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Educational, Scientific and  
Cultural Organization



Convention for the fight  
against the illicit trafficking  
of cultural property

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## Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption

Background paper

by

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for participants in the meeting

*The fight against the illicit trafficking of cultural objects  
The 1970 convention: past and future*

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## Historical Background

In 1960 the United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA 1514 (XV)). During the following decades the newly independent States were anxious to recover important items from their cultural heritage, many of which were to be found in the museums of the former colonizing States. They were also very concerned at the continuing loss of cultural heritage due to exploitation by looters at a time when they had relatively few resources to control it. Much of the early debate associated these two issues, but the major market and collecting States were reluctant to return cultural objects received in the past and now in their museums and private collections. They were, however, prepared to do something to stop the contemporary losses complained of by mainly developing States.

These issues were of course also reflected within UNESCO. Resolution 4.412 of the UNESCO General Conference at its 11th Session in 1960 authorized the Director-General:

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(d) To prepare, in consultation with appropriate international organizations, and to submit to the General Conference at its twelfth session, a report on appropriate means of prohibiting the illicit export, import and sale of cultural property, including the possibility of preparing an international instrument on this subject.

In April 1964 UNESCO appointed a committee of experts to draft recommendations for a convention on illicit traffic. In November that year the General Conference adopted the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property. This Recommendation, still, of course, in force, specified measures that should enable States to better protect their movable cultural heritage.

Four years later the General Conference of UNESCO adopted a Resolution authorizing the convening of a committee to draft a Convention. The Draft was circulated for comments by Member States. In light of comments received, it was revised and sent to a Special Committee of Governmental Experts which met in April 1970 to prepare a final draft for submission to the General Conference later that year. It has to be said that many of the States which might be designated as "holding States" because of their large public and private collections of art and artefacts, or "art market States" because the majority of commercial trade in cultural objects took place in those countries, were not enthusiastic to have such an international agreement. They were reluctant to undertake controls within their jurisdictions for heritage items of other countries.

The text to be submitted for adoption was approved by a Special Committee of Governmental Experts in April 1970. 61 states attended this meeting. Switzerland and the United Kingdom were not represented in that body. The United States of America was not initially interested until the changing political composition of all the international organizations motivated its government to seek better relations with a number of developing States, particularly those in its own hemisphere<sup>2</sup>. At a late stage in the proceedings, it commented on the draft and objected to a number of its provisions, although it expressed general agreement with the goals of the Convention. It arrived at the Special Committee with an alternative draft convention, but the representatives of the other States proceeded on the basis of the Secretariat draft, as amended in accordance with the comments of States. However, the States who were losing important cultural material to the United States market, led by Mexico, did their best to accommodate the United States position by importing into the text Articles 7 and 9 which were taken from the United States own draft.

The United States became party to the Convention in 1983, but it took three separate drafts of legislation to implement the Convention in national law before Congress would pass it. Other major market States were even slower to ratify the Convention: France in 1997, Japan and the United Kingdom in 2002, Switzerland in 2003, Germany in 2007 and Belgium and the Netherlands in 2009. For some of these States it has meant a considerable change in law and administrative practice and a need to provide a not inconsiderable bureaucracy to administer them.

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<sup>2</sup> Abramson, R.D. & Huttler, S.B. "The Legal Response to the Illicit Movement of Cultural Property" (1973) 5 *Law and Policy in International Business* 932, at pp.956-7

## The Convention's achievements

After 40 years it is appropriate to try to evaluate the success and the failures of this first international treaty of intended universal effect concerning the protection of cultural heritage in peace time. There are precedents covering protection during conflict and times of occupation by foreign States. Finding a compromise of apparently radically opposed positions has set a standard for inter-State co-operation which has now enlisted 120<sup>3</sup> countries of the international community. That achievement should not be underestimated.

The second most obvious success has been its persuasive effect on public attitudes on this issue. That is evidenced by the changing flavour of the debate in the media and in academic writings. It is also illustrated by the practice of museums and similar institutions which have in many cases consciously adopted the date of the Convention, 1970, as a key marker for enquiries into provenance. If an item cannot be shown to have been out its country of origin and owned by an individual or institution in another State, then a museum should not acquire it. For example, 1970 has been promoted in Britain as a provenance threshold for many years now, by the Museums Association since at least 2002, the British Museum since 1998, and the Department of Culture, Media and Sport since 2005. In the United States, the 1970 threshold is adhered to by the Archaeological Institute of America and, since October 2006, the J. Paul Getty Museum.<sup>4</sup> As time passes it becomes more and more difficult to fabricate provenances for recently trafficked objects.

