

USING UNIDROIT TO AVOID CULTURAL HERITAGE DISPUTES: LIMITATION PERIODS

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In the year 2000, the Minister for the Arts in the United Kingdom established an Advisory Panel on Illicit Trade (panel). Its terms of reference included the following:

“To consider how most effectively, both through legislative and non-legislative means, the UK can play its part in preventing and prohibiting the illicit trade, and to advise the government accordingly.”

In its Report¹ of December 2000, the panel advised that the United Kingdom should accede to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (UNESCO Convention) and against accession to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 (UNIDROIT Convention). The British Government accepted the panel's advice and the United Kingdom became party to the UNESCO Convention in 2002. Interestingly, the Culture, Media and Sport Committee of the House of Commons had recommended exactly the opposite a short time before the publication of the Advisory Panel on Illicit Trade report.²

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1. DEPARTMENT FOR CULTURE, MEDIA, AND SPORT, REPORT OF ADVISORY PANEL ON ILLICIT TRADE (2000), http://www.culture.gov.uk/NR/rdonlyres/2BF7F816-AA1A-41BC-993F-1161F7E3A42A/0/Report_AdPanel_Illicit_Trade.pdf.

2. Department of Culture, Media and Sport Committee, *Seventh Report: Cultural Property: Return and Illicit Trade: Volume 1* (2000), <http://www.parliament.the-stationeryoffice.com>

The panel saw the greatest barrier to adoption of the UNIDROIT Convention as being the provisions on limitation periods, i.e., the time within which a legal action must be commenced. Since limitation periods are not addressed in the 1970 Convention, this results in the continued application of normal national rules. However, when UNIDROIT was being drafted, limitation periods proved a most difficult issue and the final provisions are the work of long and complex negotiations. The House of Commons Committee had said of these limitation periods: "It is appropriate that special limitation periods should apply to cultural property to reflect the cultural and personal importance of its ownership and the possibilities of unique identification. . ."³

UNIDROIT has the capacity to play a significant role in the avoidance and resolution of cultural heritage disputes. It came into force on July 1, 1998. As of September 2006, there were 27 States party to the Convention, including Argentina, China, Cyprus, Finland, Hungary, Italy, Norway, Portugal and Spain. Its widespread adoption would establish a uniform standard for dealing with issues of theft and illicit traffic worldwide. The fact that such a significant player in the art market as the United Kingdom is singling out limitation periods as the greatest barrier to adoption of the Convention is disturbing.

I. THE UNIDROIT CONVENTION

A 1982 report⁴ to UNESCO on national legal control of illicit traffic in cultural property recommended that UNESCO take up private law matters arising from such illegal activity with an international body specialized in that branch of law. The International Institute for the Unification of Private Law (UNIDROIT) was requested by UNESCO to consider a Convention to deal with these issues. The ultimate result was the Convention on Stolen or Illegally Exported Cultural Objects 1995.

The Convention consists of five chapters, two of which address limitation periods. Chapter two pertains to restitution of stolen cultural objects and contains the specific limitation rules relating to this situation. The third chapter deals with the return of illegally exported cultural objects and contains a less complex set of limitation periods applicable to

/pa/cm199900/cmselect/cmcomeds/371/37109.htm.

3. *Id.*

4. Lyndel Prott & Patrick O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property* commissioned by UNESCO and discussed at a Consultation of Experts on Illicit Traffic, Paris, UNESCO Doc. CLT/83/WS/16 (1983), <http://unesdoc.unesco.org/images/0005/000548/054854eo.pdf>.

this situation.

In general, the Convention is not retroactive. This means that the aforementioned limitation periods will only come into play for transactions dating from July 1, 1998 at the very earliest. Specifically, that date was when the Convention was entered into force in accordance with Article 12. At that time, six States were party.

