International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?*

INTRODUCTION

This note reviews recent international efforts to combat the rapidly expanding problem of illicit trade in cultural objects, and focuses on the latest international instrument developed with a view to curtailing this activity — namely, the draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects.¹

The draft Convention was prepared under the auspices of the Rome-based International Institute for the Unification of Private Law (Unidroit). A diplomatic conference has been convened for June 1995, at which time governments will have an opportunity to consider, and perhaps adopt, Unidroit’s draft. The impact of this latest multilateral effort will depend upon whether the diplomatic conference successfully adopts a convention, and if it does, what the final version of that instrument provides.

MULTILATERAL EFFORTS TO PROTECT CULTURAL OBJECTS

Throughout history, art, antiquities, and cultural objects have been taken from their countries of origin as trophies of war. They have also been “borrowed” from colonized territories, and removed “for preservation purposes” so as not to risk deterioration if left

* The views expressed are those of the authors and do not necessarily represent the views of the Department of Justice.

in situ. Today, "the international market in works of art, which has developed in a remarkable manner since the Second World War . . . has become . . . the main cause of the impoverishment of the cultural heritage of some nations to the advantage of others."  

PROTECTION OF CULTURAL PROPERTY IN TIME OF WAR

International law has long sought to protect cultural property in time of war. Vattel and Wheaton admonished warring armies to spare monuments and works of art unless their destruction was necessary to advance the cause of war. The Hague Peace Conventions of 1899 and 1907 called for the protection of artistic property. These instruments, however, proved to be of little value during the First and Second World Wars, which saw the systematic plunder, confiscation, and destruction of art and cultural objects. Fortunately, some of the cultural booty was returned to the countries of origin as required under peace treaties and other agreements.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in 1954, and its Protocol and Regulations were intended to enhance the protection afforded under the Hague Conventions to cultural property during wartime, taking into account the inadequacies of the earlier instruments and the realities of modern warfare. The Convention, which also applies during armed conflicts of a non-international character

2 Napoleon Bonaparte, Lord Elgin, and Hermann Goering are some of the more famous figures in this history.


5 Ibid., 17-18.


7 (1956) 249 U.N.T.S. 358. The Protocol deals with the obligations of occupying States. It was adopted at the same time as the Convention, and also came into force on Aug. 7, 1956.


9 The Convention also contains provisions that apply during peacetime. E.g., Art. 3 calls on parties to take appropriate measures during peacetime for the safeguarding of cultural property situated within their own territory against foreseeable effects of an armed conflict. Parties are also, in time of peace, to introduce into their military regulations provisions that may ensure observance of the Convention.
and during occupation, was developed under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Under the Convention, parties undertake to respect cultural property situated within their own territory as well as within the territory of other parties by refraining from any use of that property that is likely to expose it to destruction or damage in the event of armed conflict, and by refraining from any act of hostility directed against such property (Article 4(1)). As in the days of Vattel, imperative military necessity permits a waiver of these obligations (Article 4(2)). Parties must also prohibit theft, pillage, or misappropriation of, and acts of vandalism directed against, cultural property, and shall refrain from any act directed by way of reprisals against cultural property (Article 4(4)).

The Convention specifies the obligations of occupying powers with respect to the preservation of cultural property (Article 5), provides for the designation in an international register of refuges having “special protection” (Article 8), and prescribes rules for transporting cultural property under special protection (Articles 12 and 13). The Convention also calls for the use of a distinctive emblem as a means of identifying certain cultural property (Articles 16 and 17). And the parties are obliged “to take, within the framework of the ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention” (Article 28).

Although the Convention has numerous parties (eighty-five as of October 31, 1994), major art market countries like the United Kingdom and the United States are missing from the list, as is Canada. Moreover, it suffers from vague provisions that have been interpreted differently by different parties, and the breaches that it sanctions are not specifically described. UNESCO is now working towards improving and reinforcing the application of the Convention, probably by embodying new provisions in a protocol, to bring it into line with current international requirements and to improve and modernize its terms. UNESCO has also resolved to harmonize its activities in the field of protection of cultural heritage with United Nations peacekeeping activities.

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10 E.g., there are differing approaches to Art. 28. Some parties interpret it to operate extraterritorially, while other parties do not.

Despite its drawbacks, the 1954 Hague Convention must nevertheless be regarded as an important achievement. In particular, it represents international recognition of the importance of having respect for and preserving cultural property, regardless of where it is located, for the benefit of all humanity. Moreover, it underlines that "such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace" (Preamble).

