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Primljeno 01.10 2009.

## **STRENGTHENING THE INTERNATIONAL REGIME FOR THE PREVENTION OF THE ILLICIT TRADE IN CULTURAL GOODS**

*Članak izučava međunarodno pravne i regionalne instrumente koji su usmereni na zabranu i sprečavanje nedozvoljenog prometa kulturnim dobrima. Analiziraju se razlike između pojedinih pravnih režima, i prikazuje razvoj međunarodno pravnih instituta u pomenutoj oblasti. Autori pre svega proučavaju komplementarnost i dejstvo UNESCO Konvencije o merama za zabranu i sprečavanje nedozvoljenog uvoza, izvoza i prenošenja svojine kulturnih dobara, (1970), Direktive (EEZ) broj 93/7 od 15.03.1993. o povraćaju kulturnih objekata nezakonito iznetih sa teritorije država članica i UNIDROIT Konvencije o ukradenim ili ilegalno izvezenim kulturnim dobrima (1995). Autori naglašavaju potrebu za daljim usavršavanjem postojećeg međunarodnopravnog uređenja u oblasti suzbijanja nezakonitog prometa kulturnim dobrima.*

*Ključne reči: nedozvoljena trgovina; kulturna dobra; UNESCO Konvencija; UNIDROIT Konvencija*

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### **1. INTRODUCTION**

It is estimated that art smuggling is second only to the international drug trade as the most lucrative crime in the world.<sup>1</sup> In 2005, UNESCO put the total value of illicit revenue of the stolen or smug-

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<sup>1</sup> See, for example, Boroughs, L., *The Hidden Art of Theft*, U.S. News and World Report, April 2, 1990.

gled antiquities and art trafficked across the globe at more than six billion dollars.<sup>2</sup>

The saleability of cultural objects has flourished since the end of the Second World War. The increased demand for cultural objects inevitably gave rise to the proliferation of illicit trade in cultural goods. The given demand stemmed from the unequal power dynamic between market countries, that were economically developed, but faced deficits in cultural goods and source countries, which were rich in cultural property but economically poor relative to market countries.<sup>3</sup>

Furthermore, the organized crime in theft or looting of cultural goods was encouraged by the advances in technological sophistication, which facilitated international communication and transfer of funds as well as the ease in crossing international borders.<sup>4</sup>

Parallel to this growth in illicit trade of cultural property, over the last sixty years has been seen a proliferation of international declarations, resolutions and treaties – bilateral, regional and universal in scope – which assert the fundamental importance of the protection of cultural heritage and pledge the support of the Contracting States for various methods of enhancing that protection. A number of these international instruments are concerned with the illicit movement across borders of cultural objects.<sup>5</sup>

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<sup>2</sup> See Graham Green, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases*, 44 HARV. J. ON LEGIS. 251, 262 (2007). and Raymond J. Fisman, *The Smuggling of Art, and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques*, Columbia University Business School; National Bureau of Economic Research (NBER), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1017769](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017769).

<sup>3</sup> See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 833–42 (1986), at 832. Examples of source countries include Mexico, Egypt, Greece, and India. Examples of market countries include the United States, Switzerland, France, and Germany. Of course, a source country may also be a market country.

<sup>4</sup> The Law Reform Commission (LRC 55–1997), *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Ireland, Ardilaun Centre, 111 St. Stephen's Green, Dublin 2, at 29, available at: [http://www.lawreform.ie/publications/data/lrc98/lrc\\_98.html](http://www.lawreform.ie/publications/data/lrc98/lrc_98.html).

<sup>5</sup> A number, however, deal with other protective issues; see for instance websites of UNESCO, Council of Europe and European Union.

The continued and almost exponential growth in the illicit trade in art in that same period suggests that they have had only limited success.

In the light of this limited success, this Article will examine the existing, applicable international and regional legal instruments aimed to the strengthening of the current regime to prevent the illicit recovery, movement and trade in cultural heritage. It will illustrate the differences between the various regimes, as well as the history and development of the international legal framework directed towards combating illicit trade in cultural heritage. A special attention will be accorded to the complementarity among, and functioning of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

This review points up the need, notwithstanding the existence of these regimes, for the further improvement and strengthening of the existing international regime.

## 2. EARLIER INTERNATIONAL INSTRUMENTS

The protection of cultural heritage started to assume real importance in the international community only towards the end of the Second World War.<sup>6</sup> The Declaration of London of 1943, concluded by the Allied Powers, expressly provided for the return of objects removed from occupied territories, regardless of whether the objects had been acquired as a result of:

“[...] transfers or dealings which had taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected [...]”

The Declaration imposed an absolute obligation upon the possessor to return objects which had been removed from occupied territories, regardless of whether he or she acquired the object in good faith.<sup>7</sup> Adherence to this

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<sup>6</sup> The Law Reform Commission (LRC 55–1997), *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Ireland, Ardilaun Centre, 111 St. Stephen's Green, Dublin 2, at 17, available at: [http://www.lawreform.ie/publications/data/lrc98/lrc\\_98.html](http://www.lawreform.ie/publications/data/lrc98/lrc_98.html).

<sup>7</sup> O'Keefe, P and Prott, L *Law and the Cultural Heritage, Volume III: Movement* (Butterworths, 1989) para 1505 *et seq.*

Declaration meant that some States had to overturn the protection that their national legal systems afforded good faith purchasers and possessors.