The standard rule in international law is that a Convention is not retroactive.⁵ However, no simple formula exists to determine how this rule works in everyday practice, as there can be a number of States involved which all become party to the Convention at different times. Consequently, the UNIDROIT Convention provides further clarification in Article 10. In respect to stolen cultural objects, the State where the claim is brought must be party to the Convention at the time of the theft. Moreover, the theft must have occurred within the territory of a contracting State after it became party, or the object must have been located in a contracting State after that State became party. In the first situation, the object must have been stolen after the entry into force of the Convention for both States. It is irrelevant whether the object is located in a contracting State at the time the claim is made. Of course, if the object is not located in the State where the claim is brought there could be problems in enforcing the judgment if the claim is successful. The second situation covers one where the object was stolen from the territory of a non-contracting State. A claim may be made for its recovery if it is located in a contracting State.⁶

With respect to illegally exported cultural objects, the Convention only applies if the object was illegally exported after both the claimant State and the State where the claim is made became party to the Convention.⁷

II. LIMITATION PERIODS APPLYING TO STOLEN OBJECTS

The basic rule governing limitation periods states that “a claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of the possessor.” In any case, the claim must be made within 50

5. Vienna Convention on the Law of Treaties, art. 28, May 23, 1969.

6. A more detailed analysis of Article 10(1)(b) can be found in LYNDEL PROTT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 80-81 (1997).

7. UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS art. 10(2), June 24, 1995 [hereinafter CONVENTION].

years from the time of the theft.⁸ This raises issues both substantive and practical.

First, the practical problems. Three years is not very long for many claimants to make a decision to pursue legal remedies, particularly when the theft occurred many years ago. For example, the British Spoliation Advisory Panel⁹ recently considered a claim against the British Library for return of a missal taken from a monastery in Benevento, Italy.¹⁰ The Library announced its acquisition of the missal in 1952. In September/October 1961, there was an exchange of correspondence between the Abbot of the monastery and the Assistant Keeper of the Department of Manuscripts in the British Museum, the Library then being part of the Museum. However, nothing further occurred until 1997, 16 years later, when the Italian Institute of Culture made inquiries. Even then there was no claim made. From evidence given during the inquiry by the panel it seems that the existence of the manuscript within the monastery library was confused and, in any case, the state of ecclesiastical libraries in Italy was such that Pope John XXIII had ordered a special investigation.

In another inquiry¹¹ by the panel, the claimant for a small painting held by the Tate Gallery had in fact identified it on a visit to the gallery in 1990. The painting had been sold by his mother for "an apple and an egg" in Belgium during the Second World War. He related its history as he knew it to the Assistant Keeper of the British Collection at the gallery on January 15, 1991. She made a note of the conversation on the painting's provenance card. At that time he made no suggestion that the painting should be returned or compensation be paid.

Both the above inquiries concerned claims where any legal right to the objects was barred by the expiration of limitation periods. The claim

8. *Id.* art. 3(3).

9. This was set up to consider claims from anyone (or their heirs) who lost possession of a cultural object during the Nazi era (1933-1945) where the object is in the possession of a United Kingdom national collection or another United Kingdom museum or gallery established for the public benefit. The Advisory Panel advises the parties what is an appropriate action in response to the claim.

10. Department for Culture, Media and Sport, Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript Now in the Possession of the British Library (2005), http://www.culture.gov.uk/Reference_library/Publications/archive_2005/rpt_spoliation_advisory_panel.htm.

11. Department for Culture, Media and Sport, Report of the Spoliation Advisory Panel in Respect of a Painting Now in the Possession of the Tate Gallery (2001), http://www.culture.gov.uk/Reference_library/Publications/archive_2001/sapreport_hc111.htm.

was a moral one only. Nevertheless, they show that claimants can be very slow to organize or put forward demands — even if they are only of a moral nature. It is true that the Spoliation Advisory Panel did not come into being until February 2000, and so this avenue was not available when the incidents above occurred. However, this does not prevent a moral claim from at least being registered.