**CURBING ILLICIT TRAFFIC IN CULTURAL OBJECTS**

Recent years have seen a proliferation in instruments seeking to combat illicit trade in art and cultural objects. The illegal trade, a crime that is increasingly international in character, has nonetheless continued to expand at an alarming rate. Efforts to curb it have been thwarted by various factors, including the extraordinary increase since the Second World War in the value of works of art and the consequent expansion in the number of rich and eager clients and markets, the increasingly sophisticated methods of international communication and electronic transfer of information, and the ease in crossing international borders. Another concern is that the trade in works of art is often linked to the international traffic in drugs and international money laundering activities. An observation by the Unidroit Secretariat is particularly apt:

While it is evident that the greater the difficulties put in the way of legal traffic the more illegal traffic will prosper, on the other hand, for as long as illegal traffic has not been stopped, it is politically difficult to encourage legal commerce. The two measures go hand in hand.

The lack of success in dealing with the illegal traffic in cultural objects is also due to the inability of the international community to achieve a workable compromise between the two diametrically

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12 The Preamble states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind," and notes that "the preservation of the cultural heritage is of great importance to the peoples of the world and it is important that this heritage should receive international protection."


opposed approaches to solving the problem. On the one hand, in countries where the art trade is prospering and where investment capital is abundant while cultural treasures are not, strong arguments are made for a generally unfettered market with sanctions for only very serious abuses. The advantages are said to be both economic and cultural:

Apart from the economic advantages which it offers, a free trade market in art — it is said — is likewise beneficial and desirable from the cultural point of view as the circulation of works of art across frontiers will indisputably contribute to that dialogue between national cultures which many see as the principal element directed towards concord among the peoples of the world and ultimately peace.\(^\text{15}\)

On the other hand, countries rich in cultural property but poor in terms of economic wealth promote a solution calling for the return of stolen or illegally exported cultural property to its country of origin, and believe that international instruments governing such return should operate retroactively.

The practical problems are as follows. In the case of a theft of cultural property, the conflict between the dispossessed owner and the \textit{bona fide} purchaser for value is resolved differently by different jurisdictions in accordance with their own legal systems. Some states would resolve the matter in favour of the dispossessed owner, citing the principle of \textit{nemo dat qui non habet}, to the effect that the thief could not pass good title to the purchaser. Other jurisdictions would protect the good faith purchaser and the dispossessed owner would be out of luck.\(^\text{16}\)

The other problem concerns illegally exported items. Many states refuse to order the return to the state of origin of an item exported contrary to that state’s export laws. States are reluctant to give effect to the export laws of other states because, they argue, international law does not recognize the extraterritorial effect of these measures.\(^\text{17}\)

Although attempts have been made to achieve a compromise between the above two schools of thought, some of the major art importing states have been reluctant to sign international instruments drawn up to deal with the problem of illegal traffic in cultural property.

\(^{15}\) \textit{Supra} note 3 at 33.


UNESCO’s Activities to Protect Cultural Property

The first multilateral attempt to create international rules for dealing with stolen or illegally exported cultural property is found in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,18 adopted in 1970 by UNESCO. The Convention establishes in its declarative section the duty of every state to “protect the cultural property existing within its territory against the dangers of robbery, clandestine excavation and illicit export” and notes that “the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close cooperation.”

The Convention defines cultural property as that specifically designated by a state as being of importance for archaeology, prehistory, history, literature, art, or science and that falls within a prescribed list of categories, including rare collections of fauna and flora, property relating to military and social history, archaeological discoveries, elements of dismembered monuments, antiquities more than 100 years old such as coins, objects of ethnological interest, rare manuscripts, archives, and furniture or musical instruments more than 100 years old (Article 1). Parties are required to:

(1) establish national services within their territories to, e.g., draft laws designed to secure the protection of the cultural heritage and to prevent illicit import, export, and transfer of ownership

(2) develop and maintain a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage

(3) take educational measures to foster respect for the cultural heritage of all states, and give appropriate publicity to the disappearance of any item of cultural property (Article 5)

(4) require exported cultural property to be accompanied by a certificate authorizing the export (Article 6).

18 (1971) 10 I.L.M. 289. Although other conventions dealing with the protection and preservation of cultural heritage preceded the 1970 Convention — see, e.g., the European Cultural Convention (1954) 218 U.N.T.S. 139 and the European Convention on the Protection of the Archaeological Heritage (1969) 8 I.L.M. 739 — the 1970 Convention was the first to seek to deal specifically with the return of property illegally removed from the country of origin.
Article 7 of the Convention also obliges importing parties to do, *inter alia*, the following:

(1) take the necessary measures to prevent museums within their territories from acquiring illegally exported cultural property

(2) prohibit the import of cultural property stolen from a museum or public monument, provided that such property is listed in the museum’s inventory

(3) at the request of the state of origin, take steps to recover and return such stolen cultural property, provided that the requesting state pays just compensation to an innocent purchaser.