A third significant achievement has been the passage of national legislation in many countries to bring their practice into conformity with the Convention. United States legislation, the *Convention on Cultural Property Implementation Act* 1983, is well-known, but detailed legislation has also been passed in a number of other countries with substantial trading interests such as Japan, the Netherlands, Switzerland, and the United Kingdom.<sup>5</sup>

Fourthly, the influence of the Convention in public education (Article 10) has led to the holding of many workshops on the topic, by UNESCO, by regional organisations, and by national administrations as well as by non-governmental organizations such as ICOM. These important efforts at public education are reflected also in the 13 other cultural recommendations of UNESCO.

The fifth success of the 1970 Convention has been its influence in the development of other conventions, particularly of UNESCO, seen in specialised areas of heritage protection such as the underwater cultural heritage (see the provisions of Articles 14 and 18 on the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001), the law of occupying powers (see the Second Protocol 1999 to the Hague Convention 1954 Articles 9 and 21), and of course the UNIDROIT Convention discussed further below, as well as the European Regulation and Directive 1993 on the movement of cultural heritage. Its importance has also been enhanced by the adoption of the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage 2003, because it ensures protection of valued artefacts used in traditional rituals, music, ceremonies and so on, without which many of these traditional practices will be lost (yet at least 13 States which are Parties to the Convention on intangible cultural heritage are not even Parties to the 1970 Convention.) The adoption of these legal instruments and their subsequent implementation has familiarised cultural experts and traders in cultural objects with the necessity of regulating this area of trade so that it does not result in the destruction or damage of any aspect of cultural heritage.

These advances resulting from the adoption of the Convention in 1970 have led to the evolution of support mechanisms for the protection of movable cultural heritage, not only the workshops already mentioned, but also national lobby groups supporting its aim. For example, the strong lobby mounted by dealers in the United States against the adoption of legislation implementing the 1970 convention

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<sup>3</sup> Ethiopia ratified the Convention and published it officially in the Ethiopian national gazette but never sent its official instrument of ratification to the UNESCO Secretariat who is depositary of the Convention. Consequently, this does not allow counting officially 121 States parties.

<sup>4</sup> Neil Brodie, "The effect of an artefact's provenance on its saleability" (2006) *Culture Without Context* No. 19, Autumn, 4-6.

<sup>5</sup> *The Dealing in Cultural Objects (Offences) Act* 2003. Not all States Parties have legislated, e.g. France, believing that their existing legislation is sufficient to support the implementation of the Convention in their country. To research such legislation consult the UNESCO Database of National Cultural Heritage Laws at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=33928&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=33928&URL_DO=DO_TOPIC&URL_SECTION=201.html). Currently the database includes 2300 national cultural heritage laws from 180 countries

was ultimately opposed by a very strong counter-lobby of archaeologists in that country, which argued strongly for an ethical position and adoption of the international rules. This support of archaeologists and anthropologists, grounded in the standards set by the 1970 Convention, for the protection of heritage in countries where they work, has been a significant factor in improving the level of protection in many States.

While there have been returns of cultural property in conformity with the 1970 Convention, many of these have taken place without direct use of the mechanisms provided by the Convention. For example, in a number of cases customs authorities have seized cultural objects which appear to be stolen or wrongfully removed, but where it has not been necessary to litigate since the importer concedes the evidence and consents to the return of the object<sup>6</sup>.

Furthermore, the Convention has inspired a number of codes of ethics. UNESCO developed its own International Code of ethics for Dealers in Cultural Property in 1999 which was adopted by the General Conference at its 30<sup>th</sup> Session<sup>7</sup>. The International Council of Museums developed one based on its principles in 1978 (revised in 2006), and it has also much influenced national associations of museums, anthropologists, archaeologists and even national development and assistance programmes to developing countries<sup>8</sup>.

### **The Convention's weaknesses**

These successes are substantial. However it is clear that there are some issues not resolved in the Convention which are weaknesses which it would have been helpful to eliminate.

The first of these is the clumsiness of some of the drafting. This is not surprising as this was a revolutionary legal instrument when it was adopted. The final text was the result of a difficult compromise and the consequences are variable interpretations and differential implementation of the Convention in the States Parties.

