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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Preliminary draft Convention
on the restitution and return of cultural objects

(prepared by the Unidroit Secretariat in the light of the
discussions of the study group on the international
protection of cultural property at its second session held
in Rome from 13 to 17 April 1989)

Rome, July 1989

Article 2

Alternative I⁽⁵⁾

(1) When a person has been dispossessed of a cultural object by theft or any other [similar] act sanctioned by the criminal law⁽⁶⁾ of the State of a court [or other competent authority] acting under Article 9, 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⁽⁷⁾ when acquiring such an object, having regard in particular to its nature and provenance, his own qualities⁽⁸⁾ and those 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 accessible register of cultural objects which have been stolen or of which another person has been otherwise dispossessed by a criminal act which the possessor could reasonably have [been expected to have]⁽⁹⁾ consulted.

(5) The first alternative for Articles 2 and 3 is based on the assumption that there will be no automatic restitution of stolen cultural objects or objects of which a person has been dispossessed by a criminal act if the possessor discharges the burden of proof provided for in Article 2(1).

(6) The question remained open at the second session of the group as to whether the article should apply only in case of theft while differing opinions were expressed as to the nature of the acts to be assimilated thereto if the scope of Article 2 were to be extended beyond theft (Study LXX - Doc. 14, paras. 20-22).

(7) A view was expressed at the second session that the words "he took the precautions normally taken" be replaced by such language as "he exercised the necessary vigilance" (Study LXX - Doc. 14, para. 27).

(8) Considerable support was forthcoming at the second session for the inclusion of a reference not only to the qualities of the transferor but also to those of the possessor (Study LXX - Doc. 14, paras. 29 and 34).

(9) A suggestion was made at the second session to delete the words in square brackets (Study LXX - Doc. 14, para. 35).

(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.

(3) The preceding provisions of this article shall only apply if the claim for restitution is brought before a court [or other competent authority] acting under Article 9 in respect of a cultural object mentioned under paragraph (1) within [thirty] years of the dispossession.

Article 3⁽¹⁰⁾

Alternative I

(1) Unless the possessor or his predecessor under Article 2(2) acquired the object with knowledge that it had been the subject of a criminal act or in circumstances in which a reasonable purchaser should at least have had doubts in that regard, the court [or other competent authority] acting under Article 9 shall, in the event of restitution in conformity with Article 2, award equitable compensation payable by the dispossessed person at the time of restitution. However, the amount of compensation may exceed neither the price paid by the possessor or his predecessor [plus interest which has accrued subsequent to the purchase], nor the actual commercial value of the object [at the place where it is located].

(2) The provisions of the preceding paragraph shall be without prejudice to the application of [Article 7 (b)(ii) of] the 1970 Unesco Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁽¹¹⁾

(10) At the second session of the group it was suggested that the two paragraphs of Article 3 should be combined in one (Study LXX - Doc. 14, paras. 47 and 48) and a new draft was proposed by Mr Loewe (APPENDIX IV to Doc. 14). That draft has been reproduced as a new Article 3(1) subject to a few minor drafting amendments, such as the replacement of the word "judge" by the language "the court [or other competent authority] acting under Article 9" and the insertion of brackets around the concluding words "at the place where it is located" whose deletion was suggested (Study LXX - Doc. 14, para. 45).

(11) This provision seeks to avoid any possible conflict between the future Convention and the 1970 Unesco Convention although it may be considered unnecessary in the light of Article 10.

Article 2⁽¹²⁾

Alternative II

(1) When a person has been dispossessed of a cultural object by theft or any other [similar] act sanctioned by the criminal law of the State of a court [or other competent authority] acting under Article 9, the possessor of any such object shall return it to the dispossessed person.

(2) The provisions of the preceding paragraph shall only apply if the claim for restitution is brought before a court [or other competent authority] acting under Article 9 in respect of a cultural object within [thirty] years of the dispossession.

Article 3

Alternative II

(1) The court [or other competent authority] acting under Article 9 shall, in the event of restitution in conformity with Article 2, award equitable compensation payable by the dispossessed person at the time of restitution unless the possessor fails to prove⁽¹³⁾ 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 possessor and 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

(12) The structure of Articles 2 and 3 in the second alternative seeks to reflect the view of some members of the group that the possessor should in all cases be required to return the cultural object to a person who has been dispossessed by theft or other criminal act.

(13) Should the group opt for a solution along the lines of Alternative II it will be necessary to determine the question of the burden of proof.

(b) he consulted any accessible register of cultural objects which have been stolen or of which another person has been otherwise dispossessed by a criminal act which the possessor could reasonably have [been expected to have] consulted.

