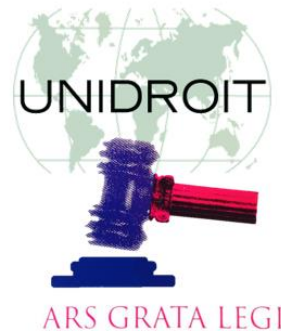




INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**Seventh Session of the Subsidiary Committee to the Meeting of States Parties to the 1970 UNESCO  
Convention - Paris, May 2019**

# **Return and restitution – mechanisms under the 1995 UNIDROIT Convention**



**Marina SCHNEIDER  
Senior Legal Officer and Treaties Depositary,  
UNIDROIT**

*The starting point  
and the context*



# 1970 UNESCO CONVENTION



**UNESCO**

**26 PROVISIONS**

# 1970 UNESCO CONVENTION



**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 legislative measures to implement the 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).

### PUBLIC LAW



### ARTICLE 7 (b) (ii)

### PRIVATE LAW



ARS GRATA LEGI

# WITHOUT INTERNATIONAL CONVENTIONS

## TWO SCENARIOS



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**



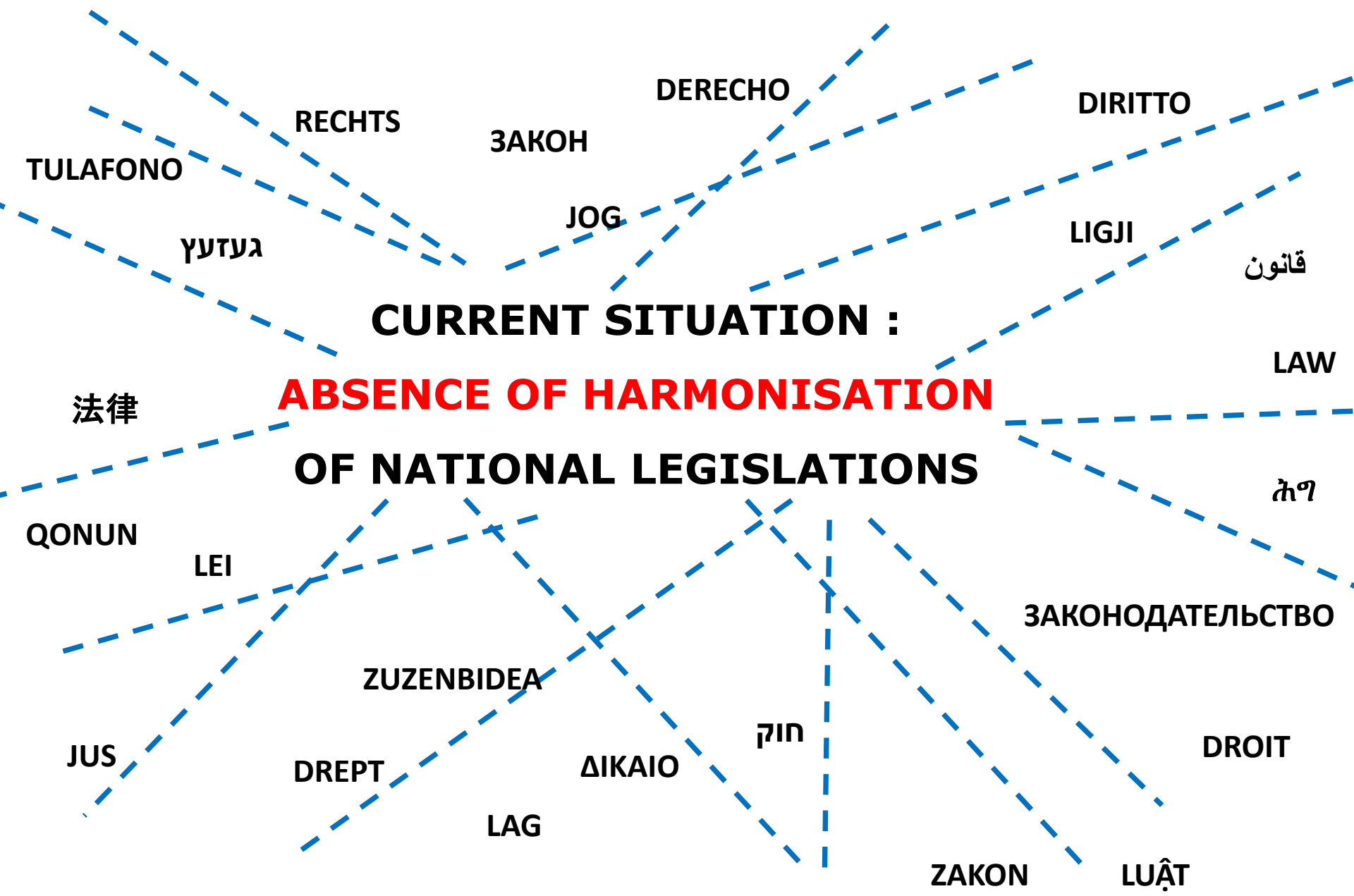
A CULTURAL OBJECT IS **ILLEGALLY EXPORTED**