The second is certain provisions of national law which limit the effectiveness of the Convention and which were not dealt with in the final text. One of these is the issue of time limitations to claims. There was a concerted effort to try to put in such a limitation but it was defeated. The other major problem is the issue of "good faith" acquisition and mandatory compensation, which is mentioned in Article 7(b)(i) of the Convention – a provision which has been widely criticised as inadequate. These issues were taken up by the International Institute for the Unification of Private Law (UNIDROIT) in its 1995 Convention on the subject.

An additional problem of private law is the need for claims to show an established legal link with the object being claimed in another country. This is clear enough where the owner sues. However some litigation has been unsuccessful or made far lengthier and more complicated because there seems to be no clear assertion of State ownership in the national legislation of the claimant State. This makes particularly difficult the return of archaeological objects which have not already been inventoried, such as those which were discovered by looters or taken from an approved archaeological excavation before they had been fully registered. A joint working group of experts from UNESCO and UNIDROIT is currently working on a model clause to solve this issue.

One reproach often made of the Convention is that it does not allow for retrospectivity. While there is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, set up to deal with cultural objects taken from their country before 1970, the Convention does not in fact prevent application of its treaty provisions to objects taken before then. The Australian legislation implementing the Convention applies to objects imported after the date of Australia's accession to the Convention, but "which were previously exported from another country at any time when there was a cultural heritage protection law in force, contrary to the provisions of that law"<sup>9</sup>. It is also surprising, considering the importance of this issue, that the Intergovernmental Committee, established for the very purpose of solving these types of claims, has been so little used. However, it has not been without influence. In the recent study made

<sup>6</sup> See Prott, L.V. *Witnesses to History: Documents and Writings on the Return of Cultural Objects* (UNESCO, Paris, 2011) [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35190&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35190&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>8</sup> See, for example, "The Rüşchlikon Principles for Partnership in Cross-Cultural Research and Guidelines for Archaeologists - A Comment" in Sitter-Lever, B. & Uehlinger, C. (eds.) *Partnership in Archaeology: Perspectives of a Cross-Cultural Dialogue* (Fribourg University Press, 1997) 217-229.

<sup>9</sup> O'Keefe, P.J. *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (Institute of Art and Law, Leicester UK, 2000) 16-17

for that Committee, the book *Witnesses to History: A Compendium of Writings and Documents on the Return of Cultural Objects*, one section is devoted to examples of returns made in the most diverse ways, such as by bilateral negotiation, mediation, arbitration, litigation, exchange and gift. While neither the 1970 Convention nor the Committee can be directly given the credit of these arrangements, one can strongly doubt that they would have taken place at all without the existence of the Convention and the Committee. Some of these objects were taken before 1970 and nonetheless have been returned.

Very slow participation of many States has also been seen as a misfortune. Why does the World Heritage Convention 1972 have 187 States Parties and why has the Convention for the Safeguarding of the Intangible Cultural Heritage 2003 already acquired 134, while the 1970 Convention after 40 years still has only 120? There are two well grounded reasons for such anomalies: one is the fact that there was substantial consensus for the first two conventions and the other lies in the difficulties of implementing the compromise of substantially opposed positions in the case of the 1970 Convention. States have seen little necessity to pass implementing legislation for world heritage or intangible cultural heritage. On the other hand, for the 1970 Convention, many States had to face difficulties of implementation, some including quite complex issues of domestic law, others being highly politically sensitive and yet others raising difficult constitutional problems. For these reasons many States were reluctant to ratify the Convention and it has been a major task for the UNESCO Secretariat to persuade them to participate.

## **Remedying Weaknesses, Building on Strengths**

In 1983 a committee of experts was set up at the request of the Executive Board of UNESCO to look into criticisms then being made about the drafting of the Convention, the exclusion of events before 1970 and the slow rate of participation as well as the particular concerns raised by certain countries concerning the pillage of archaeological sites and some specific difficulties of federal States<sup>10</sup>.

The experts felt that the provisions relating to the illicit export of the products of clandestine excavations were too weak but concluded that it "would not be opportune to revise the convention since 50 states were already parties thereto" and because preparations were well advanced at that stage for the ratification by several other States whose participation was considered important. It was felt more important to encourage other States to ratify in its present form, although the experts thought that it might be possible at a later stage to set about the preparation of a protocol to cover some of the outstanding issues.