Parties are to require antique dealers to maintain registers recording the origin of each item of cultural property, as well as information about the supplier and the price paid (Article 10). Parties are to facilitate restitution of illegally exported cultural property to its rightful owner (Article 13).

Canada became a party to the 1970 UNESCO Convention in 1978 and adopted very progressive legislation to implement it. Australia and the United States are also parties, as are more than sixty other states. However, most countries with large art markets (in western Europe) have not become party to the Convention, so that its utility has been marginal.

One major obstacle to becoming a party to the Convention is the requirement that states take steps to recover and return stolen cultural property, regardless of when the property was stolen, and that states of origin pay just compensation to an innocent purchaser, a term that is not defined. As noted above, states have approached these matters in varied ways in their national laws, some providing protection to the original owner, others giving priority to the *bona fide* purchaser.

Criticism of the UNESCO Convention has come from both sides of this argument: it is regarded as having severely eroded the principle of protection of the *bona fide* purchaser, as prejudicing original owners who may have to pay inflated prices as compensation for recovering their cultural objects, and as favouring international protection of cultural property at the expense of ensuring freedom and security in international commerce. The UNESCO

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19 Cultural Property Export and Import Act, R.S.C. 1985, c. C-51. This legislation, which came into effect in 1977, makes it an offence to import into Canada foreign cultural property that has been illegally exported from a country with which Canada has concluded a cultural property agreement.
Convention has also been criticized as putting the entire burden of protection of cultural property on states with large art markets.

**Activities of the Economic and Social Council**

The Economic and Social Council adopted a resolution in 1989, deciding that the topic of transnational crime against the cultural patrimony of countries should be included on the agenda of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The objective was to have participants explore possibilities for formulating policies of international co-operation for the prevention of these offences. The Congress, which took place in Cuba in 1990, considered a draft Model Treaty for the Prevention of Crimes that Infringe Upon the Cultural Heritage of Peoples in the Form of Movable Property.

The model treaty defines movable cultural property as that which has been designated by a state as being subject to export control by reason of its importance for archaeology, prehistory, history, literature, art, or science. The property must also belong to one or more categories, such as products of archaeological excavations, antiquities, materials of anthropological or ethnological interest, paintings, archives, etc. Under the treaty, states must take measures to prohibit the import and export of movable cultural property that has been stolen or illegally exported. They must also introduce a system whereby the export of movable cultural property is authorized by export certificate. States must impose sanctions upon persons or institutions responsible for the illicit import or export of movable cultural property, or that knowingly acquire or deal in stolen or illicitly imported movable cultural property. The draft also establishes a procedure for recovery and return of such property.

The Eighth Congress adopted a resolution recommending to states that they consider the model treaty "as a framework that may be of assistance to interested States in negotiating and drawing up bilateral agreements designed to improve co-operation in the area. . . ." The Congress also adopted a resolution, proposed by Canada and co-sponsored by twenty-three other states, calling for the creation of an automated information exchange service access-

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22 Ibid., 111.
ible to states for the purpose of ensuring international dissemination of information on stolen or illegally exported cultural property. The resolution noted that "the swift international exchange of computerized data concerning stolen or illegally exported movable cultural property is a valuable tool in the prevention of crimes against cultural heritage and the apprehension of offenders." The resolution accordingly requested that the Secretary-General of the United Nations "make arrangements . . . for the establishment of national and international computer data bases that would be used by competent authorities for the purposes of preventing and combating crime against cultural heritage. . . ." The data bases would contain information on stolen and illegally exported movable cultural property around the world, and also include national legislation and international instruments related to the protection of cultural heritage.

Canada has a computerized data base, the "Register for Stolen Art and Artefacts" (ROSA), developed by the Canadian Heritage Information Network of Heritage Canada and the Interpol Section of the RCMP. It contains information in English and French on national and international thefts, seizures, and forgeries of works of art and artefacts, and includes an optical disc for storing images of art works. Currently there are some 19,000 records on the data base, 15,000 of which are supported by images. Each year, an average of 2,000 entries are added to the system by Canadian police agencies and Interpol bureaus around the world.

The Ninth Congress on the Prevention of Crime and Treatment of Offenders will take place in Cairo in April and May 1995. Participants can expect to learn whether the model treaty considered at the Eighth Congress has proved useful, and whether the resolution on the establishment of national and international computer data bases has led to concrete results.