Turning to the overall 50 year period, this can pose practical problems for all parties. This is a long period of time, as far as the existence and continuation of evidence is concerned. In the Benevento claim above, the panel accepted that the missal had been in the possession of the Metropolitan Chapter of Benevento at the outbreak of World War I. From then until 1944, there was no reliable evidence as to where the missal was, although there was nothing to suggest that it had left the Chapter library. In 1943, the library had been removed to a seminary to escape wartime damage. The seminary itself was then requisitioned by the Allies for use as a military hospital. In 1944, the missal was purchased by a British army captain from a second-hand bookseller in Naples, and eventually sold by him to the British Museum. He died in 1994. The panel had absolutely no evidence as to how the missal found its way from the Chapter library to the Italian bookseller and then to Captain Ashe. It could have been stolen, lost or misappropriated. The case does illustrate that after a long period of time there may well be no way of establishing the circumstances of theft — if, indeed, theft did actually occur.

Chamberlain states that in England it is common for dealers and auctioneers in the art trade to not keep records of transactions going back further than six years.¹² Police records may also be unlikely to exist after 50 years. It is, of course, possible to require by legislation that such records be kept, but who will pay for this? How will they be kept? Paper records can last that long but human nature is such that physical records are misplaced or inadvertently lost. Even electronic storage is no guarantee as current devices for storage have only a limited life and the machines for reading them may also disappear.

As already noted, the Advisory Panel on Illicit Trade looked askance at the UNIDROIT limitation rules. As an example, it gave a museum, which has an object stolen from it, but does nothing to determine its location or the identity of the possessor for 48 years. The assumption was made that both these matters could have been

12. Kevin Chamberlain, *The Iraq (United Nations Sanctions) Order 2003 — Is It Human Rights Act-Compatible?*, 8 ART ANTIQUITY & LAW 357, 361 (2003).

ascertained "by elementary means." Having found who has it and where, the museum claims it under the UNIDROIT Convention. According to the scenario set up by the panel, the possessor surrenders it in accordance with the Convention, but then seeks redress from his vendor of 40 years ago under the English Sale of Goods Act 1979, s.12(2)(b). This creates a warranty of quiet possession, which runs for six years from the date possession is disturbed (i.e. the vendor may be sued for breach of the warranty).

"Of course the buyer might alternatively seek an indemnity by a claim for compensation from the claimant under Article 4 of the Convention. But this device, even if adopted, may not satisfy the possessor and may leave the vendor vulnerable."¹³

This is a somewhat cavalier dismissal of the right to compensation given under Article 4. The possessor is entitled to compensation, subject to two preconditions. Firstly, he or she must not have known, nor had reasonable cause to know, that the object was stolen. Secondly, the possessor must be able to prove that it exercised due diligence when acquiring the object. Neither of these conditions is unreasonable and indeed fulfills one of the objectives of the UNIDROIT Convention, which is to require greater care on the part of the art trade when dealing in cultural objects.

The limitation rules in the UNIDROIT Convention were not arrived at lightly. In England, the basic rule is that title expires six years following a good-faith conversion (i.e., when the object is sold to an innocent purchaser.)¹⁴ But other States had vastly different rules. In Italy, title passes immediately to a good-faith purchaser; in Switzerland after five years. In Iran there were no time limitations applying to stolen cultural property. In New York, there was the demand and refusal rule.¹⁵ The UNIDROIT limitation rules are a compromise in which many States had to give up cherished traditional local methods of resolving the problem of determining how long a title could survive.

The UNIDROIT Convention does not refer to the ultimate effect of the limitation period, for which there are two possibilities. For example, the limitation period may be procedural only (i.e., it bars a claim against a person who has been in undisturbed possession for a certain number of years.) Alternatively, at the end of the limitation period the original title

13. DEPARTMENT, *supra* note 1, at 24 n.21.

14. Ruth Redmond-Cooper, *Good Faith Acquisition of Stolen Art*, 2 ART ANTIQUITY & LAW 55 (1997).

15. See generally Stephen E. Weil, *The American Legal Response to the Problem of Holocaust Art*, 4 ART ANTIQUITY & LAW 285, 291 (1999).

may in fact be extinguished (i.e., the limitation period has a substantive effect.) What happens at the end of a limitation period under the UNIDROIT Convention is left to the relevant national legal system.

