider incorporating Chapter II on the restitution of stolen cultural objectives from the 1995 UNIDROIT Convention as a new part of Directive 2014/60.



Cross-border restitution claims of looted works of art and cultural goods

European Added Value
Assessment

Accompanying the European
Parliament's legislative
initiative report
(Rapporteur: Pavel Svoboda)

STUDY

EPRS | European Parliamentary Research Service

Author: Christian Salm
European Added Value Unit
IPE 610.988 – November 2017

IMPACT OF THE CONVENTION

➤ on the law of States not Parties to the 1995 Convention

DUTCH LAW

Since the UNIDROIT Convention does not permit reservations, the choice of the Dutch authorities was to base the implementation of the 1970 UNESCO Convention in part on « the goods elements of the 1995 UNIDROIT Convention »

Dutch Civil Code 3.86a – 3.86b – 3.87 – 3.87ba

Dutch Code of Civil Procedure



GERMAN LAW

Act on the Protection of Cultural Property (6 August 2016)

Due diligence provisions in dealing with cultural property

- Due diligence provisions not only for the professional art market, but also for private individuals selling cultural property (e.g. online on an auction platform).
- Due diligence provisions do not require the impossible, but require the seller to make sure that the object has not been stolen, illegally exported, or illegally excavated.
- In line with modern standards of consumer protection: a buyer should be assured of his financial investment.
- New law gives reference to the ICOM Red Lists of cultural objects at risk.

SWISS LAW

1995 CONVENTION



ARS GRATIA LEGI

5. SIGNIFICANT IMPORTANCE OF THE OBJECT (Art. 9(1) LTBC and **COMPENSATION GOOD FAITH ACQUIRER** (Art. 9(5) LTBC)

1. DEFINITION OF CULTURAL OBJECTS

Art. 5(3) Conv. > Art. 7 LTBC

2. DUE DILIGENCE

Art. 4(4) Conv. > Art. 24 LTBC (general duty)
> Art. 16 LTBC (dealers, auction houses)

3. TIME LIMITATION

Artt. 3(3); 5(5) Conv. (3 years) > 1 year LTBC
(50 years) > 30 years LTBC

4. JURISDICTION

Art.8(1) Conv. > Art. 98(a) LDIP (federal law)
(as amended by LTBC)
a) *residence or domicile of the defendant*
b) *lex rei sitae*

Guaranteeing the Permanence of the Restitutions and Reinforcing the Fight against Illicit Trafficking

This imbalance between applicable law within the circle of European States, on the one hand, and the principles that the judge opposes to the extra-European States on the other, affects the future of restitutions. The compensation for this imbalance and the writing of a common law of restitution between France and Africa requires that both the France and the African states concerned **ratify the UNIDROIT Convention concerning stolen cultural objects adopted on June 24, 1995**; This Convention puts in place an automatic mechanism of restitution for any future claims.

This Convention **is the only juridical tool capable of compensating for the present imbalance and thereby establishing a common law for restitution as well as insuring the permanence of the process undertaken for the cultural objects stockpiled during the colonial period.**

In other words, the **ratification of the 1995 UNIDROIT Convention will inscribe the restitutions within a perspective of durability.**

N°2018-26

Felwine Sarr
Bénédicte Savoy

**Rapport sur la restitution du patrimoine culturel africain.
Vers une nouvelle éthique relationnelle**

Novembre 2018

avec le concours de

Isabelle Maréchal
Inspectrice générale des affaires
culturelles



MINISTÈRE DE LA CULTURE

Vincent Négri
Juriste et chercheur à l'Institut des sciences
sociales du politique



UMR 7220 (CNRS - ENS Paris
Saclay - Université Paris Nanterre)

IMPACT OF THE CONVENTION



➤ on case law ...

- L. v. Chambre d'accusation de Genève, 1997
- Republic of Iran v. Barakat Galleries, 2007
- Cour administrative d'appel de Paris, 2015
- Arab Republic of Egypt v. Ignacio, Fundacion Privada Arqueologica Clos y Promocion Hoteles Layetana SA, 2008 (the Court applied the UNIDROIT Convention as an element of interpretation to solve the conflict even if the claiming State is not a State Party)
- «Incidente di esecuzione» «Italy v. Getty Museum, 2018»

Definition, claimant, time limitation and disconnection clause [Cass. Pen. n. 28653/2012]