The Efforts of the Commonwealth

At their 1993 meeting, held in Mauritius, the Commonwealth Law Ministers adopted a "Scheme for the Protection of Cultural

23 Ibid., 142.
24 Ibid.
25 Interpol Ottawa, Theft of Cultural Property in Canada, 1994 4 (Ottawa: Royal Canadian Mounted Police Public Affairs Directorate, 1994). Another example of a computerized data base is the "Art Loss Register," which was created in 1990 and has offices in New York and London.
Heritage within the Commonwealth." The Scheme was developed by a working group (on which Canada was represented) acting on a proposal of the New Zealand Minister of Justice and Attorney General made at the 1983 Meeting of Commonwealth Law Ministers. The Scheme governs the return by one Commonwealth country to another of illegally exported cultural property. To that end, it:

1. Sets out a definition of items covered
2. Requires states to prohibit the export of these items without an export permit
3. Calls for the designation of central authorities for the making and receiving of requests for return of items
4. Stipulates that an innocent purchaser be paid fair and reasonable compensation as a condition of returning the item
5. Establishes a limitation period for claiming return of an item of five years from the time the whereabouts of the item was known.

Law Ministers agreed that Commonwealth jurisdictions should take early steps to give effect to the new Scheme in their domestic legislation. Implementation in Canada will require minor changes to the Cultural Property Export and Import Act.

The Work of the European Union

The Council of the European Communities issued a directive on the return of cultural objects unlawfully removed from the territory of a member state in March 1993. This action was necessary in the light of the establishment on January 1, 1993 of an internal market within the Union in which the free movement of goods, persons, services, and capital was assured.

26 Communique, Nov. 19, 1993, LMM(93)70, points 18-22 and attachment.
27 1983 Meeting of Commonwealth Law Ministers, Colombo, Sri Lanka, Feb. 1983, Minutes of Meeting 71-73 (London: Commonwealth Secretariat). Of interest in this regard is the fact that the Ortiz case (supra note 17) concerned the illegal export from New Zealand of a Maori carving.
28 The Attorney General of the United Kingdom expressed his support for action in this area and encouraged those in a position to do so to implement the Scheme. He noted, however, that the United Kingdom was not in a position to implement the Scheme at that time.
29 Supra note 19.
Under Article 36 of the Treaty Establishing the European Economic Community, member states are entitled to maintain regulations on the import and export of "national treasures possessing artistic, historic or archaeological value." With the disappearance of customs controls, there was concern that existing regulations would be evaded. It was necessary, therefore, to introduce arrangements enabling member states to secure the return of cultural objects, classified as national treasures within the meaning of Article 36, that had been unlawfully removed from their territory.

The directive defines cultural objects as objects that have been classified under national legislation as national treasures possessing artistic, historic, or archaeologic value and that belong to one of the listed categories, including archaeological objects, paintings, mosaics, and sculptures. Some objects must meet specified age and value thresholds. Cultural objects that have been unlawfully removed from the territory of a member state are to be returned in accordance with the procedure provided for in the directive. The return procedure permits states to bring actions before foreign courts, provided stipulated limitation periods have not expired. Where the return of an object is ordered, the possessor may be awarded compensation, provided that due care was exercised in acquiring the object.

The Council of the European Communities also promulgated a regulation on the export of cultural objects in December 1992. The regulation noted the need to establish uniform rules for exporting cultural objects (using the same definition as in the directive) to states outside the European Community, and stipulated that an export permit was required to export such objects beyond Community territory. Permits can be refused for objects protected under national legislation or for the protection of national treasures possessing artistic, historic, or archaeological value. The return procedure set out in the directive would apply to objects exported contrary to this regulation.

**THE UNIDROIT DRAFT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

Originally established in Rome in 1926 as an auxiliary organ of the League of Nations, Unidroit was re-established in 1940 as an independent governmental organization. Membership is now close

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to sixty states drawn from all regions of the world and representing various legal systems. Canada has been a member of Unidroit since 1968 and a Canadian has served on its Governing Council since 1984.  

The purpose of Unidroit as set out in Article 1 of its statute, "is to examine ways of harmonising and co-ordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law." Unidroit does this by preparing drafts of laws, conventions, and agreements on private law matters that may be adopted by states, thus fostering the development of uniform internal law. Unidroit also undertakes studies in comparative private law, organizes international conferences and publishes works on private international law and unification of law.

GENESIS OF THE DRAFT UNIDROIT CONVENTION

In 1974 Unidroit completed a draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables. UNESCO thought that the 1974 draft could serve as a useful starting point for drawing up rules applicable to the illegal traffic in cultural property, and it requested Unidroit to study the issue in the light of the 1974 draft Uniform Law and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Unidroit appointed Gerte Reichelt of the Vienna Institute of Comparative Law to undertake this work. She produced two studies. In addition, the then President of Unidroit, Riccardo Monaco, prepared a document propo-

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32 Every five years the member states of Unidroit elect the 25 members of the Governing Council. The Council is responsible for drawing up the work program of the Institute and determining the methods for carrying out the Institute's mandate. E.g., the Council establishes study groups and committees to develop international instruments or to carry out studies.