The same approach was also adopted in another instrument of similar scope, the Protocol of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954. The interested states may join this instrument separately from the 1954 Convention itself.<sup>8</sup> More specifically, the 1954 Protocol to the Hague Convention states that cultural property shall never be retained as war reparation, and requires each State Party, among other things, to:

“(i) Prevent the exportation of cultural property from a territory occupied by it during an armed conflict;

(ii) Take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory; and

(iii) Return, at the close of hostilities to the competent authorities of the territory previously occupied, such cultural property which is in its territory, and pay an indemnity to the holders in good faith of such property.”<sup>9</sup>

Actually, the Hague Convention of 1954 is the only international instrument aimed specifically at protecting cultural property during armed conflict and occupation. These situations are often accompanied by looting and illicit export of cultural property from occupied territories.

The regime under these two instruments turned to be acceptable to most of the international community due to the specific post-war conditions under which there had been drafted. This consensus disappeared, however, when normal civilian life was continued. Therefore, the question of the competing interests of the dispossessed owner and the good faith possessor revived again and had to be reconsidered at the international level.<sup>10</sup>

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<sup>8</sup> As of October 2009, 100 States have accepted this Protocol, including Serbia. <http://portal.unesco.org/la/convention.asp?KO=15391&language=E>.

<sup>9</sup> See *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, UNESCO HANDBOOK, International Standards Section, Division of Cultural Heritage, 2006, at page 11.

<sup>10</sup> The Law Reform Commission (LRC 55–1997), *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Ireland, Ardilaun Centre, 111 St. Stephen's Green, Dublin 2, available at: [http://www.lawreform.ie/publications/data/lrc98/lrc\\_98.html](http://www.lawreform.ie/publications/data/lrc98/lrc_98.html).

While the 1954 Hague Convention deals with the protection of cultural property only during wartime, the 1970 UNESCO Convention, as a complement to the 1954 Hague Convention was developed for the protection of cultural property primarily during peacetime. It obliges member states to protect the cultural property of other member states through national legislation and international cooperation.

### **3. THE PROTECTION REGIME UNDER THE CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY OF 1970 (HEREINAFTER: “1970 UNESCO CONVENTION”)**

#### **A Public Law Approach**

The 1970 UNESCO Convention was the first international instrument to recognize a general obligation on States to take steps to prevent illicit movement in cultural property. This is the most broadly ratified international convention that exists on the issue of illicit trafficking in cultural property.<sup>11</sup>

It is essentially a public law treaty, which requires the Contracting States themselves to undertake the various preventive measures, such as setting-up proper national services to ensure protection of cultural property,<sup>12</sup> inventories of important public or private cultural property,<sup>13</sup> export certificates<sup>14</sup>, specific import controls<sup>15</sup>, penal or administrative sanctions<sup>16</sup>, awareness activities,<sup>17</sup> rules governing conduct of curators, collectors, antique dealers<sup>18</sup>, etc.

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<sup>11</sup> The Law Reform Commission (LRC 55–1997), *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Ireland, Ardilaun Centre, 111 St. Stephen's Green, Dublin 2, page 18, available at: [http://www.lawreform.ie/publications/data/lrc98/lrc\\_98.html](http://www.lawreform.ie/publications/data/lrc98/lrc_98.html).

<sup>12</sup> Article 5 of the 1970 UNESCO Convention.

<sup>13</sup> Article 5 (b) of the 1970 UNESCO Convention.

<sup>14</sup> Article 6 (a) of the 1970 UNESCO Convention.

<sup>15</sup> Article 7(a) and 7 (b) of the 1970 UNESCO Convention. .

<sup>16</sup> Article 8 of the 1970 UNESCO Convention.

<sup>17</sup> Article 5 (b) and 10 of the 1970 UNESCO Convention.

<sup>18</sup> Article 5 (e) of the 1970 UNESCO Convention.

In addition, it ensures the international cooperation of the States Parties in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.<sup>19</sup> It also sets forth the specific methods of international cooperation in case of public cultural heritage being in jeopardy from pillage<sup>20</sup>

### The Restitution Framework

The 1970 UNESCO Convention does, however, contain one vital private law provision. Article 7(b) (ii) of the 1970 UNESCO Convention provides for the restitution of illegally exported cultural objects, even when they are in the hands of persons who acquired them in good faith:

“The States Parties to this Convention undertake: [...] at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices [...]”<sup>21</sup>

Reichelt referred to the “commonly accepted opinion” that Article 7(b)(ii) was the principal obstacle to a more general acceptance of the 1970 UNESCO Convention.<sup>22</sup> Pursuant to above cited Article 7(b) (ii), the good faith possessor shall, nonetheless, obtain compensation. Civil law countries did not wish to abandon the fundamental concept of the protection of the good faith possessor which, in their opinion, was central to the free circulation of goods and consequently ensured the vitality of the market.

The reluctance on the part of many States to endorse this principle was augmented by the fact that Article 7(b) (ii) did not set out any limitation period within which restitution must be pursued. As it will be explained later in the text, the international and regional instruments that

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<sup>19</sup> Article 13 (b) of the 1970 UNESCO Convention.

<sup>20</sup> Article 9 of the 1970 UNESCO Convention.

<sup>21</sup> Subject to the precondition that the object is a “designated” one as referred to in Article 1 of the 1970 UNESCO Convention.