Consideration was given to the need for more specific information on various aspects of illicit traffic in cultural property. In the years since 1983 there have been numerous studies of this subject and a great deal more information is available: for example, of material passing through auction houses whose provenance is not clear, of the extent of looting in certain countries, of police and customs activities and about States which have become transit States for illegally removed cultural objects on their route to other States.

The experts proposed that UNESCO should co-operate with UNIDROIT on issues of private law such as "good faith" acquisition, choice of law, conflict of national laws, standing to sue, public policy and other differences between jurisdictions which made it difficult to recover cultural objects which had been illicitly transferred. Seven recommendations were made by the experts, six to Member States of UNESCO and one to the UNESCO Secretariat. These Recommendations and their outcome are attached in the Annex.

## **The Future of the Convention**

### ***What UNESCO can do***

While the Secretariat for the 1970 Convention has worked hard over 40 years to promote the Convention, it has not been given the resources attributed to the World Heritage Convention 1972 over its nearly 4 decades. Not only has the Secretariat for that Convention itself been substantial, but UNESCO Member States have been prepared to allocate specialists to the World Heritage Centre to augment its resources. Currently the World Heritage Centre has 100 staff devoted wholly to that one

<sup>10</sup> Final Report, "Consultation on Illicit Traffic in Cultural Property" (Paris, 14 March 1983), UNESDOC C LT/CH/CS. 51/4

Convention, while the Convention for the Safeguarding of the Intangible Cultural Heritage has 8. The 1970 illicit traffic Convention has only one full-time staff member.

This seems extraordinary since the 1970 Convention has now been selected as a priority for monitoring among the cultural conventions. Action needs to be taken to redress this balance. The allocation of budget monies is ultimately in the control of the Member States. If they wish more emphasis to be given to this Convention on illicit traffic, then they need to ensure that sufficient resources in staff are budgeted for.

The World Heritage Convention also has a Fund established by the 1972 Convention Itself, which is at least an incentive to States to take action. If UNESCO is to mount a more effective campaign for State participation in the 1970 Convention, then it needs to hold more workshops at regional level, to continue to publish helpful materials for Member States which have difficulties in implementing the Convention. It must continue to raise international awareness in the citizens of States where this heritage is in peril and especially in States where dealers and collectors accumulate substantial amounts of imported cultural material and there is a need to continually address public attitudes.

### ***What States can do***

Member States of UNESCO have many means within their control to enhance the implementation of the Convention. These include

- holding national workshops to carry on the work of UNESCO's regional workshops, training administrators, museum curators, archaeologists, anthropologists and other cultural professionals in the principles of the Convention and solving problems by consulting on specific national issues relating to the illegal traffic in cultural objects;
- ensuring close co-operation between cultural administrators, police and customs officials within the State and between regional administrations within the State;
- using regional bodies to emphasise the importance of the Convention and to invite neighbour States who are not yet party to the Convention to ratify it;
- evaluating the effectiveness of their own national legislation on illicit traffic and, where desirable, updating it;
- depositing their legislation on the topic with the UNESCO database of cultural legislation, thus providing information widely on the unlawfulness of trafficking in the jurisdiction and preventing claims that their national rules are not clear;
- sharing information on implementation by submitting periodic reports on their practice or on the difficulties they have in ratifying or implementing the Convention;
- participating in the work of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in Case of Illicit Appropriation, a body which actively supervises the problems of illicit traffic both past and present;
- considering the outposting of specialists in this field to the UNESCO Secretariat;
- ensuring a close relationship with INTERPOL, so that losses are rapidly reported to that body.

### ***What individuals can do***

Individuals have been very influential in promoting the convention. This is true of those concerned museum curators, who have pushed to have better acquisition policies to ensure that their museums do not acquire, or retain, cultural objects which have been stolen or otherwise wrongfully trafficked. The influence of archaeologists has also been significant. In a number of cases a single person has assumed responsibility for creating better ethical standards and creating a lobby group and has ensured that their country becomes party to the Convention.

Certain tourists who have come into contact with such activists, or have themselves noted the depletion of museums and sites in developing countries in particular, have become active in promoting the proper handling of cultural objects and in deterring other tourists from illegally removing objects from the areas they visit.

Some non-governmental organisations, in particular, ICOM and its regional and national groups, have been very active in promoting materials (such as ICOM's Red Lists and "100 Missing Objects" series), holding national and regional workshops and promoting discussion within the museum community.

