



United Nations
Educational, Scientific and
Cultural Organization



Convention for the fight
against the illicit trafficking
of cultural property

FIGHTING ILLICIT TRAFFICKING IN CULTURAL OBJECTS, searching for provenance and exercising due diligence in the European Union

Engaging the European Art Market in the fight against the illicit trafficking of cultural property

Capacity-building kit



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In cooperation with the European Union

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INTRODUCTION

The vigilance of stakeholders regarding the provenance of works in circulation due to varying circumstances is a key aspect in fighting illicit trafficking in works of art. It concerns both the persons involved in the art market (sellers, agents and buyers) and the cultural institutions (museums, particularly in their function of enriching collections), even if it is not applied under entirely the same terms depending on the professional field considered. From this point of view, one of the key concepts, to support verification of the regular provenance of works and objects of art, is the concept of due diligence. More familiar to the Anglo-American systems, this concept appeared in the body of international and European laws, before spreading to certain national legislations. This kit is a summary of the studies of professors Marie Cornu, Director of Research at the CNRS, and Marc-André Renold, tenured professor at the University of Geneva, that was produced for the MOOC “Engaging the European Art Market in the fight against the illicit trafficking of cultural property”. It aims to provide the tools needed to understand and apply the obligation of due diligence imposed on EU Member States, it being understood that this obligation concerns objects originating both from Member States and from third countries.

1. Concepts

1.1. The notion of cultural heritage

Illicit trafficking in cultural objects applies to **cultural heritage and property**. Strictly speaking, there is no universal definition of the concept of cultural heritage and property. This should come as no surprise, as, under the principle of sovereignty, **each State defines its own heritage** and what is included therein. With this being said, **UNESCO and the European Union** have adopted similar definitions that help better identify these two concepts. Concerning heritage, it should first of all be noted that **it is multiple**. According to the Convention concerning the Protection of World Heritage adopted by UNESCO in 1972, it is first and foremost dual: **cultural** and **natural**.

We are particularly interested here in cultural heritage. It is plural as it is composed of:

- ◆ **Tangible cultural heritage:** this heritage can be movable (paintings, sculptures, coinage, music instruments, weapons, manuscripts), immovable (monuments, ensembles, sites) and underwater (shipwrecks, ruins and underwater cities).
- ◆ **Intangible cultural heritage:** oral traditions, performing arts, rituals.

As indicated above, **the category of cultural property falls within movable tangible cultural heritage**.

1.2. The concept of cultural property

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, a pioneering text adopted by UNESCO in 1970, gives **the following definition of cultural property** in its first article:

“For the purposes of this Convention, the term ‘cultural property’ means property which, on religious or secular grounds, **is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science [...]**”.

The European Union has its own definition, updated by Article 2 of **Directive 2014/60/EU** on the return of cultural objects unlawfully removed from the territory of a Member State, which we shall come back to.

“[...] an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures within the meaning of Article 36 TFEU;”

These definitions contain **two major criteria** that distinguish cultural property:

- Property of particular importance, that justifies the need for its protection;
- Property specifically classified or defined by the holding Member State.

1.3. Cultural circles

Professor Marie Cornu distinguishes three circles of cultural property in the study supporting the EU-UNESCO project. These circles are as follows:

- ◆ First circle: “the most important objects” that receive special protection from States and that cannot generally be exported;
- ◆ Second circle: cultural objects that “could potentially be included” in the first category. Although they are generally found in circulation on the market, States exercise a form of vigilance over their movements and can sometimes apply a pre-emptive right and make their exportation subject to export authorization.
- ◆ Third circle: this includes all cultural property (cultural goods, objects and works of art) in free circulation on the art market, including objects circulating illegally, such as stolen or concealed goods.

2. Distinguishing illicit trafficking from the destruction of cultural property

The trafficking of cultural property is a **thousand-year-old phenomenon**, resulting from the perpetration of numerous violations and involving numerous stakeholders, and can serve different objectives: profit, always, but sometimes also the dissemination of the memory of a people, a cult or a civilization. It is important to briefly distinguish the different damage to cultural heritage.

Destruction results in the annihilation of a work. This may occur:

- ◆ **In peacetime:** this may be accidental or unlawful destruction, an act of mishap, negligence or vandalism;
- ◆ **In wartime:** used to damage the memory of the enemy, to eradicate the cultural productions or a cult or civilization.

Illicit trafficking is made up of multiple violations and is designed to make a profit through the illegal trade of protected property:

- ◆ **In peacetime:** a criminal activity, that may use organized crime networks and that aims to generate illicit proceeds;
- ◆ **In wartime:** accompanied or not by destruction, it serves a dual objective of generating illicit proceeds while dispersing and damaging the memory of the enemy.