Furthermore, the advisory panel does not take account of the possibility that the UNIDROIT limitation periods will improve transparency in the art trade. For example, the Swiss law of Obligations in relation to claims on warranty or guarantee due to defects of title to cultural property now imposes an absolute deadline of 30 years for such claims.

The fact that a purchaser may assert contractual claims over a period of 30 years thanks to the increased statute of limitation will no doubt have a serious impact on the attractiveness of trade with objects of cloudy origins. The latent threat of actions over 30 years means that sellers of cultural property will endeavor to exercise even more diligence for their businesses in the future.¹⁶

The English Advisory Panel on Illicit Trade was also motivated by what it saw as the absence of any express recognition within the Convention that the three-year limitation period could be activated by constructive notice on the part of the claimant, as well as by actual knowledge. The panel was concerned that claimants would do nothing to establish the location of the object and the identity of the possessor, and then take advantage of the limitation period when this knowledge fortuitously comes to them. Panel members considered that claimants should be required to take reasonable steps to discover these matters if they were to enjoy the benefits of the limitation period.

Lyndel Prott points out that the phrase “or ought reasonably to have known” was part of earlier formulations; however, following extensive discussion, it was omitted at the Diplomatic Conference.¹⁷ Its omission or inclusion is, of course, a policy decision. Why should claimants be under this obligation? From a jurisprudential point of view, it may contribute to the faster resolution of cases of theft, but at the expense of the claimant. If the claimant does not want to actively pursue a theft after having notified the relevant authorities, or is unable for some reason to do so, then surely it is the claimant’s choice. It is up to the acquirer to take all possible precautions to ensure that he or she gets a good title. This may result in a more transparent art market, one in which buyers are more careful about their purchases.

It is interesting to note that Article 934 of the Swiss Civil Code, as

16. ANDREA RASCHÈR ET AL., *CULTURAL PROPERTY TRANSFER* 64 (2005).

17. Prott & O’Keefe, *supra* note 4, at 37.

amended by the Cultural Property Transfer Act 2003, states that cultural property "lost against the will of the owner . . . is subject to a statute of limitations of one year after the owner gains knowledge of the location and the ownership of the cultural property, at the latest, however, 30 years after the property is lost." There is no indication that the claimant must have taken steps to actively seek out the knowledge in question.

Other questions are likely to arise in practice. For example, in a case discussed later, *City of Gotha v. Sotheby's and Cobert Finance S.A.*, a museum in Germany was approached with an offer to return a stolen painting for a sum of money. Should this be taken as fixing the German government with knowledge sufficient to start the limitation period running? At what level in the Government does the knowledge become relevant? What if the person involved does not realize the relevance of the information? What if proceedings are commenced in one country, but it is then realized that this is an inappropriate venue? Does this commence the time running for later proceedings in another jurisdiction?

It is, of course, possible for courts to take the unreasonable delay in seeking to discover the whereabouts of the object or its possessor into account in legal proceedings other than those involving the limitation period. Take, for example, such proceedings as laches (i.e., negligence or unreasonable delay in asserting or enforcing a right.)

III. OTHER LIMITATION PERIODS

So far the discussion has concentrated on the basic UNIDROIT Convention system of limitation periods. However, there are special rules applying to "a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection."¹⁸ Claims to such stolen objects are not subject to the overall 50 year limitation; only the three-year period applies.

However, under Article 3(5), a State party to the Convention may declare that an overall period of 75 years applies to stolen objects that fit within the categories set out in Article 3(4) "or such longer period as is provided in its law." This declaration must be made at the time the State concerned deposits its instrument indicating it is becoming party to the Convention.¹⁹ If it is not done then, it cannot be done at a later date. The longer period must be "as is provided in its law," which means that there must be some period; there cannot be an indefinite period or no period at

18. CONVENTION, *supra* note 8, art. 3(4).

19. *Id.* art. 3(6).

all.