### ***Other proposals***

## ***Heightened Punitive measures***

With the intention of improving the operation of the Convention, suggestions have often been made for stronger punitive measures, such as fines or imprisonment for looters of sites<sup>11</sup> and even for acquirers of objects who had not sufficiently researched the title or the permission for export.

Of course, a national State may take whatever means it wishes<sup>12</sup>, though the death penalty does seem to be extreme. Increasing penalties and applying them more widely is not necessarily going to improve matters. One reason is that the majority of police and customs officers are not experts in cultural heritage and they have difficulty deciding whether objects fall within the protected category. They often also lack secure storage areas and expert conservation required for important cultural objects, which they need to retain as evidence during lengthy court proceedings – sometimes lasting years.

In the context of international co-operation, many States will not apply criminal sanctions to those trading in cultural objects which prove to have been improperly removed from another country. Where an object has passed through several hands before it has been seized in the importing country, it is often very difficult to prove that the possessor knew of the illegality and had the intention to commit the illegal act. In many States the standard of proof is much higher for a criminal offence than for a civil or administrative wrong, and therefore the return of the object concerned is much more likely to happen if a civil suit, rather than a criminal suit, is undertaken. These difficulties for Canada, a State which has actively implemented the provisions of the 1970 Convention, in the case of seizure and return of Bolivian textiles, have been clearly set out<sup>13</sup>. It would be wise to consider this experience before undertaking any project to formulate internationally binding criminal standards.

Where theft is clearly proven, most countries already have provisions in their national law which enable the imposition of fines and imprisonment. An example is the prison sentences given to a well-known New York dealer by a court in the United States and to an English dealer by a court in the United Kingdom for their conspiracy to illegally acquire, export and sell important Egyptian antiquities.<sup>14</sup>

The return of the object is usually the principal concern of the State of origin and this is in itself a considerable deterrent to the illicit trade because the loss of the object, the loss of profit, and the cost of expenses in obtaining the object, directly affect the importer and make the business of selling foreign, insufficiently provenanced, cultural objects far less attractive in general. Forfeiture of the object may be imposed in either civil or criminal proceedings where the law has been broken. Indeed, one expert considers that forfeiture is the crucial action: burdening the proceedings for forfeiture with the high standard of proof required by criminal rather than civil proceedings may well make forfeiture more difficult.<sup>15</sup>

Criminologists who have made a special study of the problem of illicit traffic generally believe that control of illicit markets has tended to focus on restriction of supply, which countless illustrations (alcohol, drugs, antiquities) demonstrate will not work as long as demand remains high. The traffic in illicit cultural heritage material functions as a market, where demand (most often from wealthy market countries) drives supply (located most often, but not always, in poorer, less developed countries). The traffic is illicit because especially in supply environments the removal of antiquities nearly always violates criminal laws. The illicit traffic in antiquities is different from many other illicit markets (e.g. drugs) because it is *de facto* legal in most market environments, and operates openly often in the

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<sup>11</sup> O'Keefe, P. J. "Protection of the Archaeological Heritage: the Role of Criminal Law" in Kassimatis, G. (ed.) *Archaeological Heritage: Current Trends in Its Legal Protection* (P. Sakkoulas Bros., Athens, 1995) 55-79

<sup>12</sup> O'Keefe, P.J. & Prott, L.V. "Enforcing Cultural Heritage Protection Laws: Issues for Latin America" paper presented to a Meeting of Experts on Offences Against the Latin American Historic and Cultural Patrimony, San Jose, Costa Rica, February 1983; published as ILANUD Doc. No.6 and in *ILANUD Al Dia* (1987) 8

<sup>13</sup> *R v. Yorke* [1993] 3 S.C.R. 647 discussed in detail by Paterson, R. "Bolivian Textiles in Canada" (1993) *International Journal of Cultural Property*, 359 and "Criminal Proceedings in the Market" in "Legal Dynamics of Cultural Property Export Controls: Ortiz Revisited" (1995 – special issue) *University of British Columbia Law Review* 241 at 251; also Walden, D.A. "Canada's Cultural Property Export and Import Act: the Experience of Protecting Cultural Property" in the same publication, 203

<sup>14</sup> *United States v. Schultz* 33 F.2d 393 (2d Cir 2003); and *R v. Tokeley-Parry* [1999] *Criminal Law Reports* (U.K.) 578