<sup>22</sup> See Reichelt, G., *International Protection of Cultural Property*, Uniform Law Review (1985) 43 at 55.

have been subsequently introduced do determine the precise limitation periods.

In addition, a number of scholars, interested professionals and States alike, argued that the scope of application of the 1970 UNESCO Convention was not sufficiently clear and that consequently variety of its interpretations could significantly hinder the conduct of the legal trade in cultural property.<sup>23</sup> For instance, Siehr stated that the 1970 UNESCO Convention was hardly an efficient obstacle to international art trade.<sup>24</sup>

### **Shortcomings of the 1970 UNESCO Convention**

The 1970 UNESCO Convention includes a number of articles that require states to recognise the importance of other states' cultural heritage, and to cooperate in the protection of this heritage.<sup>25</sup> However, these provisions were subject to wide range of interpretations by different States Parties. Specifically, the implications of Article 3, Article 6 and Article 7 of the 1970 UNESCO Convention will be considered.

Article 3 provides that “the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by States Parties thereto, shall be illicit”. Article 6 obliges the states to establish an export licensing system, without which cultural heritage cannot be exported from their territory. A more specific import regime is provided for in Article 7. Actually, Article 7 (a) requires a state to prevent its museums or similar institutions from acquiring cultural heritage that has been illegally exported from the source state, whilst Article 7(b) requires a state to prevent the importation of cultural heritage stolen from a museum or religious site within the source state.

A broad interpretation of these provisions will ensure that all cultural heritage (both terrestrial and underwater) will be protected. Actually, if it is exported illegally, the state of importation will regard the importa-

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<sup>23</sup> See The Law Reform Commission (LRC 55–1997), *Report on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Ireland, Ardilaun Centre, 111 St. Stephen's Green, Dublin 2, at 19, available at: [http://www.lawreform.ie/publications/data/lrc98/lrc\\_98.html](http://www.lawreform.ie/publications/data/lrc98/lrc_98.html).

<sup>24</sup> Kurt G. Siehr, *Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects*, 38 *VAND. J. TRANSNAT'L L.* 1067, 1077 (2005).

<sup>25</sup> See e.g. Article 2, 4 and 9 of the 1970 UNESCO Convention.

tion as illegal, and ordinarily will have the heritage returned to the state of origin. For instance, Australia and Canada have interpreted the 1970 UNESCO Convention in that manner and have implemented national legislation to give effect to this.<sup>26</sup>

Unfortunately, not all states apply such a broad interpretation to these articles. While the United States, arguably the world's most powerful market state, is a party to the 1970 UNESCO Convention, its interpretation of the Convention and its implementing legislation<sup>27</sup> are extremely narrow in scope, providing that only in the instances specified in Article 7 is a state party bound to limit the importation of cultural property. In fact, Article 3 is regarded as being subject to Article 7. The United States declared that Article 3, even if taken together with Article 6 requiring export licensing certificates, would not request illegally exported cultural heritage to be declared illicit by the importing state.<sup>28</sup>

As such, the US would not, for example, consider it illegal for a private individual or an institution that it does not directly control, to import cultural heritage illegally exported from a foreign state if that property had not been stolen from a museum or religious institution of the foreign state.

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<sup>26</sup> Canada's Cultural Property Export and Import Act provides that Canada will recognise the export laws of reciprocating states, either by way of a bilateral or a multilateral treaty. See: Cultural Property Export and Import Act, SC 1975, c 50, s 31 in Forrest, Craig, "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage" [2003] MelbJIL 9; (2003), 4(2) Melbourne Journal of International Law 592, 598. On the other hand, Australia's *Protection of Movable Cultural Heritage Act 1986* gives more extensive interpretation going beyond the strict wording of Article 3 and 7 of the 1970 UNESCO Convention. It reads that foreign cultural heritage that is exported contrary to the state of origin's export laws will be considered as an unlawful import into Australia. This is not limited in application to states parties of the *UNESCO Convention*, but applies to all states whose cultural heritage is illegally imported into Australia. See in: Forrest, Craig, "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage" [2003] MelbJIL 9; (2003), 4(2) Melbourne Journal of International Law 592, 598.

<sup>27</sup> See *Convention on Cultural Property Implementation Act*, 19 USC §§ 301–315(b) (1983), codified as amended at 19 U.S.C. §§ 2601–2613 (2006)), in: Forrest, Craig, "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage" [2003] MelbJIL 9; (2003), 4(2) Melbourne Journal of International Law 592, 598.

<sup>28</sup> See: For a detailed account of the 1970 UNESCO Convention, see Patrick O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (2000). For a detailed account of the 1970 UNESCO Convention.



While in this light the US implementation of the 1970 UNESCO Convention is narrow in its general scope, it is worthwhile to note a number of bilateral agreements, that the US has signed with source states whose cultural heritage are in specific danger of being illicitly recovered and illegally exported to the US. The US has entered into such agreements with a number of states, including Bolivia, Cambodia, Cyprus, El Salvador, Guatemala, Italy, Mali, Nicaragua and Peru.<sup>29</sup> These bilateral agreements, while not uniform, generally adhere more clearly to a wider interpretation of the 1970 UNESCO Convention. However, recourse to bilateral agreements does not create uniform state practice in the course of implementation of the 1970 UNESCO Convention.

