The UNIDROIT Convention of 1995

The goal of the proponents of the 1995 UNIDROIT Convention on "stolen or illegally exported cultural objects" appears laudable and is expressed in the preamble as a promise "to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects."

According to the International Institute for the Unification of Private Law,

> The UNIDROIT Convention reinforces the rules of the 1970 UNESCO Convention and complements them with minimum rules for the restitution and return of cultural objects. Based on principles of private international law and international procedural law, the UNIDROIT Convention ensures an immediate implementation of the principles anchored in the UNESCO Convention. In this sense, both instruments are compatible and complement one another.

The UNIDROIT Convention is thus presented as a logical extension of the 1970 UNESCO Convention. However, the economics of the two conventions are completely different. The 1970 UNESCO Convention is restricted to the creation of a foundation for international cooperation in a struggle against trade in cultural objects and for restitution, while leaving to member states the matter of how to integrate its mandates into their own laws. The UNIDROIT Convention, on the other hand, established a corpus of directly applied legal rules, the adoption of which become mandatory for member states as soon as they become adherents to the Convention, even if that means violating their own internal legal codes. The 1995 convention is in fact not just an updated or revised version of the 1970 UNESCO Convention because its purview is not the same. Above and beyond the fact of its incompatibility with the civil rights or common law rights prescribed by many countries, the UNIDROIT Convention breaks the equilibrium of the obligations imposed by the 1970 UNESCO Convention.

In order to be protected by the UNESCO Convention (Article 1), the cultural objects must meet two criteria. The first is having been designated beforehand on lists produced by each state as being of importance and belonging to categories that the convention applies to. This would logically entail that if they wished to benefit from the convention's protection, the countries of "origin" would be forced, based on a national protection inventory, to "create and keep up to date a list of important public and private cultural objects whose export would be palpably damaging to the national cultural patrimony" (Article 5). It could only be because a particular cultural object had been specifically designated or classified before demand for its restitution had been made that it could come under the convention's protection.

The real problem of the enforcement of the 1970 UNESCO Convention's provisions lies not so much in a hypothetical lack of directly applicable sanctions in the countries where "illegal" cultural objects might be present, as in a lack of will, or an inertia in those countries with regard to implementing a classification policy that, in the absence of a list of protected objects, they cannot make restitution demands for.

This state of affairs has led to a change of philosophy. With the advent of the UNIDROIT Convention, responsibility is laid upon current owners and the process of recourse against them is facilitated. Proof of demonstrable minimum care for and interest in its own cultural patrimony is no longer required of an object's country of origin. There is no list or classification, and any cultural object as defined by the UNIDROIT Convention, even the most humble one, now enjoys protected status.

The notion of cultural objects as expressed by Article 2 is broad. They "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." And the notion is all the broader because those eleven categories include everything from "rare collections and specimens of fauna, flora, minerals, and anatomy, and objects of paleontological interest" to "antiquities more than one hundred years old," "products of archaeological excavations (including regular and clandestine) or of archaeological discoveries," "original works of statuary art and sculpture in any material," "postage, revenue, and similar stamps, singly or in collections," "original works of statuary art and sculpture in any material," "engravings," "manuscripts," and "archives."

It should be noted that even for the Netherlands, which is a signatory to the convention but has not yet ratified it, "the UNIDROIT Convention's definition of cultural objects is too vague and broad." Indeed, almost anything can be designated a cultural object that falls under the convention's protection, and any member state can directly invoke the rules it dictates in the courts of any other member state.

The problem is precisely that this body of "common, minimal legal rules" that the convention purports to establish contradicts and is in conflict with the internal laws of many countries. The convention's incompatible provisions include a statute of limitations of fifty years after a theft (seventy-five years if the state requesting restitution declares its demand at the same time that it becomes

signatory to the agreement) and the inversion of the responsibility for the burden of proof, which now falls upon the possessor of the "stolen" object.

A number of countries that have refused to ratify the convention have formulated clear, specific, and well-justified objections to it. Germany argues that its provisions "do not adequately correspond to national and European legal concepts." France considers that "some of its provisions are incompatible with domestic laws, particularly with regard to placing the burden of proof on the acquirer." Indeed, "under French law, the acquirer of a personal possession or a piece of personal property is presumed to be acting in good faith. He is not required to make any proof of diligence when he acquires an object."

These countries, the legal codes of which derive from their civil ones, are not the only ones with reservations. Mexico, a country with quite dissimilar legal codes, considers that the convention "establishes criteria of protection of cultural objects that are contrary to Mexican law." It is also "in contradiction with national law" for the United Kingdom, which further specifies that "the fifty-year statute of limitations after a theft that the UNIDROIT Convention prescribes" is a matter of particular concern.

Many other criticisms of the convention could be formulated, beginning with the absence of any common definition of the concept of theft, which is the first and fundamental requirement that could justify possible action, and the obligations it imposes on owners, even of good faith, to consent to restitution of their property. These are very curious omissions for a text the stated aim of which is "the establishment of common, minimal legal rules."

And then there is Article 18, which states that "no reservations are permitted except those expressly authorized in this convention." This interdiction prevented certain member states from adapting the convention to its own legal codes, such as Belgium did when it ratified the UNESCO Convention, specifying that the term "cultural objects" must be interpreted as being limited to objects enumerated in the Annexes to Council Regulation and the Operational Directives of 1992 and 1993 (nos. 3911/92–93/7/CEE).

Today, more than twenty years after its adoption, only forty-two countries adhere to the UNIDROIT Convention, despite the continuing efforts of militants who excoriate the art market and preach action against an imagined increase in the illegal trade in cultural objects that they allege helps finance terrorism—a charge that has no basis in fact nor statistics to support it and has even been formally contradicted by a report issued by the independent auditors of the Deloitte company, ordered by the European Commission and submitted in June 2017.

The authors of the UNIDROIT Convention would have done well to have kept in mind and been inspired by an adage in Roman law: *De minimis non curat praetor,* meaning "the law does not concern itself with trifles." This principle, which arose from a need for efficiency in the application and enforcement of laws, is all the more vital in this particular case, since it has such wide-ranging interest and relates to the openness of mind and spirit to other cultures promoted by the exchange and trade of cultural objects, which in turn are a catalyst for the intellectual curiosity of collectors.

One can only regret that the convention sets no limits on the trade it prohibits. In this it actually defeats itself. Even objects of low value, which in no way can be considered national treasures, fall under its purview, and resources are devoted to—and wasted on—regulating objects that should be allowed to circulate freely, subject of course to being in compliance with customs regulations.

The failure of the 1995 UNIDROIT Convention to gain acceptance is justified, and it can only be hoped that the struggle to stem the trade in cultural objects will follow other more effective paths, based on a more egalitarian vision of the duties and responsibilities of all parties involved, including those of the so-called countries of origin.

A Dangerous Assault on the Internal Jurisdictional Authority of Signatory Countries

By Yves-Bernard Debie

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