The possibility of having an overall 75-year period, or even longer period, was an attempt to deal with issues of inalienability. As is well known, some States (e.g. France), specify that all objects in the national collections are inalienable, meaning that ownership resides in the State and cannot be lost by any legal proceeding such as adverse possession or passage of time. These States would have preferred a provision in the UNIDROIT Convention prohibiting the application of any limitation period to claims for objects from monuments, archaeological sites or public collections. However, this was unacceptable to other States where there were no inalienable objects. Article 3(5) was a compromise expressed as a long period, which is an exception to the general rule of Article 3(4).

There is an element of reciprocity for such claims. Under Article 3(5), a State which has made a declaration respecting the limitation period will have the same period applied to any claim it makes for restitution of such an object in another contracting State.

The objects must be part of an identified monument or archaeological site, or belong to a public collection. The first would cover the situation which arose in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*²⁰ There the mosaics at issue had once been part of the Kanakaria Church in Cyprus until they were ripped out in the aftermath of the Turkish invasion of Northern Cyprus in 1974. However, between 1959 and 1967, the mosaics had been cleaned and restored by, *inter alia*, the Dumbarton Oaks Centre for Byzantine Studies. This body published "an authoritative volume on the Kanakaria Church and its art."²¹ There was thus no problem in identifying the mosaics as coming from the Church or, in other words, as "being part of an identified monument." Similarly, the stela at issue in *United States v. Hollinshead*²² had been discovered and recorded by the archaeologist Ian Graham, who recognized it and notified the authorities.²³

However, not all situations of this nature will be so easily resolved. Many monuments are unrecorded and clandestine excavation of archaeological sites is rife. Nevertheless, it is interesting to note that legislation has been passed in the United Kingdom making it an offence to dishonestly deal in a cultural object that is tainted while knowing or

20. 717 F. Supp. 1374 (1989), *rev'd*, 917 F.2d 278 (1990).

21. *Id.* at 1378.

22. 495 F.2d 1154 (1974).

23. KARL MEYER, *THE PLUNDERED PAST: THE TRAFFIC IN ART TREASURES* 32 (1974).

believing it to be so.²⁴ A tainted object is one that has been removed in defined circumstances or excavated, and the removal or excavation constitutes an offense. The removal must have been from a building or structure of historical, architectural or archaeological interest where at any time it formed part of the building or structure, or it had been removed from a monument of such interest. The definition of "monument" further expands the scope of the legislation. It means:

- any work, cave or excavation,
- any site comprising the remains of any building or structure or of any work, cave or excavation,
- any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other movable structure, or part of any such thing.²⁵

Specifically, the building, structure or monument may be above or below ground or underwater. There is nothing in the legislation that causes an object to cease to be tainted.

The third category of material subject only to the three-year period under Article 3(4) is that belonging to a public collection. This is not a term of art, but is specifically defined for the purposes of the Convention. It consists of a group of inventoried or otherwise identified cultural objects owned by:

- a Contracting State;
- a regional or local authority of a Contracting State;
- a religious institution in a Contracting State;
- an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognized in that State as serving the public interest.²⁶

The first point is that this Article requires a "group" of cultural objects (i.e., there must be more than one object.) However, two or more objects would be sufficient to constitute a group and thus fulfill the first requirement for a "collection." There is no requirement of a unifying theme in order to constitute the collection. The public collection is then defined by who owns it.

The second point is that the cultural objects must be "inventoried or otherwise identified" as owned by the entities listed. It is well known that inventories are notoriously inaccurate. For example, a major survey of public heritage collections made in Australia in 1991 revealed a

24. Dealing in Cultural Objects (Offences) Act 2003, Ch. 27 (2003) (U.K.). This does not apply to Scotland.

25. *Id.* at 2(5).