The requirement of specific designation of cultural property under as laid down in Article 1 of the 1970 UNESCO Convention is also subject to different interpretations.

Namely, for cultural property to be protected under the 1970 UNESCO Convention, the definition requires that, not only should the items fall within one of the listed categories, but also that the cultural heritage be “specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”.<sup>30</sup>

When it comes to different interpretations, the state practice has evidenced a range of responses: from a narrow interpretation in which the state specifically lists individual items, to a wider response by which a state designates all such items within their territory. A narrow interpretation had the effect of excluding the protection of the undiscovered cultural heritage that was illicitly excavated and exported as this cultural heritage had not been previously specifically designated within the meaning of Article 1 of the 1970 UNESCO Convention.<sup>31</sup> On the other hand, the broad interpretation

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<sup>29</sup> See Bureau of Educational and Cultural Affairs, Department of State (US), *Chart of Current and Expired Import Restrictions under the Convention on Cultural Property Implementation Act (2002)* <<http://exchanges.state.gov/culprop/chart.html>> at 1 October 2003.

<sup>30</sup> See Article 1 of the 1970 UNESCO Convention.

<sup>31</sup> Undiscovered cultural heritage includes but it is not limited to the underwater cultural heritage. The illicit traffic in underwater cultural heritage is addressed by the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001 (hereinafter “the UCH Convention”). However the legal regime under the UCH Convention will not be subject to review, as it is beyond the scope of this Article to analyze the UCH Convention.

of the designation requirement taken by some states parties, does not necessarily mean that their respective interpretations will be recognized by the concerned importing state. Even, more problematic is the task of proving that the cultural heritage in question is indeed covered by the broad designation.

As susceptible to a myriad of interpretations, it is clear that the 1970 UNESCO Convention is not sufficiently robust to provide an adequate and uniform protective regime of the illicit trade in cultural heritage. In this regard, the legal instruments, which will be analyzed later in the text, do offer some possible improvements in the protection regime.

However, it is worth mentioning that besides various interpretations of the 1970 UNESCO Convention, there are additional obstacles that undermine its effectiveness.

Initially, some labeled the Convention a failure because very few market states had become party to the 1970 UNESCO Convention and, at the outset, a number of states were reluctant to join the 1970 UNESCO Convention. Merryman [1986], found that as of 1986, fifty-eight nations had become parties to the 1970 UNESCO Convention, but only two of states parties, the United States and Canada, could be classified as major market nations.<sup>32</sup> However, latter developments indicated a changing attitude to the 1970 UNESCO Convention and the number of states parties to the 1970 UNESCO Convention has increased substantially. As of October 2009, 118 nations became states parties to the 1970 UNESCO Convention.<sup>33</sup>

Despite the 1970 UNESCO Convention became more attractive legal mechanism, States Parties to the Convention, especially market countries, frequently had failed to adopt implementing national legislation. Siehr [2005]<sup>34</sup> has found that the Convention's obligations require national

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<sup>32</sup> See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831,843 (1986).

<sup>33</sup> For instance, major market countries such as Switzerland (date of deposit of instrument 03/10/2003), the United Kingdom (date of deposit of instrument 01/08/2002), France (date of deposit of instrument 07/01/1997), and Germany (date of deposit of instrument 30/11/2007) have ratified the 1970 UNESCO Convention and adopted implementing legislation: <http://portal.unesco.org/la/convention.asp?KO=13039&language=E>.

<sup>34</sup> See Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1077 (2005).

implementing legislation, but that only a few of the more than one hundred states that have ratified the 1970 UNESCO Convention passed implementing statutes. Meanwhile, progress was made in this regard, too. However, it should be emphasized that legal framework of certain States Parties, such as the United States and Switzerland,<sup>35</sup> does not fully implement the 1970 UNESCO Convention regime.

In addition, critics points to the fact that the 1970 UNESCO Convention has no retroactive protections, and therefore, does not apply to cultural property stolen or illegally exported before November 1970. Thus, source countries that seek repatriation of cultural property that has been looted from archaeological sites over many years, even centuries, find no recourse in the Convention.<sup>36</sup> Although, later there were attempts to incorporate an express provision on retroactivity in the subsequently drafted international legal instruments, the official text of the 1995 UNIDORIT Convention does not provide retroactive effect. As it will be presented later in the text, the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State does not apply retroactively either.

The further shortcomings of the 1970's UNESCO Convention relate to the fact that the 1970 UNESCO Convention primarily allows states parties, while not private parties, to claim restitution of stolen or illegally exported objects through the diplomatic channels. In other words, an individual or a legal entity is eligible to claim restitution only when it is admitted by the law of the State Party.<sup>37</sup>

### Positive Developments

However, the 1970 UNESCO Convention is not a failure. Despite its flaws, the 1970 UNESCO Convention is the cornerstone of the international system's attempt to curtail illicit international trade in cultural property. It allows market countries and source countries to communicate and cooperate for the protection and return of cultural property through diplomatic channels and domestic legislation. Also, it gives states parties the ability to assert claims

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<sup>35</sup> Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTREDAM LAW REVIEW, 1835, at 1868, available at: <http://ssrn.com/abstract=1346575>.

<sup>36</sup> *Ibidem*.