2.1. The trafficking of cultural property: a recent phenomenon?

Damage to cultural property, whether resulting from **destruction or illicit trade**, is currently a topical concern in light of the abuses committed by different terrorist groups. **These criminal acts have two objectives that may be concurrent, correlated or independent of one another:**

- ◆ **Destroying** *the memory of a people, a civilization and an era, that is reflected in its works;*
- ◆ **Making a profit** from the resale of objects on the international market.

Written traces of the looting of cultural property can be found throughout the history of great civilizations. **A papyrus from the Amherst collection**, now exhibited in the John Pierpoint Morgan Library in New York, United States, recounts the perpetration of such offences **in 1134 B.C.**

Article IX of the Treaty of Münster, signed as part of the Peace of Westphalia in 1648 ending the Thirty Years' War between the Kingdom of France and the Holy Roman Empire, also refers to **the general restitution of all seized property** during the various territorial conquests, to their entity of origin.

As shown in the latter example, the looting of cultural property **has often taken place during armed conflict**, with no abatement of trafficking at the end of the fighting. It is a universal scourge that affects all areas of the world as and when conflicts occur, but also exploits the opportunities offered by **flexible legislation, unregulated market sectors and too lenient policies**. In any event, this situation calls for a dual response, **in peacetime as in wartime**.

2.2. The dual response of the 'Concert of Nations'

With the **advent of bodies of international governance**, in the late 19th century and throughout the 20th century, measures have been taken to fight against the trafficking of cultural property whenever and wherever possible. The first principle to be elevated to international level was the protection of property against destruction and looting in wartime. **The Hague Convention of 1899**, revised in 1907, followed by **the Roerich Pact, signed in 1935**, both contain provisions designed to protect cultural property from annihilation and illicit trade.

But it was in 1954, under the auspices of UNESCO, that the **Hague Convention** for the Protection of Cultural Property in the Event of Armed Conflict was adopted, a pioneering text that primarily aims to prevent the destruction of movable and immovable cultural heritage in times of war. For all that, its two protocols, adopted in 1954 and in 1999, strengthened the protecting of objects against trafficking. This international treaty was the precursor to international public law on the fight against the illicit trafficking of cultural property, symbolized by two conventions: **the UNESCO Convention of 1970 and the 1995 UNIDROIT Convention**.

2.3. The protection of heritage in wartime and in peacetime

The illicit trafficking of cultural property, like other large-scale trafficking (weapons, drugs), is multiple and **is difficult to define**.

Unlike drug trafficking and arms smuggling, trafficking in cultural property does not concern the trade of dangerous objects. However, **it is far from being a harmless illegal activity**, quite the contrary. The involvement of criminal and terrorist organizations in this trafficking is a prime example.

3. The main impacts of illicit trafficking in cultural property

The illicit trafficking of cultural property is difficult to quantify due to its opaque nature and the lack of reliable figures available. While drugs and weapons remain an illegal and closed trade, throughout the entire chain, one **undeniable characteristic** distinguishes the trafficking of cultural property from all other forms of illegal trade: **the objects concerned almost always end up on the art market, in the hands of legal operators**. Whether these legal operators are acting in good faith or not, they are the **last link in the trafficking chain**. From the **first acquisition**, or after **successive fencing of stolen goods**, the objects being trafficked transit via galleries, auction houses, antiques dealers, private and public collections, museums and often end up on the internet.

That is why the involvement of professionals in the art market and the general public is essential in combating the illicit trafficking of cultural property.

3.1. The impact on heritage and identity

The illicit trafficking of cultural property consists of taking away **the composing elements of the history and identity** of a local community, religious denomination or State. As noted by **Amadou-Mahtar M'Bow**, former Director-General of UNESCO, in his famous 'Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It', published in 1978:

"The peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also **robbed of a memory** which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better."

3.2. The scientific impact

Removing cultural property from its scientific context means that it cannot be studied in the conditions needed for its full understanding. This is the case specifically concerning **Undiscovered archaeological objects** that fall victim to looting. It remains extremely difficult to return these to their initial environment and their testimony is subsequently lost, at least in part. Consideration should also be given to the **question of fakes**; as when the art market prospers, fakes flood the market and can complicate the work of experts.

3.3. The financial impact

Museum collections allow States to **promote their heritage** and to generate income that contributes to the conservation and restoration of works. Depriving museums and other heritage institutions of this wealth places heritage as a whole in danger. **Cultural property that falls victim to trafficking can be altered**, whether at the time of its theft, during its concealment or its transport. Although this situation primarily affects its scientific value, it can also lead, *a posteriori*, to expensive restoration costs.