(2) The amount of compensation awarded under paragraph (1) may exceed neither the price paid by the possessor or his predecessor [plus interest which has accrued subject to the purchase], nor the actual commercial value of the object [at the place where it is located].

(3) 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.

Article 4

(1) When a cultural object has, in infringement of a prohibition, been exported from the territory of a Contracting State (the requesting State) that State may request the court [or other competent authority] 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] [and]]⁽¹⁴⁾

(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,

(14) Opinion was divided at the second session of the group as to the desirability of retaining sub-paragraph (a) (Study LXX - Doc. 14, paras. 56 and 57).

(v) the [great] [outstanding] cultural importance of the object for the requesting State.⁽¹⁵⁾

(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 [twenty] [fifty] years following the death of that person; or

(b) no claim for the return of the object has been brought before a court [or other competent authority] acting under Article 9 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.

[(3) To be admissible, the request shall contain [or be accompanied by] the indications necessary to enable the competent authority of the addressed State to judge whether the conditions laid down in paragraphs (1)(a) or (1)(b) are fulfilled. In all cases, the request shall contain all useful information regarding the conservation, security and accessibility of the object after it has been returned to the requesting State.]⁽¹⁶⁾

(15) At the second session Mr Crewdson proposed the following draft of point (v): "the great cultural importance of the object to the requesting State having regard to the extent and richness of the existing stock of heritage material of the requesting State whether in public or private ownership and the degree of uniqueness of the object".

Alternatively it was suggested that point (v) be redrafted to reflect the idea expressed in the former point (vi) so as to read: "the [great] [outstanding] cultural importance of the object for the requesting State established for example by classification or similar measures or by taxation arrangements with private persons whose collections are accessible to the public" (Study LXX - Doc. 14, paras. 59-61).

(16) Text proposed at the second session by Mr Fraoua and Mr Lalive (Study LXX - Doc. 14, paras. 66-68).

Article 5

The possessor of a cultural object who, when exporting or acquiring it, neither knew nor ought to have known of the fact that it had been exported in infringement of a prohibition⁽¹⁷⁾ may at his option require that the requesting State pay him, at the time of the return of the object, [equitable compensation] [the price paid by him]⁽¹⁸⁾ or, when returning the object to that State, retain ownership and possession 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.]⁽¹⁹⁾

[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.]⁽²⁰⁾

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- (17) The group may, at its third session, wish to consider whether the precautions to be taken by the purchaser should be spelt out in detail and, if so, to what extent they should be similar to those set out in Article 2(1). (Study LXX - Doc. 14, paras. 74 and 75).
- (18) It was suggested at the second session that, unlike the situation contemplated in Article 3, the "good faith" purchaser of an illegally exported cultural object should in all cases be entitled to full compensation. (Study LXX - Doc. 14, para. 77).
- (19) This sentence was left in square brackets by the group at its second session given the difference of opinion which existed regarding its retention (Study LXX - Doc. 14, paras. 78-81).
- (20) Although this article was deleted at the second session of the group it was agreed that an attempt should be made to introduce its content in another provision so as to identify certain well defined cases which would be excluded from the principle of return as contemplated by the Convention (Study LXX - Doc. 14, paras. 82-84).

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 [or other competent authority] acting 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.

(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.

[Article 8

(1) In determining the value of a cultural object for the application of Article 4(1), regard shall in particular 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].⁽²¹⁾

(2) For the application of Article[s 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 infringed a prohibition, and when it is in the possession of a single person.]⁽²²⁾

(21) The group agreed at its second session that a decision would be taken on the language in square brackets at its third session (Study LXX - Doc. 14, paras. 87-89).

(22) The whole article was placed in square brackets by the group at its second session pending a decision on the retention of Article 4(1)(a) (Study LXX - Doc. 14, para. 90).

Article 9

The courts [or other competent authorities]⁽²³⁾ 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 upon another jurisdiction or submit the dispute to arbitration.

Article 10

Any State Party to this Convention may accord wider protection to a person dispossessed of a cultural object in the circumstances described in Article 2(1) or to the rights of 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.⁽²⁴⁾

Article 11

This Convention shall apply only in respect of a cultural object of which a person has been dispossessed by a criminal act or which has been exported in infringement⁽²⁵⁾ of a prohibition after the entry into force of the Convention.

(23) Given a difference of opinion on the insertion of these words at the second session of the group, the Secretariat has included them, as elsewhere in the text, in square brackets (Study LXX - Doc. 14, para. 96).

(24) This redraft was proposed at the second session of the group (Study LXX - Doc. 14, paras. 97-101).

(25) It was suggested at the second session of the group that the following language be added: "However, it shall not affect any provisions in this respect which were in force at the time of the dispossession or of the infringement prior to its entry into force" (Study LXX - Doc. 14, para. 108).