<sup>37</sup> See Article 13 (c) of the 1970 UNESCO Convention.

against each others. There have been successful repatriations of cultural property pursuant to the 1970 UNESCO Convention.<sup>38</sup> It represented a significant step forward in laying the foundations for an international framework for the effective protection of cultural heritage. It may, perhaps, have been prematurely adopted. Actually, the 25 years between the adoption of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention have brought about a change in attitude on the part of many States. Virtually, the growing damage to humanity's cultural heritage become so serious, meanwhile, that states got prepared to consider more drastic action in respect of stolen cultural objects, such as to accept that all such cultural object should be returned.<sup>39</sup>

Indeed, during 70s emerged on the part of a number of scholars, interested professionals and States alike, an approach that the protection of cultural objects, which civil law jurisdictions had traditionally afforded to the good faith purchaser and possessor should be abandoned.

The need for a supplementary instrument that would provide clear and specific obligations in respect of both stolen and illegally exported cultural objects was beyond doubt. Indeed, it was UNESCO that commissioned the International Institute for the Unification of Private Law (hereinafter "UNIDROIT") to study private law aspects of the illicit trade in cultural objects that were not directly regulated by the concerned instrument what hindered proper implementation of the 1970 UNESCO Convention.

#### **4. THE PROTECTION REGIME UNDER THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS OF 1995 (HEREINAFTER THE "1995 UNIDROIT CONVENTION")**

UNESCO strongly promotes the 1995 UNIDROIT Convention, as it is complementary to the 1970 UNESCO Convention from a private law perspective.

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<sup>38</sup> See James Cuno, *Who Owns Antiquity?* 153 (2008). It describes the successful return of twelve thousand Pre-Columbian artifacts to Ecuador from Italy after seven years of litigation), cited in Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTREDAM LAW REVIEW, 1835, at 1842, available at: <http://ssrn.com/abstract=1346575>.

<sup>39</sup> Prott, L., *UNESCO and UNIDROIT: A partnership against trafficking in cultural objects* (Paper presented at the Art Theft Conference, London, 15th November 1995).

It established common rules for the restitution and return of cultural objects between states party to the Convention. It attempts to fill the gaps in the 1970 UNESCO Convention and to remedy problems of it.

### Delicate Compromise

The 1995 UNIDROIT Convention achieved an acceptable balance between source states and market states as well as between civil and common law jurisdictions. Source states did not wish any limitation periods to apply, and wanted the 1995 UNIDROIT Convention to apply retrospectively, in direct opposition to the market states' position. While the retroactivity clause was not adopted, a system of limitation periods was agreed upon.

Additionally, states from common law and civil law jurisdictions clashed over the application of the principle of *nemo dat quod non habet*. The compromise that was reached required compensation payments to *bona fide* purchasers.<sup>40</sup>

While the 1995 UNIDROIT Convention did achieve this extremely delicate compromise, it had the effect of limiting the number of possible states parties to it, given the constitutional and political arrangements of many market and source states.<sup>41</sup> The critics pointed out that the prohibition of reservations except those expressly authorized in the 1995 UNIDROIT Convention have further hindered the widespread implementation of the 1995 UNIDROIT Convention.<sup>42</sup> As such, if states were cautious of certain provisions of the Convention, they could not sign on to

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<sup>40</sup> The 1995 UNIDROIT Convention is a good legal compromise as it follows the Common Law practice of favouring the dispossessed owner of an object over a good-faith purchaser, thus closing the 'international loophole', but in accordance with the principles of Civil Law it allows a good-faith purchaser to claim compensation should the object be reclaimed. See Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material*, Commissioned by Museums Association and ICOM UK, at page 42, available at: <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue6/stealinghistory>

<sup>41</sup> See: Paul Jenkins, 'The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects' (1996) 1 Art, Antiquity and Law 163, 164–5, 169.

<sup>42</sup> See Article 18 of the 1995 UNIDROIT Convention.

other provisions which they found effective.<sup>43</sup> At present there are only thirty States Parties to the 1995 UNIDROIT Convention.<sup>44</sup>

On the other hand, given the relationship between the 1995 UNIDROIT Convention and the 1970 UNESCO Convention, increased ratification of one gives rise to the possibility of further gaining support to the other instrument. In other words, the recent growth in interest in the 1970 UNESCO Convention may have the flow-on effect of increasing recognition of the 1995 UNIDROIT Convention. This goes to demonstrate that these instruments do not work in isolation, and form part of a network of international cultural heritage law. Inevitably, a resurgence of interest in one area leads to a consideration of the others.<sup>45</sup>

### **Positive Developments and Inherent Shortcomings of the 1995 UNIDROIT Convention**

The best way to understand the 1995 UNIDROIT Convention may be to compare it with the 1970 UNESCO Convention.

#### *a) Purposes and Domains*

Opposite to the 1970 UNESCO Convention that covers both prevention and recovery phase, the 1995 UNIDROIT Convention focuses only on the recovery phase. As arriving 25 years after the 1970 UNESCO Convention, the 1995 UNIDROIT Convention assumes better national prevention schemes.<sup>46</sup>

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<sup>43</sup> See Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, Columbia Journal of Law and the Arts, Vol. 32, p. 111, at 139, 2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287365](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287365).

<sup>44</sup>The *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, <http://www.unidroit.org/english/implement/i-95.pdf> (last visited October 15, 2009).

<sup>45</sup> See in: Forrest, Craig, "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage" [2003] MelbJIL 9; (2003), 4(2) Melbourne Journal of International Law 592, 606.