33 T. Bradbrooke Smith of Stikeman, Elliott in Ottawa and former Assistant Deputy Attorney General of the Department of Justice served on the Governing Council from 1984 through 1988. Madam Justice Anne-Marie Trahan of the Quebec Superior Court and former Associate Deputy Minister for Civil Law and Legislative Services of the Department of Justice has served on the Council since 1989.

34 Supra note 18.

sing an outline for a private law convention on the international protection of cultural property. The paper "stressed the need for striking a balance between the interests of the countries of origin of cultural property and those referred to as importing countries."\textsuperscript{36}

In 1986, the Governing Council of Unidroit decided to include the subject of the international protection of cultural property on the Institute's work program, and in 1988 it set up a study group to consider the feasibility and desirability of drawing up uniform rules on the international protection of cultural property. Over the next four years the study group prepared a preliminary draft convention on stolen or illegally exported cultural objects, including the concept of the right to payment and restitution. The Governing Council submitted the draft for consideration to a Committee of Governmental Experts.

The Committee, composed of representatives of some sixty states, including Canada, as well as a number of international organizations such as UNESCO, Interpol, and the Hague Conference on Private International Law, met on four occasions during the period 1991 to 1993. At its fourth session it adopted the draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects.

THE DRAFT UNIDROIT CONVENTION

The Convention sets out rules for the return of stolen or illegally exported cultural property, as defined in the Convention, provided that certain conditions are met. The questions of compensation for \textit{bona fide} purchasers and limitation periods for bringing actions are addressed, as is the issue of the proper jurisdiction in which to bring a claim. The draft Convention is divided into five chapters, each of which will be dealt with separately.

\textit{Chapter 1: Scope of Application and Definition}

Article 1 provides that the Convention applies to claims of an international character for the restitution of stolen cultural objects or for the return of illegally exported cultural objects. In other words, the Convention does not apply to domestic claims. Where illegally exported cultural objects are concerned, the Article specifies that the objects must have been exported contrary to a law that

\textsuperscript{36} \textit{Supra} note 3 at 31.
prohibited their export because of their cultural significance. Thus, they must have been exported contrary to a law that places conditions on or prohibits the export of objects because they are culturally significant.

Article 2 defines cultural objects for the purposes of the Convention. The definition is very broad and includes objects that, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art, or science. The definition refers by way of example to the list of classes of objects found in the definition of cultural property in the 1970 UNESCO Convention. The definition does not refer to specific qualities of the object such as age, nor to the degree of importance of the object.

The definition Article was vigorously debated during the sessions of the Committee of Governmental Experts. Some participants pressed for a detailed definition listing categories of objects, a formulation said to facilitate matters before the courts, while others suggested that it would be sufficient to refer to objects that have been designated in national legislation as being of importance because of their cultural significance. Proponents of the latter approach argued that such a definition recognizes the right of each state to decide for itself what is culturally significant for that state.

Chapter 2: Restitution of Stolen Cultural Objects

Article 3 of the Convention places an obligation on the possessor of a stolen cultural object to return it. In addition, the Article specifies that objects that have been unlawfully excavated, or lawfully excavated but unlawfully retained, are deemed to have been stolen. It also contains provisions for limitation periods for actions for restitution of stolen cultural objects.

The length of the limitation periods appears in square brackets in the draft Convention because the Committee of Governmental Experts could not reach a consensus on the appropriate period. The two options for the principal limitation period are one and three years from the time when the claimant knew or ought reasonably to have known the object's location and the identity of its possessor. This means that a person wanting to make a claim to get property back would have to do so within one or three years from the time of becoming aware of the object's location and its possessor's name, depending on the period that is eventually stipulated.

The Canadian Cultural Property Export and Import Act, supra note 19 follows this approach.
in the final version of Article 3. The options for the absolute limitation period are thirty and fifty years from the time of the theft.

Shorter limitation periods favour possessors, and would therefore tend to bring greater certainty to the trade in cultural objects. A buyer of a cultural object would face less risk of being sued and hence be less concerned about eventual restitution. By contrast, longer limitation periods are to the advantage of claimants who have been unlawfully deprived of their property. Some states do not want to include any limitation periods, arguing that the passage of time should not operate to legalize theft. This issue will likely give rise to considerable debate at the diplomatic conference.38

Paragraph 4 of Article 3, which currently appears in square brackets because the Committee of Experts did not reach consensus as to whether it should be included, provides that claims for restitution of a stolen cultural object belonging to a public collection are subject to two possible options, both appearing in square brackets: either to no limitation period or to a limitation period of seventy-five years.