26. CONVENTION, *supra* note 7, art. 3(7).

significant number of local museums with no inventory and a number of major institutions with inadequate documentation.²⁷ Of an English collection owned by a company limited by guarantee but registered as a charity, it was said: "When surveyed in 1992, the collection was roughly 60 percent documented, which, given the size and nature of the collections, was pretty good really."²⁸ Consequently, this requirement of there being an inventory will curtail the volume of material that will be covered by the "public collection" exception to the general rule of Article 3(3). If the object is not inventoried, it will be difficult to "otherwise identify" it in terms of the Article. There may be a registration number affixed that is unique to a particular collection or resort may be made to the memory of curators, but these are unlikely methods of identification.

Paragraphs (a) and (b) of Article 3(7) are relatively straightforward and need no discussion. Whether collections are owned by the contracting State or one of its constituent bodies is a matter for the political structure and law of that State. It is clear that they are public collections. Institutions falling under paragraph (d) may be structured as private bodies (e.g., legally they may be set up as trusts, foundations or, as mentioned above, as companies or whatever other form may be available in the State concerned.) However, they must have "an essentially cultural, educational or scientific purpose." Profits may be sought to assist in funding the operation (e.g., restaurant, gift shop), but cannot be the *raison d'être* of the institution's existence. The institution must also be recognized "in that State" as serving the public interest. The paragraph does not say "by that State." If there is general public recognition that it serves the public interest that is sufficient. This may be by way of media perception and treatment as a general public benefit. Public funding by the State or one of its organs would indicate a strong presumption that the body concerned serves the public interest. The European Union Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State²⁹ also refers to "public collections," but emphasizes this financial aspect: the collection must be owned by an institution which is itself "the property of, or significantly financed by, that Member State or a local or regional

27. Margaret Anderson, *Heritage Collection Working Group: Heritage Collections in Australia: Report*, NAT'L CTR. FOR AUSTRALIAN STUDIES 28, 57 (1991).

28. Peter Cannon-Brookes, *University and Foundation Collections and the Law*, 13 MUSEUM MGMT. & CURATORSHIP 340, 377 (1994).

29. Council Directive, 93/7/EEC, Mar. 15, 1993 (E.U.), <http://europa.eu/scadplus/leg/en/lvb/111017b.htm>.

authority.”

Paragraph (c) refers to “a religious institution in a Contracting State.” It is much more difficult to envisage why a group of objects owned by such an institution should be regarded as a “public collection.” It is true that in some States, the overwhelming proportion of cultural heritage is owned by a religious body — in many cases the Roman Catholic Church. Parts of this are recorded in inventories, but much is not. The Church does have places where heritage is exhibited to the public as secular objects, but much of what it possesses is used for devotional purposes and much is not recorded apart from what exists in parish records or the memory of local pastors. By contrast, in Sweden legislation requires that every parish of the Church of Sweden and autonomous cathedral keep a list of church furnishings of historic value. However, there is no central record.

Why should the collections of a religious institution be singled out for special treatment? There is reference to cultural property stolen from a “religious . . . public monument” in Article 7(b)(i) of the UNESCO Convention. At least this restricts the circumstances to theft from a “public monument,” which would include a cathedral or church. However, many religious groups of objects are not held in such places. And what of the Miho Museum in Japan? It houses Mihoko Koyama’s private collection of Asian and Western antiques, as well as other pieces bought on the world market by the Shumei organization, a spiritual movement.³⁰ Could at least this part of the collection be said to be a “public collection” in the sense of Article 3(7)(c)? In other words, what is the situation where part of a collection is owned by a religious institution and part not? Moreover, does the collection have to relate to the spiritual activities of the institution in an objective sense? Are all institutions which claim to be religious to be accorded the benefits of Article 3(4)? Schneider states that “the word ‘religious’ was adopted as representing all faiths.”³¹ Can a person establish his or her own religion for this purpose? The concept of public collections belonging to religious institutions is very broad and difficult to confine within practicable limits.

Finally, there is a special provision on limitations when the object stolen is “a sacred or communally important cultural object belonging to

30. See Souren Melikian, *A Splendid Art Collection Goes on Display in Japan*, INT’L HERALD TRIB., Nov. 6, 1997, available at <http://iht.com/articles/1997/11/06/museum.t.php?page=1>.

