

UNIDROIT 1989  
Study LXX - Doc. 11  
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

---

---

Preliminary draft Convention  
on the restitution and return of cultural objects

(prepared by the Unidroit Secretariat)

Rome, February 1989

1. At its first session, held in Rome from 12 to 15 December 1988, the Unidroit study group on the international protection of cultural property proceeded to a preliminary exchange of views on a number of questions falling within its terms of reference, and in particular those associated with the theft of cultural objects (and similar culpable acts) and with the export of such objects in violation of export prohibitions.

2. In the course of its discussions the group had particular regard to a preliminary draft Convention on the restitution of cultural property prepared by the Austrian member of the Unidroit Governing Council, Mr Roland Loewe, which dealt with a certain number of essentially private law aspects of the question. While some features of the draft were seen as providing a basis for future work, other possible approaches were canvassed and it was agreed that the Unidroit Secretariat should prepare an alternative draft for consideration by the study group. That draft is appended hereto in the form of a preliminary draft Convention on the restitution and return of cultural objects.

3. In submitting this preliminary draft, the Secretariat is fully conscious of the fact that it does not reflect on every point the differing views which find expression in the summary report on the session (Study LXX - Doc. 10). To do so would have entailed the preparation of numerous variants of the proposed texts and in consequence a multiplicity of notes which, at this early stage of the group's work, would not seem to facilitate discussion. Generally speaking therefore the proposed draft articles seek to reflect consensus to the extent that this seems to have been reached, the majority view in the event of differences of opinion and, when no such majority view can be established, a compromise solution. It must therefore be understood that the text is intended to serve essentially as a starting point for further discussion rather than as a reflection of all the views expressed at the group's first session and it should, above all, in no way be seen as intended to foreclose discussion on matters not considered at that session.

4. This being said, the Secretariat has attempted, by way of notes to the text, to indicate as far as possible alternative solutions to those proposed, although it has been assumed that Mr Loewe's draft, as well as the proposals made by other members of the group in papers submitted at the first session, remain on the table so that they need not be referred to systematically in the notes.

5. It goes therefore without saying that the Secretariat assumes full and sole responsibility for the present document which should be seen as a discussion paper designed to permit further clarification of the complex issues which will be considered by the study group at its second session.

PRELIMINARY DRAFT CONVENTION  
ON THE RESTITUTION AND RETURN OF CULTURAL OBJECTS

*Article 1*

(1) For the purpose of this Convention, "cultural object" <sup>(1)</sup> means any material object created by man of cultural, artistic, historical, spiritual or ritual significance.

(2) This Convention governs neither:

(a) the question of ownership of cultural objects or that of other rights which may exist over them; however, a possessor who has been obliged to make restitution of a cultural object to a person <sup>(2)</sup> who has been deprived of possession or who, in conformity with Article 4(1), has returned it against payment of compensation to the State of origin may no longer assert ownership or any other real right thereover; nor

(b) the liability of experts, auctioneers or other sellers of cultural objects.

*Article 2*

(1) When a person has been dispossessed of a cultural object by theft, conversion, fraud, intentional misappropriation of a lost object or any other culpable act assimilated thereto <sup>(3)</sup> [by a court acting under

---

(1) The definition in paragraph (1) is based on that contained in Mr Loewe's preliminary draft (hereafter referred to as "the Loewe draft"). It has been amended to take account of certain observations made at the first session of the group, in particular the replacement of the notion of "cultural property" by "cultural object".

(2) It has been assumed that the word "person" includes a State making a claim for restitution under Article 2.

(3) The Secretariat experienced difficulty in drawing the distinction between theft and other culpable acts to which attention was drawn at the first session of the group for while it is true that Article 10 permits Contracting States to go further than does the Convention in protecting a dispossessed person, thus preserving the application of the nemo dat rule in those jurisdictions in which it obtains, it is not immediately apparent how, unless Article 2 were to be restricted to cases of theft stricto sensu, any meaningful rule could be laid down in relation to fraud, conversion etc. falling short of the "right to payment" which would, in any event, give full protection to the investment of the purchaser in good faith. A possible solution might lie in the establishment of different rules as to time-bar under Article 2(3).