A proposed definition of "public collection" for purposes of the longer limitation period appears in square brackets in the Convention, as follows:

For the purposes of this paragraph, a "public collection" consists of a collection of inventoried cultural objects, which is accessible to the public on a [substantial and] regular basis, and is the property of (i) a Contracting State [or local or regional authority], (ii) an institution substantially financed by a Contracting State [or local or regional authority], (iii) a non profit institution which is recognized by a Contracting State [or local or regional authority] (for example by way of tax exemption) as being of [national] [public] [particular] importance, or (iv) a religious institution.

Article 4 of the Convention provides that a possessor of a stolen cultural object who is required to return it is entitled to fair and reasonable compensation to be paid by the claimant. There are two conditions that a possessor must meet in order to be eligible for compensation. First, the possessor must show that he or she neither knew nor ought reasonably to have known that the object was

38 The Canadian Cultural Property Export and Import Act, ibid., provides that no limitation period applies to actions for recovery of illegally exported cultural property brought in the Federal Court of Canada. However, under existing federal legislation, an action brought in one of the superior courts of the provinces would be subject to provincial limitation periods.
stolen. Second, the possessor must show that he or she exercised due diligence when acquiring the object.

Paragraph 4(2) states that, in determining whether the possessor exercised due diligence, consideration should be given to the circumstances in which the object was acquired. Those circumstances are described as including the character of the parties, the price paid, and whether the possessor consulted any reasonably available register of stolen cultural objects.

Paragraph 4(3) states that a possessor who acquired an object by inheritance or by gift shall not be in a more favourable position than the person from whom he or she acquired the object. In other words, a possessor is not excused from returning a stolen cultural object by the fact that he or she inherited it or received such an object as a gift.

Chapter 3: Return of Illegally Exported Cultural Objects

Article 5 sets out the conditions for the return of an illegally exported cultural object. It is the contracting state (as opposed to the individual or institution that has been deprived of its cultural object) that makes the request for the return of the object. Paragraph 5(1) provides that the object must have been exported in violation of that state's law regulating the export of cultural objects because of their cultural significance. In other words, that state must have enacted legislation that places conditions on or prohibits the export of cultural objects because those objects are culturally significant, and the export must have been contrary to that legislation.

A contracting state may also request the return of an object that was temporarily exported under a permit and has not been returned in accordance with that permit. This might occur when a cultural object was exported for purposes of an exhibition, and the object was not returned when the exhibition was over.

The request for return must be made to a court or other competent authority of another contracting state, such as a government minister or a designated official. There was some debate during the meetings of the Committee of Governmental Experts as to whether it should be possible to make such a request to a body other than a court of law. One delegation expressed the view that the courts provide a better guarantee of impartiality, and the fact that they are bound by precedent would add certainty to the process.
Under paragraph 5(2), to have the object returned after illegal export the requesting state must establish that the removal of the object from its territory significantly impairs one or more of the following four interests:

(1) the physical preservation of the object or its context
(2) the integrity of a complex object
(3) the preservation of information of, for example, a scientific or historical character
(4) the use of the object by a living culture.

In the alternative, the requesting state must establish that the object is of "outstanding cultural importance" for the requesting state. The above provisions gave rise to vigorous debate during the meetings of governmental experts. A number of participants have argued that the burden of proof placed on the requesting state is too rigorous and that it should be sufficient for a requesting state to prove that the object has been exported contrary to its laws protecting cultural objects. Many of the art importing countries, however, have made it clear that this provision is a *sine qua non* for their adoption of the Convention.

Paragraph 5(3) places an obligation on the requesting state to provide any information of a factual or legal nature to assist the court or other competent authority in determining whether the requirements of paragraphs 5(1) and (2) are met. Claimants are required to file information with the court or competent authority, or possibly to provide expert witnesses about export laws, on such matters as whether the object forms part of a larger cultural object, and the use of the object.

The last paragraph of Article 5 contains the limitation periods for requests for return of illegally exported cultural objects. As with the provisions relating to stolen objects, options for limitation periods appear in square brackets. The principal limitation period is either one or three years from the time when the requesting state knew or ought reasonably to have known the location of the object and the identity of its possessor. The absolute limitation period is either thirty or fifty years from the date of the illegal export.