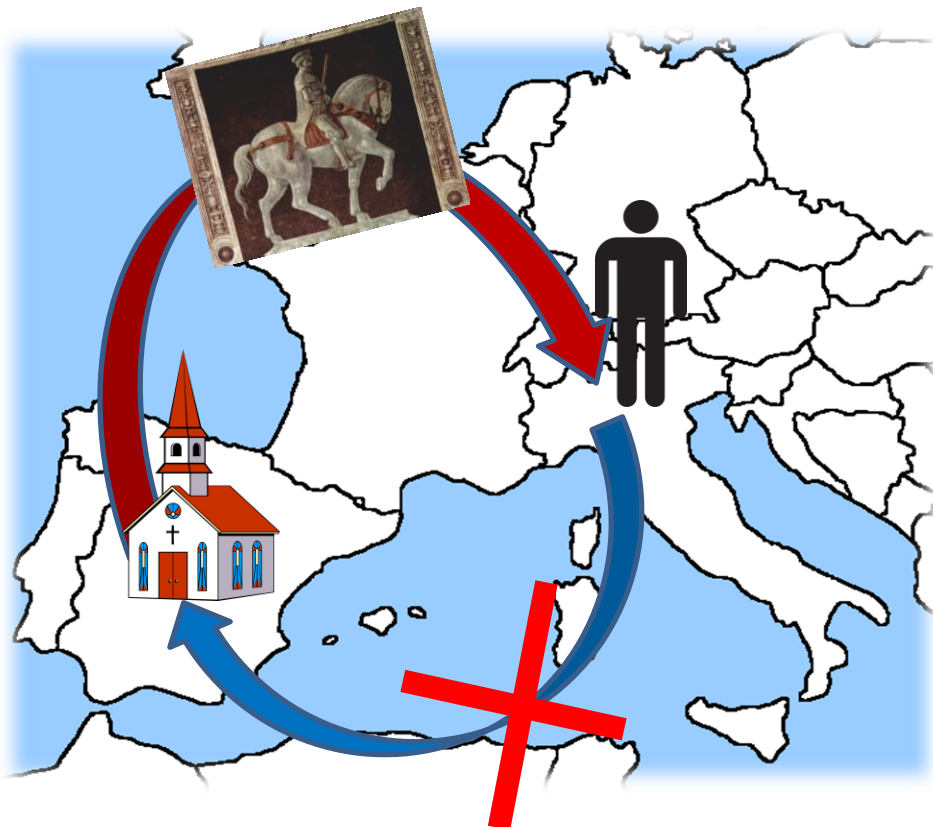
Turin Court (First grade): upheld the complaint of the Italian prosecutor (PM) regarding the violation of Articles 3 and 4 of the 1995 UNIDROIT Convention.



The decision was **APPEALED AGAINST** on the grounds of **breach of Article 606, §1 (b)(e) c.p.p. "contradictory nature and illogicality of the judgement"** : "Was the object stolen? Does the object meet the definition of the Convention?"

The Italian SUPREME COURT ruled in favour of the Italian dealer:

- "It is **not clear** whether the object in question can be considered, on the basis of the aforementioned rules, a **cultural property** and therefore subject to the special protection provided for by the international agreements (UNIDROIT) that have been implemented in Italy" – **Definition of "cultural objects"**
- Scarce evidence to prove the theft. If the object were to be considered "**illegally exported**", only the Spanish State could have claimed it back. No action was brought by the State. – **Type of offence and claimant**



- **93/7/EEC** should be applicable between two EU member States. – **Disconnection clause**
- The **action** was **time-barred**. – **Time limitation**



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<https://1995unidroitcap.org>

**1995 UNIDROIT CONVENTION – Need to raise awareness,
involve academics and practitioners, and gather information
on its implementation**



THE 1995 UNIDROIT CONVENTION ACADEMIC PROJECT

Facilitating the Study of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

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The Convention



- Convention Text
- Status
- National Implementation
- Explanatory Report and Commentaries
- Preparatory Work
- Follow-up
- Informal Ratification Task Force
- Related Instruments

The fresco pictured above adorns the walls of the Hall of the Horatii and Curiatii (Musée Capitolin, Rome), where the 1995 UNIDROIT Convention was open.



Blackboard

Library

The **Library** is an accessible electronic storage of materials relating to the 1995 Convention on Stolen or Illegally Exported Cultural Objects.

The Library includes documents provided by UNIDROIT, consisting of case law, case comments, as well as articles prepared by scholars, and valuable papers submitted by students of affiliated Universities and UNIDROIT's interns.

This section also contains self-instructional material and material useful for professionals and law enforcement authorities.

The Library is organised by categories of material. The list to the right of the page contains additional information about the documents and links to access them.



Reporting of Judicial/Extrajudicial activity

Containing documents associated with judicial actions related to the Convention (case-law).