3.4. The impact on security

The question of security has cast new light, particularly in the media, on the fight against the illicit trafficking of cultural property. Although it is difficult to calculate the economic weight of this activity, there is no doubt that **criminal and terrorist organizations** use cultural objects as a source of funding, or at least as an alternative.

4. The origins of due diligence

The concept of 'due diligence', is established in Anglo-Saxon law and can be compared to the Roman law principle of **caveat emptor**, meaning "**let the buyer beware**". This term refers to the **exercise of care** that must be taken by a buyer when acquiring a good or investing its assets. It is therefore first and foremost a concept of commercial law, but its use has been extended to other types of law.

4.1. A concept primarily used in commercial law

The term due diligence is often used during business acquisition, referring to **all of the checks that must be completed by a buyer** in order to be sure of their investment. It thus refers to preliminary audit practices that are intended to protect the buyer against potential risks which may arise through showing a certain standard of care. But the application of this concept has been extended to other legal frameworks.

4.2. Due diligence and Human Rights

The **OECD Guidelines for Multinational Enterprises recommend that companies** "carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts". As such, multinational enterprises must incorporate a due diligence strategy into their risk management processes allowing them to identify practices that violate human rights in their subsidiary or partner companies. Although these are simply guidelines and recommendations made to large companies, this demonstrates that the concept of due diligence is promulgated in many sectors as a strong legal concept that should guide the actions of those to whom it applies.

4.3. Due diligence in civil law

Although due diligence is above all an Anglo-Saxon concept, it is becoming increasingly common in national legislation in countries with Romano-Germanic legal systems, as well as in international law. In civil law, due diligence means **the exercise of care that a reasonable business or person is expected to take before acquiring an object**, so as to verify the legality of the seller's possession. They may only

be compensated in the case of the acquisition of stolen or illegally imported objects if they can prove that they acted with due diligence. The application of this concept is not without its difficulties in terms of civil law, since it may be in conflict with the concept of presumed good faith, that is found in most countries of Romano-Germanic tradition.

5. Due diligence and good faith

5.1. Good faith: protection for the possessor

According to Marie Cornu, when it comes to the acquisition and return of cultural objects, the concept of good faith “may be defined as the purchaser’s belief at the time of purchasing the object that he is purchasing it from the true owner”. In most countries of Romano-Germanic tradition, **good faith is presumed** and is associated with the principle that “in the case of movable property, possession is equivalent to title”. The rights of the possessor of movable property, even stolen, are therefore protected as long as the person challenging them cannot demonstrate their bad faith; the burden of proof thus lies with the latter.

5.2. Due diligence as a criterion of good faith

With the incorporation of the concept of due diligence into the 1995 UNIDROIT Convention, and its inclusion in European Directive 2014/60/EU, good faith is no longer presumed. Although good faith is generally understood as the erroneous and blameless belief in the existence or non-existence of a fact, law or legal rule, the application of the criterion of due diligence modifies its meaning. Consequently, in light of these legal instruments, good faith implies that the person has carried out a certain number of acts prior to the acquisition of cultural objects. There has thus been a **reversal of the burden of proof**, since the holder must prove that they have accomplished certain checks, primarily concerning the provenance of the object, in order for their good faith to be acknowledged. This reversal is **justified by the difficulty in proving knowledge of illegal behaviour**, by the need to consider novice and professional buyers, and, of course, to strengthen the protection of cultural property and promote its return to its legitimate owners. As such, due diligence, when applied to the acquisition of an object, is one of the **criteria that determines** the good faith of the possessor. Although good faith is often presumed in countries of Romano-Germanic tradition, the need to **protect cultural property against trafficking** calls for the reversal of this burden of proof, in order for stolen or illegally exported property to be returned to its original owner. While some texts do not provide for separate regimes for different types of buyers - professionals or laymen- **judges always assess the notion of due diligence with regard to all of the circumstances surrounding the acquisition, including the character of the parties.**

6. Due diligence in cultural heritage law: a contribution from the UNIDROIT Convention

It was the **1995 UNIDROIT Convention that introduced the concept of due diligence** into the body of international law on cultural heritage. For the first time, the UNIDROIT Convention imposes a “rule of return not connected with the rule of good faith”, as explained by Marie Cornu. This means that in the case of stolen or illegally exported property, **the good faith of its possessor shall not prejudice howsoever the restitution or return of this property** to its original owner.

But what about compensation for this ‘dispossessed’ possessor? This is where the **concept of due diligence comes in** and replaces good faith.