31. Marina Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, 6 UNIFORM L. REV. 512 (2001).

and used by a tribal or indigenous community in a Contracting State.”³² These objects are subject to the same time limitations as those from public collections. The provision applies to objects from a broad group of people. Attempts³³ have been made to define the concept of “indigenous,” but it is still amorphous. Commonly invoked distinguishing features include original habitation of an area taken over by conquest or colonization and a distinctive culture. Inclusion of tribal groups greatly expands the scope of Article 3(8). Some countries are totally composed of tribal groups. Nevertheless, this Article explicitly reflects the reference to the cultural heritage of “tribal, indigenous or other communities” in the preamble to the UNIDROIT Convention.

However, the potential scope is cut down by the requirement that the object must be “sacred or communally important.” “Sacred” means there must be a connection with the religion of a tribal or indigenous community. What is “communally important” is a matter for each group, but would have to be proven to the satisfaction of a court or the authorities of the State where the claim is being made. Additionally, the object must be used as part of the community’s traditional or ritual use. “Ritual” is defined as being “of, with; consisting in, involving, religious rites.”³⁴ In most cases this should be relatively easy to establish for the type of object that is sufficiently attractive to the market to be stolen. We are not saying that the object must have aesthetic qualities in the Western sense. It may be stolen solely because it has been venerated by an indigenous people, even though it appears to be nothing more than a rock³⁵ or a piece of twisted wood.

Some of the issues involved are apparent in the *tau tau* statues of Tana Toraja in Indonesia. In 1990, at least 50,000 Toraja practiced the *aluk to dolo* religion (literally “rituals of the ancestors”) and even those who had converted to Christianity still had strong respect for the tradition of carving statues of the deceased and placing them in high caves near where the burial took place.

“Displayed for all to see, the statues symbolized for the Toraja the individual status of the deceased, the collective powers and prescience of the ancestors, and the conscious ethnic identity of a minority mountain

32. CONVENTION, *supra* note 7, art. 3(8).

33. For example, Economic and Social Council, *Discrimination Against Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2 (April 4, 1994).

34. THE CONCISE OXFORD DICTIONARY 1078 (1st ed. 1964).

35. For example, the focus of worship to Siva in the Hindu religion is the Siva Lingam, a phallus-shaped piece of stone which was held in the case *Bumper Development Corp. Ltd. v. Comr. of Police* to have the ability to sue in the English courts. [1991] 1 W.L.R. 1362 [1991] 4 All E.R. 638 (1991).

cultural tradition.”³⁶

“Discovered” by dealers, many of the statues or their heads were stolen in the years immediately after 1971 and eventually appeared in Western museums. This is an example of cultural objects that are both sacred and communally important being used as part of the community’s traditional or ritual use.

But what was envisaged by use of the word “traditional”? It must be something else than associated with religion. Moreover, the object must be “communally important.” This excludes objects in everyday use by families even though they may be of a traditional nature. It may catch, for example, a loom used for traditional weaving if it is one used by a community and important to that community.

IV. LIMITATION PERIODS APPLYING TO ILLEGALLY EXPORTED OBJECTS

There is only one provision on these periods, Article 5(6), and it is relatively straightforward. Any request for return has to be brought within three years from the time when the requesting State knew the location of the cultural object and the identity of the possessor. The various implications of this formulation have already been discussed.

It should be noted that the limitation periods for theft and illegal export are identical (albeit dealt with in separate provisions) — this is so as to ensure that the (different) length of the limitation period does not become the deciding factor in determining the grounds on which a claim will be brought, for example where unlawfully excavated objects are concerned.³⁷

There is also an overall period of 50 years from the time when the object was illegally exported. The problem with this could well lie in establishing just when illegal export occurred. The need for limitation rules such as the above is well illustrated by the following. During debate on Article 3 in the Diplomatic Conference, an Australian representative described a recent case summarized below.