<sup>46</sup> UNESCO Information Note, *UNESCO AND UNIDROIT – Cooperation in the Fight against Illicit Traffic in Cultural Property, Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 1, at .p.3, 24 June 2005, UNESCO Headquarters, Paris.

More specifically it sets uniform rules and conditions for:

- i. Restitution claims on stolen cultural objects,<sup>47</sup>
- ii. Return claims on illicitly exported cultural objects<sup>48</sup>

*b) Scope of Protected categories*

The scope of the 1995 UNIDROIT Convention is extended comparing to the 1970 UNESCO Convention. The same categories of cultural objects are protected under Article 1 of the 1970 UNESCO Convention and Annex to the 1995 UNIDROIT Convention. Moreover, both instruments offer protection only if these cultural objects are “of importance for archaeology, prehistory, history, literature, art or science”. However, unlike the 1970 UNESCO Convention, definition of the cultural object under the 1995 UNIDROIT Convention does not rely in any way on a specific government designation.

Having retained the UNESCO formula of “being specifically designated by each State”, the 1995 UNIDROIT Convention enabled the protection of the cultural objects that were illegally excavated, and so not inventoried by virtue of specific designation.<sup>49</sup> The possibility of protection of undocumented cultural goods presents significant development. Later in the text, this issue will be further elaborated.

*c) Private Right of Action*

The 1970 UNESCO Convention allowed only states parties to the Convention to request restitution of stolen or illegally exported objects. The 1995 UNIDROIT Convention remedies this oversight by allowing private parties to initiate restitution as well.<sup>50</sup> More precisely, under the 1995 UNIDROIT Convention, either a state party or an individual or a legal entity owner may claim restitution, in case of stolen cultural

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<sup>47</sup> Chapter II (Articles 3-4) of the 1995 UNIDROIT Convention.

<sup>48</sup> Chapter III (Articles 5-7) of the 1995 UNIDROIT Convention.

<sup>49</sup> Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material*, Commissioned by Museums Association and ICOM UK, at page 40, available at: <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue6/stealinghistory-report.htm>.

<sup>50</sup> See Article 2 and Article 8 of the 1995 UNIDROIT Convention.

objects.<sup>51</sup> On the other hand, only a state party is eligible to claim restitution in case of illicitly exported cultural objects.<sup>52</sup>

Contrary to the 1970 UNESCO Convention, the 1995 UNIDROIT Convention does set clear time limits, which strike a balance between the needs of legal predictability and facilitating the recovery by the original owner (case of theft) or interested state (case of illicit export).<sup>53</sup>

The 1995 UNIDROIT Convention does contain the operational private law provisions requesting claims to be brought before the court or other competent authority of the State Party. A limitation period formula fully ensures the effectiveness of this framework. On the other hand, the regime of limitation periods is not mandated for requests through the diplomatic channel under the 1970 UNESCO Convention. It is not required because the final outcomes of these requests depend also on political circumstances and as such can not be predicted.

At any rate, the private rights of action as well as the precise time limits do contribute to the efficiency of the 1995 UNIDROIT Convention.

#### *d) Good Faith Requirement*

As it has been discussed earlier in the text, the 1995 UNIDROIT Convention entitles acquirers of stolen or illegally exported cultural property to fair and reasonable compensation if they lose title to the original owner. Although, the just compensation to the good faith possessor was already provided under the 1970 UNESCO Convention, the predominant inter-state cooperation approach made this provision less effective.

By compensating the diligent, the general “winner take all” rule is lessened and a more workable solution is provided. In doing so, thorough provenance research is promoted. In other words, it encourages the purchasers to conduct due diligence and actively research an object’s chain of ownership. If they fail to do so, they cannot afterwards claim compensation.

In this light is also relevant Article 4(4) of the UNIDROIT Convention, which lays out the conditions for due diligence:

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<sup>51</sup> Chapter II (Articles 3-4) of the 1995 UNIDROIT Convention.

<sup>52</sup> Chapter III (Articles 5-7) of the 1995 UNIDROIT Convention.

<sup>53</sup> See Article 3 of the 1995 UNIDROIT Convention.



“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, and 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.”

Some commentators considered these this rule as the be perhaps the most significant feature of the 1995 UNIDROIT Convention as it would discourage the acquisition of objects without clear provenance as well as result in the reduction of the illicit trade in cultural goods in long run.<sup>54</sup>

Although this noteworthy provision attempts to expand the kinds of activities a diligent acquirer should undertake, we find that the 1995 UNIDROIT Convention could have been more specific about what exact actions should be taken, rather than leaving the issue open to the various states’ interpretations. A better system would have required that a buyer consult impartial experts, or at the very least check the major art theft databases, in every art and antiquities transaction before claiming good-faith status.<sup>55</sup> However, the 1995 UNIDROIT Convention leaves these specifics to be determined by individual nations.

Nevertheless, any measure making it more likely that buyers conduct provenance research is a welcome change. However, it is very important to bear in mind that the single biggest factor perpetuating illicit trade market is the lack of transparency and of the provenance that routinely surrounds cultural property transactions.<sup>56</sup> Generally, very little information regarding the authenticity of title is given, and there are no guarantees that any of the provenance information that is given is accurate. In deal-

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<sup>54</sup> Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material*, Commissioned by Museums Association and ICOM UK, at page 40, available at: <http://www.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue6/stealinghistory-report.htm>

<sup>55</sup> See Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, *Columbia Journal of Law and the Arts*, Vol. 32, p. 111, at 137, 2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287365](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287365)

<sup>56</sup> Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 *CHI. J. INT’L L.* 169, n.38 (2007).

ing with this lack of transparency, legal systems, commentators and judges have had difficulty fitting general legal principles into cultural property disputes.