6.1. Due diligence in the UNIDROIT Convention

In order to fully understand the application of due diligence in the UNIDROIT Convention, we must look at two cases:

6.1.1. Case 1: Stolen objects

- The possessor **must return the object** (Article 3);
- The possessor shall be entitled to payment of fair and reasonable compensation **provided that he neither knew nor ought reasonably to have known that the object was stolen** (Article 4.1);
- The possessor shall be entitled to payment of fair and reasonable compensation **provided that he can prove that he exercised due diligence when acquiring the object** (Article 4.1);

The criteria of due diligence thus only applies to a right to fair and reasonable compensation, and **by no means in the case of civil or criminal prosecution**, which is governed by the national law of the States Parties, as the UNIDROIT Convention is a **private international law treaty**.

In **Article 4.4**, the Convention states that **all the circumstances of the acquisition** shall be taken into account in determining due diligence. The treaty then lists the behaviour that shall be assessed to determine the diligence of the buyer:

- **The character of the parties:** is twofold. For professionals in the art market, expectations shall be higher. Conversely, if a novice buys an object from a renowned art dealer, the assessment of diligence shall be more lenient.
- **The price paid:** When the price, of the object bought is well below the object's value, it can generally be assumed, that due diligence cannot be recognized.
- **The duty of inquiry:** here the text refers to the consultation of registers or agencies that could determine the questionable provenance of the object.

6.1.2. Case 2: An illegally exported object

In this case, the UNIDROIT Convention states that **the object must be returned to its owner if two criteria are met (Article 5):**

- **The object has been illegally exported;**
- **The illegal export of the object significantly impairs one or more of the following interests:**
 - the physical preservation of the object or of its context;
 - the integrity of a complex object;
 - the preservation of information of, for example, a scientific or historical character;
 - the traditional or ritual use of the object by a tribal or indigenous community, for which the object is of significant cultural importance.

Regarding the compensation of the possessor and the application of the criterion of due diligence, **the rule remains similar (Article 6):**

- The possessor shall be entitled to payment of fair and reasonable compensation **provided that it neither knew nor ought reasonably to have known that the object had been illegally exported.**
- **To assess this criterion**, regard shall be had to the "circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State".

7. The two effects of due diligence in international law

7.1. A unifying effect

By imposing provisions directly applicable under domestic law, the UNIDROIT Convention has already reshaped international law on cultural heritage. Yet by reversing the burden of proof, placing the obligation to act with diligence on the buyer of an object, the Convention **unifies a practice** that was above all based on **the concept of presumed good faith**. This practice is particularly prevalent in

countries with Romano-Germanic legal systems (France, Italy, Spain), where the principle of “possession is equivalent to title” applies.

7.2. A ratchet effects

The incorporation of the criterion of due diligence in the UNIDROIT Convention, **although at times controversial** and resulting in the reluctance of some States to ratify the Convention, has had a globally unifying effect.

8. Due diligence: code of ethics

“The code of ethics must accept the rule of law, it is subservient to it but the law may also accept the code of ethics, and more precisely there is every interest in that.” Pr. Marie Cornu

8.1. Deontology and Ethics

Deontology and ethics are two concepts that, although they generally only have a facultative impact, are composed of a set of principles that make a practice virtuous and beneficial to all. Most international intergovernmental and non-governmental organizations have produced **codes of ethics or conduct** that serve as a benchmark for professionals as well as the general public when acquiring cultural objects. Non-compliance with some of these codes may lead to **disciplinary sanctions** for members of these associations and unions. A relatively weak threat, admittedly, but one that demonstrates that it is in the interest of representatives of these professions to check the provenance of the objects in which they trade and to exercise due diligence.

Below is a selection of codes that **we invite you to view**:

- › UNESCO International Code of Ethics for Dealers in Cultural Property
- › ICOM Code of Ethics for Museums
- › Us et coutumes, Syndicat national des antiquaires français (SNA) (only available in French)
- › Code of Ethics, International Federation of Dealer Associations (CINOA)
- › ILAB Code of Ethics
- › Code of Conduct, Association of International Antiquities Dealers (AIAD)

8.2. Due diligence is a legal, ethical and deontological obligation

The notion of due diligence corresponds to a **series of best practices** that all persons likely to trade in cultural objects must implement.

Most of the aforementioned codes of ethics contain rules on the **search for provenance**, for example.

CONCLUSION

As we can see, due diligence is addressed by various sources that must be coordinated. Although the UNIDROIT Convention has had a catalysing effect and has promoted closer links, the harmonization of laws is still an ongoing process. From this point of view, the States have an important responsibility. It is well known that the disparity of solutions is one of the weaknesses of the system inasmuch as it further exacerbates the trafficking of cultural objects.