[I]n Australia where the return of an object that was part of the collection of the Australian National Gallery had been claimed by the Peruvian Government. It had taken the Peruvian Government approximately three years, if not more, after it had knowledge of both the location of the object and the identity of the possessor, to

36. Eric Crystal, *Rape of the Ancestors: Discovery, Display, and Destruction of the Ancestral Statuary of Tana Toraja*, FRAGILE TRADITIONS: INDONESIAN ART IN JEOPARDY 29, 31 (PAUL TAYLOR ed., Univ. of Hawaii Press 1994).

37. Schneider, *supra* note 31, at 508.

collect all the evidence necessary.³⁸

V. DISPUTE SETTLEMENT

The limitation rules in the UNIDROIT Convention can contribute to the avoidance and resolution of cultural heritage disputes by eliminating competing rules. Consider the case of *City of Gotha v. Sotheby's and Cobert Finance S.A.* before Mr. Justice Moses in the English High Court.³⁹ It concerned a painting of *The Holy Family with Saint John and Elizabeth*, by Joachim Wtewael, which had been the property of a Foundation in the city of Gotha in the German Land of Thuringia. At the end of the Second World War it disappeared. The judge concluded that probably it had been taken from a depositary by a Soviet trophy brigade because, in 1986, it surfaced in Moscow. By a long and circuitous route, it came into the hands of the defendant, Cobert Finance S.A., a Panamanian registered company. Cobert conceded at trial that neither it nor anyone else had acquired the painting in good faith.

Judge Moses found that, following various legal proceedings, the painting was owned by the German government, provided its claim was not time barred. He held that the German limitation period of 30 years had not expired at the time proceedings for recovery were commenced. The period began to run in 1987 when there had been a misappropriation.

However, the judge went on to offer his opinion as to what should happen if the German claim were found to be statute barred. This is of course an *obiter dictum*. Judge Moses indicated that, in his opinion, it was possible to identify a "public policy in England that time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith."

What would be the situation if both Germany and the United Kingdom were party to the UNIDROIT Convention and the facts were to arise in the future? The painting obviously came from a public collection in terms of Article 3(7). As such, if no declaration had been made under Article 3(5), paragraph 4 would be applicable. Germany would have had three years from the time when it knew the location of the painting and the identity of its possessor. Proceedings were commenced by Germany

38. Rosalie Balkin in Presidenza del Consiglio dei Ministri, *Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects: Rome 7 to 24 June 1995: Acts and Proceedings* 173 (1996).

39. *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance SA*, Queens Bench Division (Sept. 9, 1998), available at <http://www.iuscomp.org/gla/judgments/foreign/gotha1.htm>.

in 1997 and by the City of Gotha in 1993. From the facts as given in the case, it appears that one of the possessors of the painting approached the museum in Gotha in 1990 with an offer to sell it, but the museum was unable to raise the price asked. The facts are not sufficiently precise to take the matter further. However, if the facts were such that the UNIDROIT Convention could apply, then the issue would have been resolved without the lengthy legal analysis and multitude of legal specialists that were involved.

VI. CONCLUSION

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 contains rules on limitation periods that are fair and, in general, of no great complexity. Certainly there are issues that will arise when they are implemented. However, all limitation periods are the result of compromises; all will have defects when viewed by people whose legal systems have taken other directions. The UNIDROIT rules are the result of long and intense negotiation. They deserve respect even when particular national legal systems differ from them. In particular, the rules have been drafted to deal with the peculiarities of the art market, something that most legal systems are only just coming to appreciate. In the words of Richard Crewdson, a leading English authority on cultural heritage law, appearing before the House of Commons Committee on Culture, Media and Sport:

“[T]o apply the standard limitation period to cultural property is harsh because each piece of cultural property is unique, and the remedial benefits of insurance cannot provide adequate recompense in the way they do routinely for the loss of consumable durables.”⁴⁰

40. Department of Culture, Media and Sport Committee, *supra* note 2, at iv.