Article 9] [by the law of the State where the act was committed]<sup>(4)</sup> the possessor of any such object shall return it to the dispossessed person [when the possessor fails to prove that:

- (a) he took the precautions normally taken when acquiring such an object, having regard in particular to its nature and provenance, the qualities of the person from whom he acquired it (the transferor) or his trade, any special circumstances in respect of the transferor's acquisition of the object known to the possessor, the price, or provisions of the contract and any circumstances in which it was concluded; and
- (b) he consulted any register of cultural objects which have been stolen or of which another person has been otherwise dispossessed by a culpable act which the possessor could reasonably have been expected to have consulted.

(2) The conduct of a predecessor in possession from whom the possessor has acquired the object by inheritance or otherwise gratuitously shall be imputed to the possessor].<sup>(5)</sup>

(3) The preceding provisions of this article shall only apply if the action for restitution is brought before a court in respect of a cultural object mentioned under paragraph (1) within [thirty] years of the dispossession.

### Article 3

(1) Any dispossessed person who is entitled to restitution of a cultural object shall at the same time, but at his own option, compensate the possessor either for the price paid by the latter or by his predecessor under Article 2(2) or for a sum corresponding to the actual value of the object at the place where it is located.

---

(4) Opposing views were expressed on this question at the first session of the group.

(5) The Loewe draft seems to have started out from the assumption that the cultural object would not be returned to the dispossessed person if the possessor had taken all the necessary precautions (c.f. the rule contained in Article 7 (b)(ii) of the 1970 Unesco Convention). If, however, the "right to payment" solution were to be adopted in all cases then some at least of the square-bracketed language in Article (1) could be embodied in Article 3(2) and that of Article 2(2) elsewhere in Article 3.

(2) Paragraph (1) of this article shall not apply and no compensation shall be due when the [dispossessed person proves that the]<sup>(6)</sup> possessor or his predecessor under Article 2(2) acquired the object with knowledge that it had been the subject of a culpable act or in circumstances in which a reasonable purchaser should at least have had doubts in that regard.

#### Article 4

(1) When a cultural object has, notwithstanding a prohibition, been exported from the territory of a Contracting State (the requesting State) [in which it was created]<sup>(7)</sup> that State may request the court of a State acting under Article 9 (the State addressed) to order the return of the object to the requesting State on condition that:

(a) the object has, at the place where it is currently located, a value in excess of [25,000] Special Drawing Rights, or

(b) the requesting State proves that the removal of the object from its territory significantly impairs one or more of the following interests:

(i) the physical preservation of the object or of its context,

(ii) the integrity of a complex object,

(iii) the preservation of information,

(iv) the use of the object by a living culture,

(v) the great cultural importance of the object for the requesting State,

(vi) an arrangement between the requesting State and the former possessor of the object under which the latter agreed, in return for certain advantages, to make the object accessible to the public.

---

(6) The square-bracketed language indicates that a decision on the question of the burden of proof has still to be taken.

(7) The language in square brackets was criticized on the occasion of the first session of the study group and the decision as to its retention will determine the fate of Article 4(2)(c).

(2) The provisions of paragraph (1) shall not apply when:

- (a) the object was exported during the lifetime of the person who created it or within a period of [fifty] years following the death of that person; or
- (b) no claim for the return of the object has been brought before a court within a period of [five] years as from the time when the requesting State knew or ought reasonably to have had knowledge of the identity of the person in possession of the object, and in any case within a period of [twenty] years as from the date of the export of the object [; or
- (c) the object has a closer link with the culture of a State other than that on whose territory it was created].<sup>(8)</sup>

(3) When considering a request for the return of a cultural object under paragraph (1) a court of the State addressed may ask the requesting State to provide any information relating, *inter alia*, to the ownership and location of the object prior to its export and its intended location on its return.<sup>(9)</sup>

#### Article 5

(1) When the requesting State proves that the possessor of a cultural object exported in violation of a prohibition [or his predecessor under Article 2(2)]<sup>(10)</sup> had knowledge, when exporting or acquiring the object, of the export prohibition or that a reasonable person should at least have had doubts in that regard,<sup>(11)</sup> the possessor shall be required to return

---

(8) See note (7) above.

(9) This provision has been introduced for discussion as a provisional solution to the problem of non-pecuniary conditions which might be imposed on the return of cultural objects.

(10) The group may wish to consider whether the rule applicable to theft and other culpable acts in Article 2(2) imputing knowledge to the possessor should also be applied to an "innocent purchaser" of illegally exported cultural objects.