FROM **STATE X**

RETURN CLAIM

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



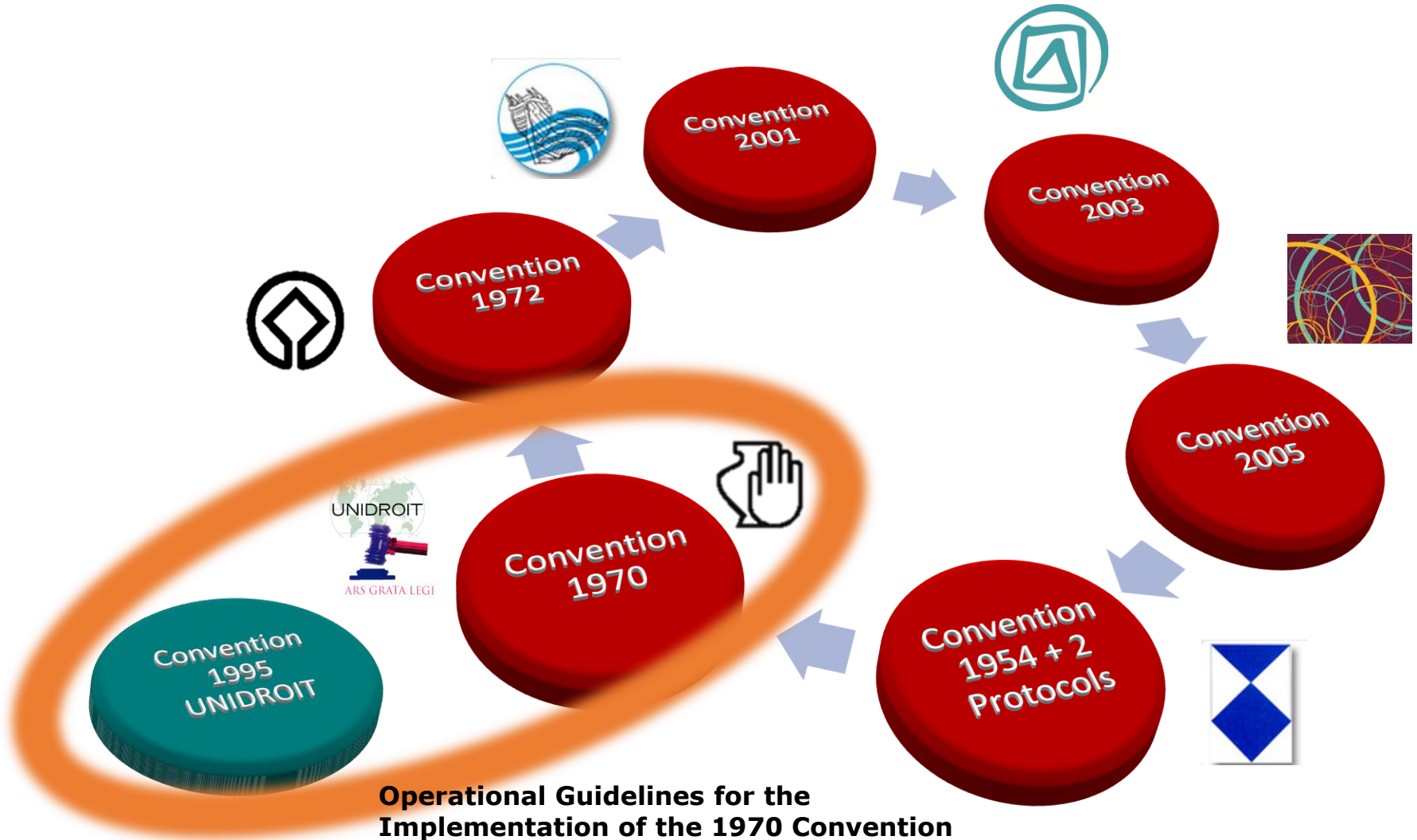


*The 1995 UNIDROIT  
Convention*

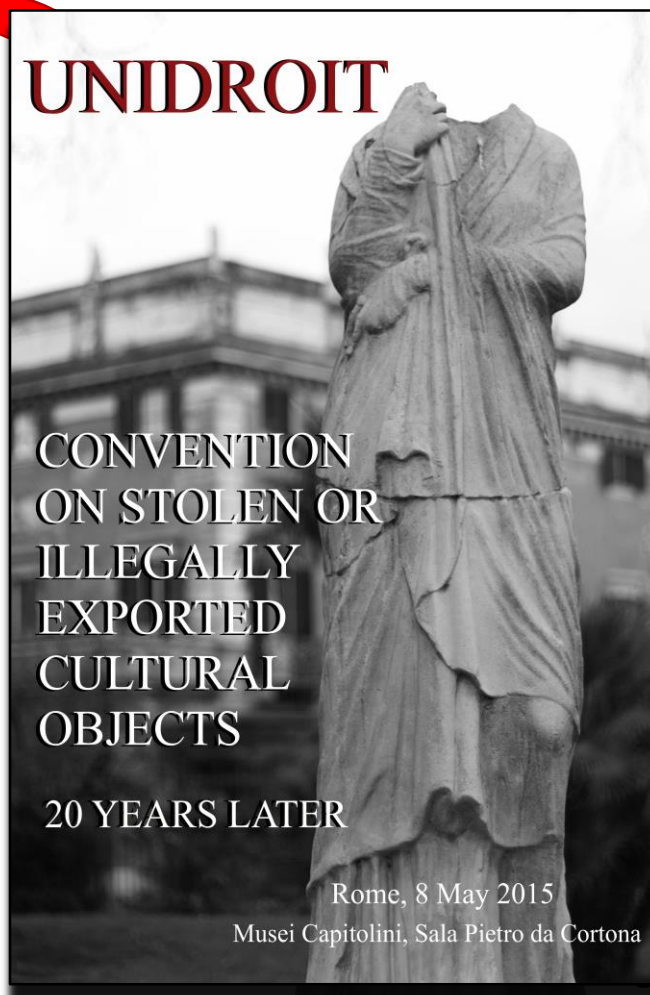




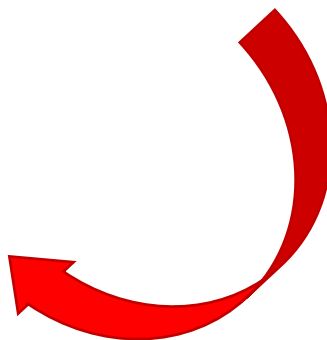
# UNESCO CULTURE CONVENTIONS



## "REMEDYING WEAKNESSES, BUILDING ON STRENGTHS"



Return of  
illegally  
exported  
cultural  
objects



## 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)

Origin= country notoriously victim of looting?



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

Place where the transaction took place (art gallery, flea market, backroom emporium...?)



Sotheby's

Museum / Collector / Dealer / Inexperienced Buyer ... ? «Tailored» due diligence

the character of the **parties,**

Too cheap for the type of object? Doubt!



the **price paid,**

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



National database of stolen objects / INTERPOL Stolen Works of Art Database



INTERPOL posters «Most wanted works of art»

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

Excavation reports

ICOM Red Lists



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



UNESCO Database on National Cultural Heritage Laws





## 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

ICOM Code of Ethics for Museums

### OBJECTS IN DANGER

Red Lists of Cultural Objects at Risk (ICOM)

## PRACTICAL TOOLS



Operational Guidelines for the Implementation of the 1979 Convention

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

Rules of Procedure for Mediation & Conciliation

ICPRCP (1978)  
Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Resilution 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



## UNESCO - WCO Model Export Certificate



World Customs Organisation  
Organisation Mondiale des Douanes



## UNESCO DATABASE OF NATIONAL CULTURAL HERITAGE LAWS



[www.unesco.org/culture/heritages](http://www.unesco.org/culture/heritages)



UNODC

SHERLOC

SHARED ELECTRONIC RESEARCH AND LAWYER ONLINE

### UNESCO-UNIDROIT MODEL PROVISIONS

1. SCOPE AND PURPOSE  
2. DEFINITIONS  
3. STATE OWNERSHIP OF UNDISCOVERED CULTURAL OBJECTS  
4. EXPORT AND IMPORT OF UNDISCOVERED CULTURAL OBJECTS  
5. LIABILITY  
6. RECOVERY OF UNDISCOVERED CULTURAL OBJECTS  
7. GENERAL PROVISIONS