Due to the given lack of provenance at the markets for cultural goods, the classic dispute in cultural property litigation does not involve the original owner and the thief, but rather the original owner and a subsequent purchaser. When it comes to the stolen cultural goods, the 1995 UNIDROIT Convention is not of such immense importance. Actually, all nations forbid theft, and every jurisdiction recognizes that a thief cannot possess superior title to the original owner regardless of the fact whether or not concerned states ratified the 1995 UNIDROIT Convention. However, the 1995 UNIDROIT Convention becomes of great relevance when it comes to the private international disputes related to cases of acquisitions without provenance.

#### *e) Limited Right of Return*

Article 5(3) is an innovative provision imposing obligations on the States Parties to enforce foreign export restrictions in certain situations, if they serve an international interest. Absent a treaty or special legal provision, states do not generally enforce the public laws of other states. The 1970 UNESCO Convention also set forth the limited right of return but at any rate we find that the 1995 UNIDROIT Convention contains more adequate rule as it allows return in a wider number of cases.

Article 5(3) provides for the return of an illicitly exported foreign object if the removal “significantly impairs one or more of the following interests:”

- a) The physical preservation of the object or of its context;
- b) The integrity of a complex object;
- c) The preservation of information of, for example, a scientific or historical character;
- d) The traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.<sup>57</sup>

The limited right of return of illegally exported cultural objects introduced by the 1995 UNIDROIT Convention indeed presents a significant change, which could have a beneficial impact on the illicit trade in cultural property. The UNIDROIT approach is a good one because in addition to establishing

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<sup>57</sup> See Article 5(3) of the 1995 UNIDROIT Convention.

the right it also mitigates the common uncertainty as to what constitutes a public law. There are legitimate international interests in this area beyond merely retaining works of art, and the 1995 UNIDROIT Convention balanced them properly by requiring enforcement of foreign export restrictions only in limited circumstances.

Nevertheless that this limited right of return is an idea with great promise, it is problematic because other portions of the 1995 UNIDROIT Convention seem to conflict with it.

Article 3(2) contradicts to the Article 5(3) as it allows return even when an international interest is not at stake:

“For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.”

This provision is arguably unnecessary because, like Article 5(3), it provides for return, but, unlike Article 5(3), it is an all-encompassing, streamlined return provision. It applies to sites and objects where there is no threat to objects or archaeological context. There are legitimate reasons for not enforcing all foreign ownership declarations, such as the case, for instance, when a source nation does nothing to police the antiquities trade itself or omits to make its national ownership declaration sufficiently clear.<sup>58</sup>

At the very least the article conflicts with other aspects of the 1995 UNIDROIT Convention, and because no reservations are permitted, it seems unlikely that many more states will want to sign on.<sup>59</sup>

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<sup>58</sup> See *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd*, *Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991); *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.*, [2007] EWHC (QB) 705, cited in Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, *Columbia Journal of Law and the Arts*, Vol. 32, p. 111, at 140, 2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287365](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287365)

<sup>59</sup> John Henry Merryman, a member of the UNIDROIT Study Group which produced the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 159 has strongly criticized the provision: [T]he introduction of Article 3(2) was highly controversial. It pointed out that several delegates predicted that its inclusion would prevent their governments from becoming parties to the Convention. The most important market state, the U.S., has shown no interest in signing on. The U.K., despite a Select Committee recommendation, seems unlikely to sign on as well. See in: John Henry Merryman, *The UNIDROIT Convention: Three Significant Departures from the Urtext*, 5 INT'L J. CULTURAL PROP. 11, 14 (1996).

**5. THE COMPATIBILITY BETWEEN THE REVIEWED  
INTERNATIONAL INSTRUMENTS AND COUNCIL DIRECTIVE  
93/7/EEC ON THE RETURN OF CULTURAL OBJECTS  
UNLAWFULLY REMOVED FROM THE TERRITORY OF  
A MEMBER STATE (HEREINAFTER  
“COUNCIL DIRECTIVE 93/7/EEC”)**

Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State was adopted on 15 March 1993, and is aimed at providing, as between the EU Member States, a simple and efficient regime for the return of cultural objects as defined in the Directive. These cultural objects relate to “national treasures” possessing artistic, historical or archaeological value under national legislation which also fall into one of the categories specified in the Annex to the Directive. Various financial thresholds apply, but only to some of the categories: for example, archaeological objects are covered regardless of value.<sup>60</sup> However, we may conclude that the categories of protected cultural objects do not fully coincide with the list of cultural items protected under the 1970 UNESCO Convention and 1995 UNIDROIT Convention.

The brief comparison, among the respective instruments further reveals that all three of them are not retroactive. In addition, different time limits are imposed under the 1995 UNIDROIT Convention and the respective Directive, while the 1970 UNESCO Convention does not provide any time limitation. Furthermore, all three instruments do contain provisions for the compensation of a good faith purchaser. On the other hand, like the 1970 UNESCO Convention and contrary to the 1995 UNIDROIT Convention, the Directive is an instrument of intergovernmental co-operation and as such does not allow the private parties to directly claim return.