Article 6 states the circumstances in which a court or other competent authority of the state may refuse to order the return of

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39 Under Canada's Cultural Property Export and Import Act, *ibid.*, the foreign State need show only that the cultural property was illegally exported from that State, and therefore illegally imported into Canada.
illegally exported cultural objects, even where all of the requirements of Article 5 have been satisfied. The principal ground for such refusal is that the object has a “closer connection” with the culture of the state to which the request for return has been made.40

This provision was also the subject of lengthy debates during the meetings of governmental experts. Some delegations considered that the inclusion of Article 6 would render it more difficult for courts or other competent authorities to decline to return an object, while other delegations believed that the provision would have the opposite effect. The debate will no doubt be resurrected during the diplomatic conference.

Article 6 also contains a provision in square brackets that would allow the court or other competent authority to refuse to order the return where the object was unlawfully removed from the state addressed before it was unlawfully removed from the territory of the requesting state.

Article 7 states that a contracting state may not make a request for the return of an illegally exported cultural object where the export is no longer illegal at the time of the request. Paragraph 2 also provides that no request for return may be made for two types of objects: those that were exported during the lifetime of the person who created them (a provision in square brackets states “or within a period of [five] years following the death of that person”); and, where the creator is not known, those that were less than twenty years old at the time of the export. The period of five years following the death of a known creator is intended to permit the timely winding up of the creator's estate. Some delegations thought that the provision would not prove useful because the time of death of the artist would often be difficult to determine or to prove.

In addition, Article 7 contains a provision in square brackets that would allow a contracting state to request the return of an object made by a member of an indigenous community for use by that community, even though the creator is still alive or, where the creator is not known, the object is less than twenty years old at the time of the export. There was reluctance to adding this provision on the part of several delegations, because the term “indigenous” was not defined and was subject, in their view, to very broad interpretations. The provision was added late in the day, and there was

40 The Article would not apply, however, in the case of objects that were exported under a temporary export permit and have not been returned according to the terms of the permit.
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insufficient time for discussion; it may be deleted from the final version. In any event, the Convention is intended to deal with cultural objects in general and is not designed to cover all aspects of aboriginal cultural objects. These are being dealt with in conventions or in fora that deal specifically with aboriginal concerns — for example, the United Nations Working Group on Indigenous Peoples, which is currently studying cultural and intellectual property rights.

As with stolen cultural property, there is a provision providing for fair and reasonable compensation to a possessor who is required to return an illegally exported cultural object. Article 8 requires the possessor to show that he or she neither knew nor ought reasonably to have known at the time of acquisition that the object had been unlawfully removed from the requesting state. However, unlike the possessor of stolen cultural property, the possessor of illegally exported cultural property does not need to offer proof of due diligence in acquiring the object to get compensation. The Committee of Governmental Experts resolved that purchasers of stolen objects should be subject to a greater burden, because theft is universally recognized as a criminal act whereas export rules differ from country to country.

Article 8 includes a square-bracketed paragraph on the subject of export certificates. Under this paragraph, where a contracting state has instituted a system of export certificates, the purchaser of an object is put on notice that an object has been illegally exported if the object is not accompanied by an export certificate. The Convention does not, however, require contracting states to institute a system of export certificates for cultural objects.

Export certificates are referred to in several of the international instruments that deal with the protection of cultural property. Such a system, it is argued, provides for control over the legal export of cultural objects, and the absence of an export certificate can signal that the object came into the hands of the possessor illegally. The presence or absence of an export certificate can be important when determining the *bona fides* of an acquirer of an object. However, opponents of export certificates argue that such systems can be administratively burdensome and enormously costly, particularly for countries with large art markets. Thus, there is

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41 Canada has set up a system of export permits for cultural property in the Cultural Property Export and Import Act, *supra* note 19, to meet the requirements of the 1970 UNESCO Convention.
considerable reluctance to including such a provision in the Unidroit Convention.

Paragraph 3 of Article 8 provides that, as an alternative to compensation, a possessor who is required to return an illegally exported cultural object may nevertheless retain title of the object, or may transfer title to a person residing in the requesting state "who provides the necessary guarantees." "Necessary guarantees" are not defined. This provision demonstrates the paramount importance of having cultural objects, rather than legal titles thereto, returned to their countries of origin.

Article 8 places the cost of returning the object on the requesting state. The article concludes by stating that a possessor shall not be in a more favourable position than the person from whom the object was acquired by way of gift or inheritance.

Chapter 4: Claims and Actions

Article 9 provides that a claim may be brought in the place where the cultural object is located. This is a special ground of jurisdiction, since there is currently no general rule providing for jurisdiction based solely on the location of a movable object. Normally, jurisdiction would be based on the residence of the possessor or, in the case of stolen cultural objects, where the theft had occurred. This special ground of jurisdiction is important because it may often be easier to locate a stolen or illegally exported cultural object than to find the person who has or purports to have title to it.