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



UNIDROIT

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



ICOM Code of Ethics for Museums



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



## 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.

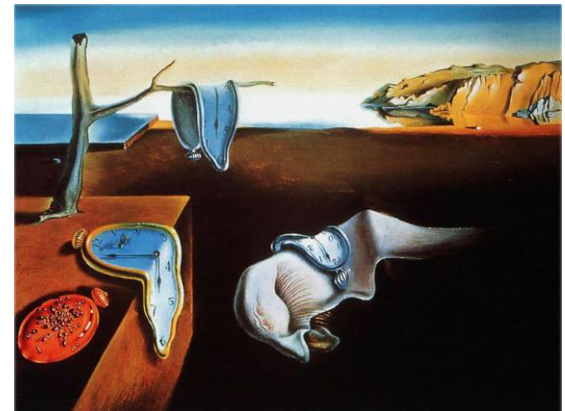
A **State** can take similar action for the return of an illegally exported object.



## 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)



*The Persistence of Memory* - Salvador Dali

## 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**

1970 UNESCO Convention



### 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**.



Professor Pierre LALIVE

- 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

# “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))

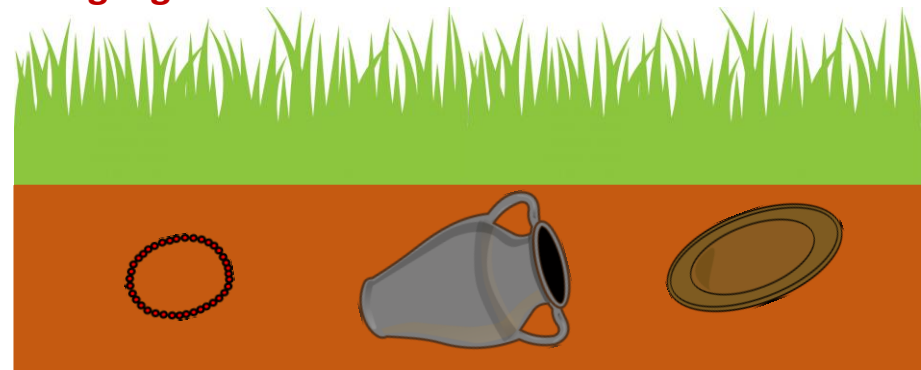
## 2011 UNESCO – UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects

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 ICPRCP took note of their finalisation (17<sup>th</sup> 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)



## NO RETROACTIVE APPLICATION

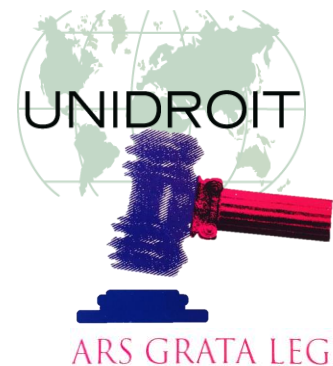


The **Convention** only applies for objects stolen or illegally exported **after** its entry into force

**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 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

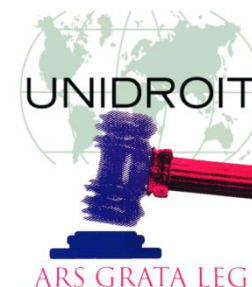
GOOD FAITH

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

*Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, Paris, 1970)*



## **ANNEX 6 Links to other Conventions related to the 1970 Convention**

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 .....

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)

ILLEGAL EXPOSURE

Directive 2014/60  
Article 10.2

All “taken” from  
the 1995 UNIDROIT Convention

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)

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.

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.

### REGULATION FROM THE EUROPEAN PARLIAMENT AND THE COUNCIL ON IMPORT OF CULTURAL GOODS



*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.

### SWISS LAW

1995 CONVENTION



**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*

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.

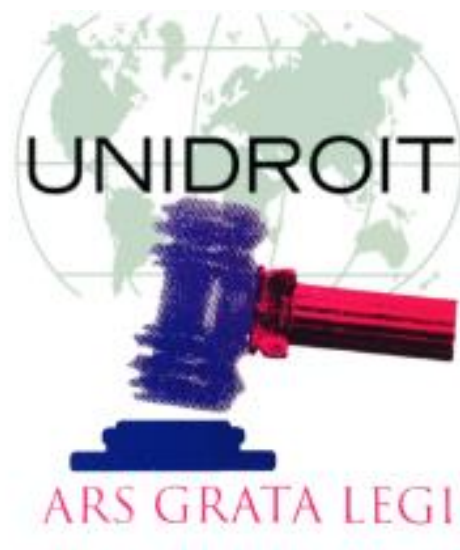
December 17, 2015

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**.



**THANK YOU!**



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