The existence of a European system for return represents a significant development. However, this framework does not diminish the importance of the regime that is international in nature and as such should attract maximum support in the form of accessions. In addition, it is not supposed to replace the given applicable instruments.

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<sup>60</sup> See [http://ec.europa.eu/enterprise/regulation/goods/dir937\\_en.htm](http://ec.europa.eu/enterprise/regulation/goods/dir937_en.htm).

Actually, the legal analysis demonstrates that the 1995 UNIDROIT Convention is of great importance for the EU Member States nonetheless that the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State is applicable to them.

It is customary for international private law conventions to contain a provision safeguarding existing agreements dealing with the same or similar subject-matter. Adhering to this custom, the 1995 UNIDROIT Convention states in Article 13(1) that it shall not affect any international instrument by which any Contracting State is legally bound which contains provisions on matters governed by the Convention, unless a contrary declaration is made by those States.<sup>61</sup>

Furthermore, a particular emphasis should be placed on Article 13(3) of the 1995 UNIDROIT Convention, which was drafted particularly having in mind the special position of the Member States of the European Union. It asserts that:

“In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.”

The Member States of the European Community are obliged to apply Community rules in preference to other rules, national or international. Thus, Member States are obliged to avail of the regime for the return of illegally exported cultural objects set out in Council Directive 93/7/EEC in those situations in which the object is, after its illicit removal, located in another Member State.

On the other hand, the provisions of the 1995 UNIDROIT Convention's Chapter III regulating return of illegally exported cultural objects, shall be operative both where:

- o A Member State seeks the return from a non-Member State of a cultural object illegally removed from its own territory,

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<sup>61</sup> It would appear that the guarantee not to affect those legally binding instruments to which at least one Contracting State is a party applies only to those international instruments already concluded and binding. See [http://www.lawreform.ie/publications/data/lrc95/lrc\\_95.html](http://www.lawreform.ie/publications/data/lrc95/lrc_95.html).

o An object falls outside the scope of Council Directive 93/7/EEC but inside the definition of objects protected under the 1995 UNIDROIT Convention.

It is apparent from the wording of Article 13 (3) of the of the 1995 UNIDROIT Convention that a claimant who fails to satisfy the criteria in Council Directive 93/7/EEC may seek the protection under the 1995 UNIDROIT Convention. Actually, Article 13(3) reads that members of regional bodies may apply to their mutual relations, their own internal rules rather than those provisions of the Convention provided that the scope of the aforementioned internal rules “coincides with that of those rules”.

Also, the application of Chapter II of the 1995 UNIDORIT Convention, which regulates the restitution of stolen cultural objects, is, of course, unaffected by the Council Directive 93/7/EEC, as this Directive applies only to illegally exported objects. In other words, Chapter III of the 1995 UNIDROIT Convention is applicable to all EU Member States, which ratified the 1995 UNIDROIT Convention.

## 6. CONCLUSION

Despite its public law related ineffectiveness as well as other inherent shortcomings, the 1970 UNESCO Convention is the cornerstone of the international system’s attempt to curtail illicit international trade in cultural property.

The need for adoption of supplementary instrument that would fill the gaps in the 1970 UNESCO Convention by firmly placing operational capacities of private law mechanisms was beyond any doubt.

Introduction of the private parties’ right to initiate restitution, protection of the undocumented movable cultural heritage, determination of good diligence requirement as well as the definition of the limited right of return for illegally exported objects are considered as positive developments of the 1995 UNIDROIT Convention.

Owing to the fact that thus far there are only thirty States Parties to the 1995 UNIDROIT Convention, we might conclude that the 1995 UNIDROIT Convention proved to be a too ambitious effort to provide a private law complement to the 1970 UNESCO Convention

Due to some inconsistent and conflicting rules as well as inflexibility to make reservations upon signing the treaty, the anticipated wide-

spread implementation of the 1995 UNIDROIT Convention did not occur.

The undergone legal analysis further reveals that despite the existence of a European framework for return of cultural goods, the 1995 UNIDROIT Convention is of great importance and as such it is applicable to the EU Member States as long as its provisions do not coincide with that of the Directive's rules.

In a nutshell, we might sum up that additional efforts should be made to gain wider support through further accessions or ratifications of the 1995 UNIDROIT Convention. Also, the 1995 UNIDROIT framework should be revised as to improve its inconsistent and non-flexible provisions. More specifically, we recommend that controversial Article 3(2) of the 1995 UNIDROIT Convention endangering the limited right of return of illegally exported objects should be repealed as well as that prohibition of reservation under Article 18 should be abolished.

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***STRENGTHENING THE INTERNATIONAL  
REGIME FOR THE PREVENTION OF THE ILLICIT  
TRADE IN CULTURAL GOODS***

*This Article examines the applicable international and regional legal instruments aimed to the strengthening of the current regime to prevent the illicit recovery, movement and trade in cultural property. It illustrates the differences between the various regimes, as well as the history and development of the international legal framework directed towards com-*

*bating illicit trade in moveable cultural heritage. A particular emphasis is placed on the complementarity among, and functioning of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. This review points up the need, notwithstanding the existence of these regimes, for the further legal development of the existing international regime.*

*Key words: illicit trade; cultural goods; UNESCO Convention; UNIDROIT Convention*