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Return and restitution – mechanisms under the 1995 UNIDROIT Convention

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The starting point and the context
1970 UNESCO CONVENTION

3 PILLARS
PREVENTION
RESTITUTION
COOPERATION

UNESCO

26 PROVISIONS
STARTING POINT - The foundations of a genuine international law of cultural property and an 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 – not all States have enacted specific legislatives measures to implement the Convention.

1970 UNESCO CONVENTION

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...
UNESCO COMMITTEE OF EXPERTS - CONCLUSIONS 1983

(4) That UNESCO undertake a joint study with UNIDROIT (the International Institute for the Unification of Private Law) concerning the rules of private law affecting the 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 (1975).

P U B L I C L A W

ARTICLE 7 (b) (ii)

P R I V A T E L A W

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WITHOUT INTERNATIONAL CONVENTIONS

TWO SCENARIOS

A CULTURAL OBJECT IS STOLEN

OFFENCE

FROM A PRIVATE OWNER/WORSHIP PLACE/STATE

RESTITUTION CLAIM

WHO CAN CLAIM

PROBLEM

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

A CULTURAL OBJECT IS ILLEGALLY EXPORTED

FROM STATE X

RETURN CLAIM

ACTION

Ex. The object has been licitly imported in a third State
CURRENT SITUATION:
ABSENCE OF HARMONISATION
OF NATIONAL LEGISLATIONS
The 1995 UNIDROIT Convention
UNESCO CULTURE CONVENTIONS

Operational Guidelines for the Implementation of the 1970 Convention
“REMEDIYING WEAKNESSES, BUILDING ON STRENGTHS”
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
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
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...

Articles 3 et 4

Stolen anywhere, including in a private house

Also objects not inventoried

To obtain compensation the possessor has the burden of proving he/she exercised due diligence
DUE DILIGENCE criteria – 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.
UNESCO - WCO Model Export Certificate

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

Basic Actions concerning Cultural Objects being offered for Sale over the Internet (UNESCO, INTERPOL, ICOM)

ICOM Code of Ethics for Museums

UNESCO Rules of Procedure for Mediation and Conciliation
Due Diligence
Who can claim?

A **private owner** may make a claim directly in a foreign court for the restitution of a stolen object.

A **State** can take similar action for the return of an illegally exported object.

Time limitation of actions

**Relative and absolute periods**

(No time limitation for action relating to cultural objects forming an integral part of an identified monument or archaeological site, or belonging to a public collection, or a cultural or religious institution, and sacred or communally important cultural objects belonging to and used by a tribal or indigenous community)
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**
Article 8(2)

The parties may agree to submit the dispute to any court or other competent authority or to arbitration.

- Such a choice was regarded as a matter of procedural freedom which if omitted would have dissuaded some States from ratifying the Convention
- Would solve a potential problem in the application of the Convention, the issue of State immunity
- Argued that recourse to arbitration should be not only allowed but encouraged (confidential, swift and neutral)
- Enable experts to be arbitrators, bringing to the proceedings expertise in relation to the type of object under dispute

Professor Pierre LALIVE
“SPECIAL PROTECTION”

PRODUCTS OF CLANDESTINE ARCHAEOLOGICAL EXCAVATION

- Illicit excavation = theft (Art. 3(2)) when consistent with the law of the State where the excavation took place = automatic restitution
- Not time limitation: “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” unless the possessor and location are known

OBJECTS IN USE BY TRIBAL OR INDIGENOUS COMMUNITIES

- Importance stressed in Preamble
- No time limitation to action, unless the possessor and location are known.
- Illegal export impairs the traditional or ritual use by a tribal or indigenous community (Art. 5(3)(d))
2011 UNESCO – UNIDROIT
Model Provisions on State Ownership of Undiscovered Cultural Objects

Those provisions are made **available to States to consider** in the drafting or strengthening of their national legislations.

**Model offered to States** which might need it in order to succeed in the recovery of their undiscovered cultural property, **to be completed and adapted by each State**

**Not adopted by States** – the ICPBRC took note of their finalisation (17th session in 2011) as well as the UNIDROIT Governing Council - **Not a binding legal text or a normative instrument**

https://www.unidroit.org/instruments/cultural-property/model-provisions
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)
The **Convention** only applies for objects stolen or illegally exported *after* its entry into force

**BUT**

the Convention **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 ...)
**Article 19 (2)** The instruments of ratification or acceptance shall be deposited with

the Director-General of UNESCO

**Article 21 (1)** This Convention shall be deposited with

the Government of the Italian Republic
INSTRUMENTS NEED TO BE IN DUE FORM

COMPULSORY DECLARATIONS

AT THE TIME OF RATIFICATION OR ACCESSION

Article 16, paragraph 1: indicate the procedure(s) under which the claims for the restitution or the requests for the return of cultural objects may be submitted according to Article 8:
(a) directly to the courts or other competent authorities;
(b) to courts through a designated authority(ies);
(c) through diplomatic or consular channels.

NO LATER THAN SIX MONTHS FOLLOWING THE DATE OF DEPOSIT OF THE INSTRUMENT OF RATIFICATION OR ACCESSION

Article 17: any Contracting State provide the depositary with written information in one of the official languages of the Convention (English, French) concerning the legislation regulating the export of its cultural objects. This information shall be updated from time to time as appropriate.
Complementarity
1970 and 1995
in summary
HOW 1970 IS COMPLEMENTED BY 1995

**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**

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

**DUE DILIGENCE**

- Criteria for “due diligence”
- Art. 4(4) Burden of proof on the possessor

@Marina Schneider
PRO 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

National implementation law needed

IMPLEMENTATION

Self-executing treaty

TRIBAL OR INDIGENOUS COMMUNITIES

Specific protection for objects used by tribal or indigenous communities

@Marina Schneider
Major interaction with other international agreements:

- One interaction of the 1970 Convention with other international agreements is with the other UNESCO culture conventions. [...]

- The second and one of the most significant links of the 1970 Convention to another international agreement is with the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the 1995 Convention). UNESCO asked UNIDROIT to draft the 1995 Convention to compliment the 1970 Convention and provide a model for uniform treatment of restitution for stolen or illegally exported objects. Convention covers all stolen cultural objects, not just inventoried and declared ones. The 1995 Convention strengthens the provisions of the 1970 Convention of by formulating common minimum rule
Synergies between 1970 and 1995 Conventions –

Example of best practice

• Finland [at the time of ratification]

“The Government of Finland declares that it will implement the provisions of Article 7 (b) (ii) of this Convention in accordance with its obligations under Unidroit Convention on Stolen or Illegally Exported Cultural Objects done at Rome on 24 June 1995.”

The impact of the 1995 UNIDROIT Convention
IMPACT OF THE CONVENTION

➤ on EU instruments ......


**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"

All "taken" from the 1995 UNIDROIT Convention

European Parliament resolution on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (2017/2023(INI)) .....
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.

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

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

- a) residence or domicile of the defendant
- b) lex rei sitae

1995 CONVENTION
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.

The UN Security Council adopted 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.

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.