Scholarly Articles

Containing scholarly articles on the 1995 UNIDROIT Convention.

Students' Papers

Containing papers and notes prepared by UNIDROIT's interns and students.

Self-instructional materials

Comprehensive educational materials for individuals needing information about the Convention.

Materials for Professionals

Containing materials intended for art lawyers, judicial authorities, customs agents and police units.



Find more about the EYCH





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- information on academic courses, expert meetings, workshops, training sessions to strengthen I in this field and/or on initiatives of legislative and regulatory domestic reform, or the preparation
- contribution to the Academic Project information Platform by sharing knowledge products (e.g., specific areas of national relevant legislation.

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- China University of Political Science and Law, Beijing, China

Hungary

- Károli Gáspár University of the Reformed Church, Hungary

Italy

- Roma Tre University, Rome, Italy
- Università degli Studi di Milano, Italy

Poland

- Institute of Law Studies of the Polish Academy of Sciences
- University of Gdańsk, Poland
- University of Opole, Poland

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**GET INVOLVED and
SUPPORT UCAP !**

@Marina Schneider

DEVELOP POLICIES

MODELS/STANDARDS

Model Provisions on State Ownership of Undiscovered Cultural Objects (UNESCO-UNIDROIT)

Model Export Certificate for Cultural Objects (UNESCO - WCO)

Object ID Standard for Inventories

CODES OF ETHICS

UNESCO Code of Ethics for Dealers in Cultural Property

PRACTICAL TOOLS

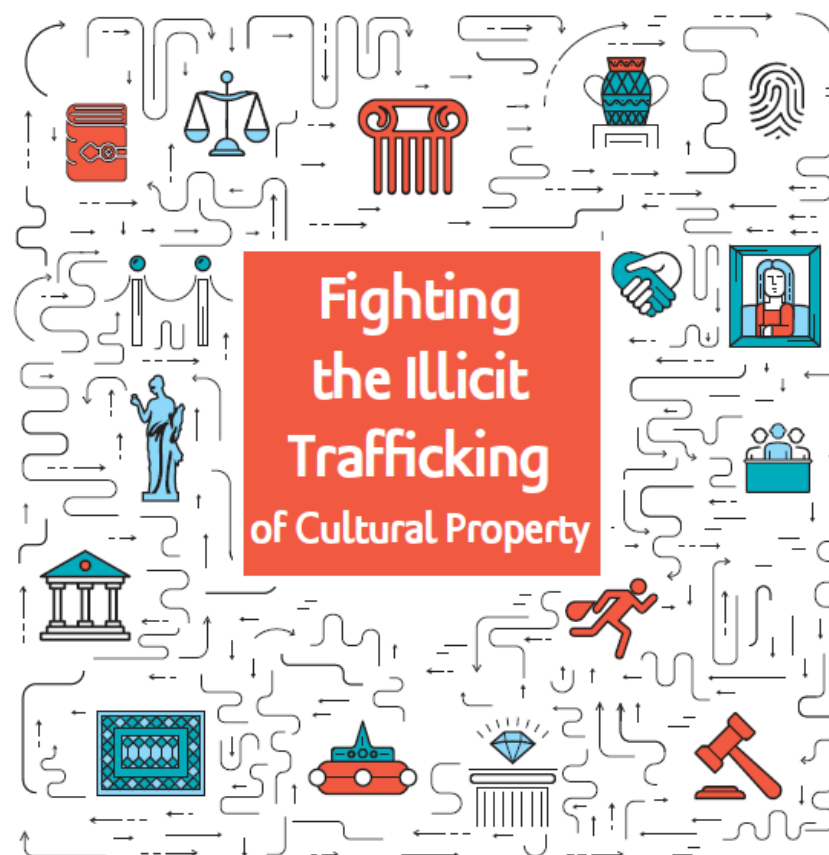
Operational Guidelines for the Implementation of the 1979 Convention

ICPRCP (1978)

Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation

Facilitate bilateral negotiations where conventions cannot be applied

Composed of 22 Member States mandated over a period of 4 years



A TOOLKIT FOR EUROPEAN JUDICIARY AND LAW ENFORCEMENT



International Code of Ethics for Dealers in Cultural Property
Code international de déontologie pour les négociants en biens culturels



Basic Actions co being offered for (UNESCO, INTERPOL)



UNESCO Rules of Procedure for Mediation and Conciliation



THANK YOU

Marina SCHNEIDER,
UNIDROIT Senior Legal Officer and Treaty Depositary

m.schneider@unidroit.org