(11) The general structure of Article 5 has in effect transposed the solution proposed in the Loewe draft in respect of the purchaser in "bad faith" to that of the *bona fide* purchaser in the sense that he had no actual or constructive knowledge of the violation of the export prohibition. It will therefore be for the group to decide whether the burden of proving the state of knowledge of the possessor should be placed on him or on the requesting State. Similarly, it may be necessary to develop the notion of the doubts of a reasonable person, as has been done in Article 2(1), by specifying the precautions which have to be taken.

the object to the requesting State and shall be entitled to [no compensation] [such compensation from the requesting State as may be determined by the court of the State addressed].<sup>(12)</sup>

(2) The possessor of a cultural object who, when exporting or acquiring it, neither had knowledge of the fact that it had been exported in violation of a prohibition nor should at such time have had any reasonable doubts in that regard may, at his option, require that the requesting State pay him a sum corresponding to the amount which would be due by a dispossessed person in conformity with Article 3(1), or transfer the object, for reward or gratuitously, to a person of his choice in the requesting State. [In the latter case, the requesting State shall undertake neither to confiscate the object nor to interfere in any other way with the possession of the person to whom the object has been transferred or of his successors under a universal or individual inheritance.]<sup>(13)</sup>

#### [Article 6

A request for the return of a cultural object under Article 4 may be refused if the granting of that request is manifestly incompatible with the public policy ("ordre public") of the State addressed.]<sup>(14)</sup>

#### Article 7

(1) The Special Drawing Rights referred to in Article 4(1)(a) are those defined by the International Monetary Fund. Such rights shall be converted into the national currency of the State of the court with jurisdiction under Article 9 in accordance with the value of that currency on the date on which the court is seized of the case and in accordance with the method of valuation applied by the Fund for its operations and transactions.

- 
- (12) The alternative offered by the language in square brackets reflects differences of opinion expressed within the group at its first session.
- (13) The language in square brackets was the subject of lengthy discussion at the first session of the group. It had however been considered on the assumption that the possessor had actual or constructive knowledge of the violation of the export prohibition and might give rise to less concern in the case of a possessor who had no such knowledge.
- (14) A view was expressed by some participants at the first session of the group that it was to be understood that a State addressed might refuse the return of a cultural object on the grounds of "ordre public" although no decision was taken as to whether a provision to that effect should be included in any future instrument. The text of Article 6 is based on that of Article 5 of the Hague Convention on Celebration and Recognition of the Validity of Marriages of 14 March 1978.

(2) the value of the national currency, in terms of Special Drawing Rights, of a State which is not a member of the Fund shall be calculated in a manner determined by that State. <sup>(15)</sup>

#### Article 8

(1) In determining the value of a cultural object for the application of Article 4(1), regard shall be had to the price applied in respect of a comparable object at the place where the object is located [, and in particular to the price fetched at auction sales]. <sup>(16)</sup>

(2) For the application of Articles 2(1) and 4(1), a cultural object forming part of a collection, set or series or which comes from the same collection, set or series shall be considered to be a single object when the same person has been deprived of possession of it or when its export has violated a prohibition, and when it is in the possession of a single person.

#### Article 9

The courts either of the State where the possessor of the cultural object has his habitual residence or those of the State where the cultural object is located shall, at the option of the claimant, have jurisdiction over claims governed by this Convention. The parties to the dispute may however agree <sup>(17)</sup> upon another jurisdiction or submit the dispute to arbitration.

---

(15) Unlike the Loewe draft, which contemplated the possibility of the value of a cultural object being expressed in Swiss francs, the Secretariat would propose that the unit of account of the Special Drawing Right alone be taken into consideration as this is predominantly the unit to which reference is made in recent international conventions.

(16) In view of the objections made by some members of the group to the concept of the monetary value of cultural objects and the offence which might be caused thereby to certain communities the concluding words of paragraph (1) have been placed in square brackets.

(17) This article (Article 8 of the Loewe draft) was not discussed in detail by the group at its first session. Given however the relationship between this article and other provisions of the present draft, it might be necessary to review the wording of those provisions insofar as Article 9 contemplates the possibility of an action for restitution or return being brought before a court of a Contracting State when the possessor of the object has his habitual residence in that State.



*Article 10*

Any State Party to this Convention may extend the protection accorded to a person dispossessed of a cultural object in the circumstances described in Article 2(1) or the rights accorded to a requesting State under Articles 4 and 5 by disallowing or restricting the right to compensation of the person in possession of the object or in any other manner.

*Article 11*

This Convention shall apply only in respect of a cultural object of which a person has been dispossessed by a culpable act or in violation of an export prohibition after the entry into force of the Convention.