<sup>15</sup> O'Keefe, P.J. "The Use of Criminal Offences in UNESCO Countries: Australia, Canada and the U.S.A." (2001) 6 *Art Antiquity and Law* 19-35 at 34

most elegant of venues. In the case of antiquities, it is likely to be more productive to use "punishment and persuasion", where the greater emphasis is placed on persuasion aimed at reducing demand in the market environments. To summarise: there in fact are few punishments which have been developed to fit this illicit traffic in the demand nations, and, if the use of "persuasion" is to be attempted, it needs a regulatory body to develop such policies and supervise their implementation.<sup>16</sup> UNESCO has experience in this work and would appear to be the appropriate body to take on this task. Leadership from UNESCO seems to be a vital element of any practical strategies in the immediate future.

If the proposal to strengthen penal measures is pursued, it would seem crucial to get the advice of specialists in this field to make sure the best means are used to deter the illicit trade.

### **Amendment or protocol to 1970 convention**

Another not infrequent proposal has been to amend or adopt a protocol to the 1970 Convention. These processes, though possible, are extremely time-consuming and often difficult to apply.

The difficulties of creating amending instruments or Protocols which are not universally accepted is illustrated by the complex history of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 controlling the liability of air carriers in suits arising from accidents on international flights. It limits the carrier's liability to about \$8,300 and has 152 States Parties. This limit was doubled by the 1955 Hague Additional Protocol No 1 (137 Parties). The limit was increased again in 1966 by the Montreal Protocol No. 4 (57 Parties) which set a limit of \$75,000 per person and it was raised again to approximately \$136,000 by the Guatemala City Protocol (not in force) in 1971. The Montreal Additional Protocol 3 of 1975 attempted to unify the rules but is not in force. The Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999 (101 States Parties) has introduced a new system of strict liability limited to that sum, but unlimited liability where fault can be proved against the carrier. In all therefore there are 6 separate agreements<sup>17</sup>. Each of these only comes into force for a State which has ratified it. Where two States are involved, only the agreement which both have ratified is effective. This led to a nightmare of differential regimes for air carriers who often carried passengers from 20 or 30 countries or more. Even though the 1999 Convention is designed to avoid these complications and the enormously expensive litigation entailed by it, it still does not cover all the States which are party to one of the earlier agreements, thus showing that even 80 years of effort cannot force agreement if there are dissents between participating countries.

In the case of the 1970 Convention it would be most unfortunate to add such complications to the most widely accepted co-operative network that currently exists. It would be particularly difficult in cases where there is already a question as to which of several neighbouring countries with border straddling cultures is the country of origin and which might result in very complex arguments as to the correct legal regime. An example was the case brought by Peru against a dealer in the United States where the artefacts concerned could equally have come from Bolivia or Ecuador, since the Inca culture is found in all three States<sup>18</sup>. This already creates difficulties, but imagine the additional confusion where each of such States has a different treaty regime governing the recovery of objects of cultural value.

Another problem is that the compromise represented by the 1970 Convention has reached a certain degree of acceptance and it would be most inopportune to re-open those issues which have been settled and to generate a debate on other provisions which might lead to a weakening of the Convention's provisions. The two most serious textual weaknesses ("good faith" acquirers and time limitation of suits) of the 1970 Convention have been remedied by the adoption of the UNIDROIT

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<sup>16</sup> This summary is based on the following works: Alder, C., Chappell, D. & Polk, K, "Perspectives on the organization and control of the illicit traffic in antiquities in South East Asia" in Manacorda, S (ed) *Organised Crime in Art and Antiquities* (Milan, ISPAC, (2009) 119-144; Alder C. & Polk, K, "A victimology approach to the study of the illicit traffic in antiquities," in Hagemann, O., Schafer, P. & Schmidt, S. (eds) *Victimology, Victim Assistance and Criminal Justice* (Hochschule Niederrhein, Mönchengladbach, 2009) 99-110; Grabosky, P. "The System of Corporate Crime Control," in Pontell, H. & Shichor, D. (eds), *Contemporary Issues in Crime and Criminal Justice* (Prentice-Hall, Upper Saddle River, New Jersey, 2000) 137-154; Green, P. and Mackenzie, S. *Criminalising the Market in Illicit Antiquities: An Evaluation of the Dealing in Cultural Objects (Offences) Act 2003*, Research Report, (London, Westminster University, 2007)