This special ground of jurisdiction does not prevent claimants from relying on other, more traditional, grounds of jurisdiction, since the article states that the special ground exists without prejudice to the jurisdictional rules either in the ordinary law of states parties to the Convention or in international conventions. Therefore, claims could still be brought where the possessor resides. 42

Paragraph 2 of Article 9 states that the parties may agree upon the jurisdiction to which to submit their dispute, or they may agree to go to arbitration rather than to court. Finally, paragraph 3 permits parties to have resort to interim measures for the protection of the object that are available under the law of the contracting state where the object is located, even if the request for return of the object is brought in a different contracting state.

42 Under the Cultural Property Export and Import Act, ibid., claims may be brought in Canada when the object in question is in Canada.
Chapter 5: Final Provisions

Article 10 allows parties to apply rules that are more favourable to the international return of stolen or illegally exported cultural objects than those found in the Convention. For example, a state can enact legislation stipulating less stringent limitation periods. In its final version, this chapter will also set out the procedures for states to become parties and the numbers required to bring the Convention into force. There will also be a federal state clause to enable federal states to become party to the Convention, extending its application to those of their territorial units that have adopted implementing legislation.

Other Issues

Debates on matters not reflected in the draft Convention also occurred during the meetings of the Committee of Governmental Experts. One such issue was the question whether states should have the option of implementing only that part of the Convention dealing with illegally exported cultural objects. In other words, some states have proposed that the Convention permit opting out of the part dealing with stolen cultural property, because the Convention's provisions are vastly different from their national laws dealing with stolen property.

Another issue is whether the Convention should operate retroactively. States that have lost art treasures and items of cultural heritage have vigorously promoted retroactivity, while art market states have refused to consider any such proposal. This issue is likely to be debated at length during the diplomatic conference. It is doubtful, however, in the light of the considerable opposition that has been expressed against it, that retroactivity will find its way into the final version of the Convention.

Conclusion

The illicit trade in cultural property has continued to flourish in the face of increasing numbers of international instruments designed to control it. These instruments have not succeeded because they have not reconciled the opposing views of the proponents of an unfettered art market and the advocates of countries that continue to suffer from the impoverishment of their cultural heritage through theft and illegal export. As the Unidroit Secretariat has explained, "States naturally tend to adopt a position
more favourable to the defence of their own particular interests. If a satisfactory solution is to be reached, however, it will be necessary to look beyond these purely egoistic considerations. Regard will have to be had to all the competing interests and an attempt made somewhere to strike a fair balance."

Although Unidroit's draft on cultural property is of considerable interest to a number of countries, participants have thus far demonstrated limited willingness to compromise on key issues. Thus, there is a risk that the diplomatic conference will fail to adopt a final convention along the lines of Unidroit's draft.

Nevertheless, recent regional instruments such as the European Community Directive and the Commonwealth Scheme for the Protection of Cultural Heritage Within the Commonwealth provide some basis for believing that progress can be made. True success, however, lies in a multilateral approach such as the draft prepared by Unidroit. Only universal or near universal action will result in curbing an illegal trade that has become internationalised. The means to struggle against this must also be international.

If a convention is adopted on the basis of the Unidroit draft that has the support of art importing and art exporting countries, Unidroit's effort will represent the most significant achievement to date in the international effort to protect cultural property.

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Sommaire
La collaboration internationale visant à assurer la restitution de biens culturels volés ou illicitemment exportés: Est-ce qu’Unidroit a trouvé une solution globale?

La protection internationale des biens culturels a commencé par des efforts visant à limiter l'appropriation illicite des biens culturels et les dommages qui leur étaient causés en temps de guerre. Le principal exemple de ces efforts est la Convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé. Par la suite, on s'est préoccupé de mettre en place des mesures de répression du trafic illicite et international des biens culturels, telles que celles prévues dans la Convention de l'UNESCO de 1970 concernant les mesures à prendre pour interdire et empêcher l'importation, l'export-

43 Supra note 3 at 36-37.

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International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?

The international protection of cultural objects began with efforts to reduce damage to and unlawful appropriation of cultural objects in time of war. The primary example of such efforts is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Subsequently, attention was turned to curbing the international illicit traffic in cultural objects, as in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Canada is a party to this Convention, which is implemented domestically through the Cultural Property Export and Import Act. However, since most countries with large art markets (particularly in Western Europe) are not parties to the UNESCO Convention, its utility is marginal. Unidroit has produced a draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects, which will be considered at a diplomatic conference in June 1995. The draft Convention, which strives to strike a balance between the interests of countries of origin of cultural property and those of importing countries, would represent the most significant achievement to date in the international effort to protect cultural property. However, there is a risk that this convention will not be adopted, since participants have demonstrated a limited willingness to compromise on key issues.