

UNIDROIT 1995:Tackling the illicit trafficking of cultural property through private law means

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VALORISATION ADDENDUM

Knowledge valorisation can be defined as “the process of creating value from knowledge, by making knowledge suitable and/or available for social (and/or economic) use and by making knowledge suitable for translation into competitive products, services, processes and new commercial activities” (definition derived from the *Waardevol: Indicatoren voor Valorisatie* report by the National Valorisation Committee (2011), The Hague: Rathenau Institute, p. 8). The valorisation of the present research can, *inter alia*, be explored in discussing the results of this study in relation to both its scientific and societal relevance.

In respect of the scientific relevance of the present work: the lack of specificity of some of the provisions of the convention – alongside the on-going disagreement as to its understanding – has often contributed to its dismissal. This haphazard debate called for the adoption of overarching guidelines relating to the convention’s applicability. The present contribution has explored the regime of Chapter II of the convention in greater detail. Therefore, it has provided a clear overview of the functioning of the convention in addressing cultural property and archaeological theft, despite the convention’s complexity. This further enables disregarding fallacious or superficial arguments and inspires future debates as to the convention. Furthermore, it is important to note that two earlier publications about the UNIDROIT convention have tried to explain the inner workings of its regime. Nonetheless, their reach in understanding Chapter II is limited: on the one hand, the first research entitled *Commentary on the Unidroit Convention on Stolen or Illegally Exported Cultural Objects* – published by Lyndel Prott in 1997 and conducted in English – has limited itself to explaining the convention as a result of the work undertaken by UNESCO and UNIDROIT. On the other hand, a second – although less accessible – German publication entitled *Internationaler Kulturgüterschutz nach der UNIDROIT-Konvention* undertaken in 2005 by Bettina Thorn has compared the regime of Chapter II of the convention with the rules applicable in Austrian, English, French, German, Italian, Portuguese, Spanish and Swiss law, despite clear indications in Prott’s 1997 contribution that the regime of Chapter II has its roots in American law. In accordance with Prott’s observations, the present research finds that the treaty is prominently inspired by American law. Therefore, part of the scientific relevance of this research is to further the work undertaken in these previous contributions. This is notably done by discussing the convention in light of the manifold sources – including the preparatory work, doctrine or even domestic case law – and by providing a bottom-up analysis of the regime of Chapter II in the light of, *inter alia*, California, New Jersey and New York law. The final results of the research establish that New Jersey and California law served as a blueprint for the regime of restitution of Chapter II and that the regime of good faith acquisitions laid down in Article 4 of the convention bears considerable similarities to Belgian, French and Dutch law. This contribution confirms that an in-depth study of New Jersey and California law proved significant in understanding the regime of Chapter II, thus giving a limited role to the impact of Thorn’s findings. Additionally, the present exercise differs from earlier research as it frames the discussion about the convention in terms of fighting the illicit trafficking of cultural property instead of putting the emphasis on the convention as a means of restitution and / or return. Finally, it attempts at providing a constructive reflection of the convention to seek further fine-tuning of its regime. The potential for improvement is tabled with the intention of securing a higher incidence of participation. In this context, it is strongly believed that this contribution will be helpful to assist UNIDROIT or its UCAP in rendering the convention more accessible.

Concurrently, this dissertation is embedded with a multifaceted societal relevance: firstly, the international community has recently been faced with pervasive acts of terrorism worldwide and with a notable increase of terrorist attacks occurring within the Western hemisphere. In this context, the looting of cultural property has been identified as a potential source of income used by terrorists to finance their activities. With the recent rise of the so-called Islamic State and the spoliation of artefacts originating from Iraq, Syria and Libya, this has provided the art market with ‘blood antiques’; the international community is now facing an unprecedented challenge. Thenceforth, the process of looting artefacts in politically unstable territories to generate means of subsistence has become a reality that

states cannot leave unaddressed. Therefore, means to disincentivize the art market from acquiring blood antiques are needed, which, in turn, calls into question the role that the UNIDROIT convention could play in this regard. This work concludes that its ability of moralizing the art market may provide the necessary deterrence. Secondly, due to the lackadaisical participation of the international community in the convention's regime, determining its added value is of the utmost importance to countries that are considering ratification. As specified within the research, the convention has thus far been received with mixed feelings and – since its success depends primarily on broad participation – it is important to ferret out the grievances formulated against it for the purpose of alleviating ungrounded concerns. The present contribution allows elucidating debates surrounding the convention, thus assisting non-contracting states in taking a well-informed decision with regard to the treaty. Thirdly, at the time of concluding the research, the European Parliament is scrutinizing the possibility to make the convention – or parts of it – legally binding within the European Union. This contribution can be of avail to the Parliament in setting its course of action. Fourthly, the UNIDROIT regime seems to grow more influential through parallel tracks but adhesion. This growth in the indirect influence of the convention corroborates the presence of mixed-feelings surrounding its acceptance. To encourage direct participation in its regime, emphatic conclusions as to its virtues are sought. This research has provided the reader with a comprehensive overview of the convention's regime dealing with cultural property and archaeological theft, thus allowing to appreciate its face value in both respects. Finally, this dissertation enables touching upon the question of whether the 1995 instrument contributes to the improvement of society, a question that has been pending since its adoption. This study has demonstrated that the regime analysed, if adhered to, is beneficial to society. This is notably due to its deterrent effect on the trafficking of stolen cultural objects and of its non-interference with the licit trade.

The results of this research are not only meant for the consideration of both UNIDROIT and its UCAP, but it is also meant to guide legal practitioners, art market stakeholders, academics and students alike in understanding the functioning of Chapter II of the 1995 instrument. Furthermore, it allows understanding what due diligence in the acquisition of cultural objects – a key component of Chapter II – entails. This is particularly important to the art market, where due diligence and provenance research is becoming an inevitable aspect of dealers' daily activities. As such, this work could contribute to the future drafting of guidelines and / or best practices on due diligence. Such guidelines / best practices have not been undertaken extensively hitherto.