<sup>17</sup> International Civil Aviation Organization website on treaties  
<http://www2.icao.int/en/leb/Lists/Current%20lists%20of%20parties/AllItems.aspx>

<sup>18</sup> *Government of Peru v. Johnson* 720 F. Supp. 810 (C.D. Cal. 1989) at 812



Convention on Stolen or Illegally Exported Cultural Objects 1995. It has also remedied a major problem in relation to claims for return of clandestinely excavated objects by its Article 3(2)<sup>19</sup>. This Convention also represents a difficult compromise, but one which nonetheless is feasible, since it has been signed and ratified by States representing all types of interests. The most beneficial action at this stage would therefore appear to be to use every effort to have this Convention accepted by every State which is party to the 1970 Convention. Until the 1995 Convention has been fully adopted and implemented (it currently has 31 Parties<sup>20</sup>), it is highly unlikely that any protocol or amendment to the 1970 Convention would take a higher standard. It would be tragic to adopt a lesser standard and thus renounce the better cover for claimants of stolen or illegally exported objects that has been available since 1995. On the other hand, once the UNIDROIT Convention is widely accepted, it might then be appropriate to work towards a revised convention, which might indeed cover the ground of both the 1970 and the 1995 Conventions.

Finally one has to consider the time and cost required for negotiation of a protocol or amendment, not only the cost to the Organization, but to the Member States in terms of allocating their staff to the work, and the cost of their attendance at working groups and a diplomatic conference as well as translation of documents where this is necessary (as is the case for many States affected by illicit traffic). The cost of interpretation alone at final working groups is about \$80,000 (for three working groups in the six official languages of UNESCO for example). Such a sum might be better applied to a practical regional workshop where States can seek regional support and exchange valuable experience in stopping the illicit trade.

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<sup>19</sup> "For the Purposes of this convention, 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."

<sup>20</sup> On 1st February 2011, the Government of the Kingdom of Denmark deposited its instrument of accession to the Unidroit Convention.

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## ANNEX

The following Recommendations were made by the consultation of experts in 1983. The result of each Recommendation, as far as is known, is included after each one.

1. That all States which have not yet done so become Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

**There has been an increase from 50 to 120 States Parties between 1983 and 2011.**

2. That States should enter into regional agreements as appropriate which would protect the cultural heritage of the region

**As far as is known only three such regional agreements have been made:**

- **Andrés Bello Convention (Bogotá 1970) for the Andean countries, revised and including Spain (Madrid 1990);**
- **Agreement Concerning Co-operation and Mutual Assistance with Regard to the Holding and Restitution of Cultural Property Illicitly Carried across State Borders 1986 (Plovdiv 1986) and**
- **Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the territory of a Member State of the European Community 1993.**

3. That efforts be made to sensitise all persons benefiting from diplomatic immunity to their duty to obey the laws of the host State.

**It is not known whether States have undertaken this obligation. Some breaches of this rule have been reported.**

4. That UNESCO undertake a joint study with the International Institute for the Unification of Private Law (UNIDROIT) concerning the rules of private law affecting their return to their country of origin of illicitly transferred cultural goods, with reference, *inter alia*, to the UNIDROIT draft uniform law on the acquisition in good faith of corporeal movables.

**Two studies were undertaken followed by the negotiations which led to the adoption of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 which now has 31 States Parties**

5. That those States to which illegally exported cultural property is often conveyed should offer assistance to those States which suffer from illicit export of cultural property in training of specialised personnel and in drawing up of national inventories of cultural goods.

**A number of states have assisted claimant states in drawing up appropriate lists of threatened heritage. These include The Netherlands, Japan, Switzerland and the United States.**

6. That States take measures to prevent the provision of services of authentication, evaluation and conservation to cultural property which has been the subject of illicit traffic.

**While States do not appear to have been active in this regard, cultural professionals including archaeologists, anthropologists, conservators and museum staff have been active in establishing ethical guidelines on these matters.**

7. That States should adopt the measures advocated in the Recommendation concerning the International Exchange of Cultural Property 1976 to develop the circulation of cultural property among cultural institutions in different countries as a means of discouraging the spread of illicit trading.

**While there has been a considerable increase in such exchanges since 1983, it is not possible to assess whether it has discouraged the spread of illicit trading. In view of the volume of material still passing through auction houses and commercial dealers without guaranteed provenance it would seem that it has not had this effect.**