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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

OBSERVATIONS OF GOVERNMENTS
ON THE PRELIMINARY DRAFT UNIDROIT CONVENTION
ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(Canada, Mexico, Sweden, Turkey)

Rome, April 1991

Chapter II - Restitution of Stolen Cultural Objects

1. In some instances, cultural objects will have been both stolen and illegally exported. Therefore, the existence of different limitation periods in Article 3 and Article 7 would appear to raise a problem. The limitation period is not the only area in which the dichotomy between property which is stolen and that which is illegally exported seems to cause problems. For example, Article 3(1) provides that a possessor of stolen property shall return it, whereas Article 8(2) allows certain options to the possessor of illegally exported property.

2. Article 4(1) provides for compensation where a possessor can prove that he or she exercised "necessary diligence" when acquiring a stolen cultural object. As the possessor is in possession of stolen or illegally exported material, patently he or she did not exercise the diligence necessary to prevent such an acquisition. Thus, it would be preferable to require "reasonable" diligence rather than "necessary" diligence.

3. By Article 4(3) the conduct of a predecessor is imputed to a possessor who acquires a cultural object by inheritance. It seems likely that, in many cases, an inheritor will be unable to prove that "necessary diligence" (or any other degree of diligence) was exercised by the testator. Thus an inheritor could be in a worse position under this Convention than would be other possessors.

Chapter III - Return of Illegally Exported Cultural Objects

1. Article 5(2) provides that a request shall contain specific information about the conservation, security and accessibility of a cultural object after its return to the requesting State. The Convention does not allow the State addressed to refuse a request for return where the proposed measures for conservation, security and accessibility of the cultural object are not satisfactory. Should this possibility be stated in the Convention?

2. Article 6 provides that a court may refuse to order the return of a cultural object to the requesting State where the object is more closely connected with some other State. A State other than the requesting State ("the second State") cannot bring an action unless the object was illegally exported from the second State. This seems to imply that the State addressed could be entitled to retain an object with which it had no reasonable or substantial connection. An additional provision could be inserted in the Convention in order to deal with such an eventuality.

3. Article 8(2) provides that when returning a cultural object to a requesting State the possessor may, instead of requiring compensation, decide to retain ownership and possession of the object. The reference to retaining possession could raise some confusion; it would seem preferable to follow closely the French text which refers solely to ownership ("rester propriétaire").

4. With respect to the "necessary guarantees" provided for in Article 8(2), would it not be preferable for the Convention to give some guidance as to what constitutes such guarantees and as to whether they should be imposed by the tribunal?

5. In addition, has the tribunal or the competent authority ordering the return of an illegally exported cultural object any role to play in determining, according to Article 8(1), the fair and reasonable compensation payable to the possessor?

Chapter IV - Claims and Actions

Article 9 provides the location in which an action under the Convention may be initiated, but makes no provision for safeguarding the cultural object while the legal action is in progress. Should it not be necessary to add a provision which would oblige the State in which an object is found to take appropriate steps in accordance with its legislation to safeguard the object? For instance, it can be suggested that the State in which a cultural object is located should prohibit the further export of the cultural object once an action has been commenced."

MEXICO

"For Mexico, a country with a large quantity of cultural objects and from which they are exported both legally and illegally, any attempt at drawing up international rules applicable to the circulation of such objects is of the greatest importance: it is for this reason that the work undertaken by Unidroit in this connection is worthy of praise as it recognises the existence of an international market in cultural objects and seeks the introduction therein of legal rules.

The angle from which the international protection of cultural property is treated in the draft Convention under consideration is that of private law and the object is essentially that of the restitution of stolen or illegally exported cultural objects.

The observations of the Mexican Government on the preliminary draft are set out hereafter:

Article 1 - This article describes the situations dealt with by the draft Convention, namely the theft and the illegal export of cultural objects. The Mexican Government is of the belief that as from this very first article a distinction should be drawn between those two situations. Theft is an act committed against individuals and concerns private ownership whereas in the case of illegal export the illegal act is one committed against the patrimony of the State.

It should be added that, in the opinion of the Mexican Government, the draft Convention should, in connection with illegal export, use the language "contrary to its legislation" rather than "contrary to its export legislation" as the present wording reduces the scope of the future Convention as regards the laws which may be contravened in the event of the illegal export of cultural objects.

Article 2 - The definition contained in this article is so broad and general that practically any object could be considered to be a cultural object. With a view to solving this problem, the Mexican Government would propose adding to the definition the following words: "in accordance with the law of the requesting State".

Article 4 - This article is, in the view of the Mexican Government, one of the most important of the draft Convention.

For the Mexican Government, the fact that the burden of proving its possession in good faith is placed on the possessor represents a major step forward.

As to any accessible register of stolen cultural objects the Mexican Government would point out that many cultural objects belonging to the Mexican State have been, and are being, found in unknown or unexplored sites at the time of their discovery and illegal export and it is for this reason that no such register of cultural objects exists. In the light of this observation, the Mexican Government considers that establishing as proof of the good faith of the acquisition of a cultural object the consulting of a register of stolen cultural objects would be contrary to the aim which it is sought to achieve on account of the many difficulties associated with the requirement of the availability of such a register.

According to the text of the draft, the good faith possessor of a stolen cultural object who is requested to return it is entitled to payment of "fair and reasonable" compensation ("indemnisation équitable") by the claimant. The notion of "fair and reasonable" is an Anglo-Saxon concept which leaves judges a wide measure of discretion and it could be the case that the compensation payable to obtain restitution of the stolen cultural

object would be so high as to render restitution practically impossible.

It is stated in the explanatory report that the adjectives "fair and reasonable" as applied to the compensation lay down a strict limit and permit regard to be had to the financial capacity of developing countries. The report furthermore recalls in this context that a similar notion to be found in public international law in relation to nationalisation has allowed judges to award sums lower, and sometimes much lower, than the commercial value of the property nationalised. This reasoning is however far from conclusive. The comparison drawn in the report fails to take account either of the differences between public international law and private law or the fact of the considerable increase in the prices realised by cultural objects on the international market as a result of speculation.

Article 5 - This article creates insuperable difficulties for the Mexican Government. It establishes a single procedure for the return of stolen and of illegally exported cultural objects by providing that the requesting State or the individual concerned may request the court or other competent authority of the State addressed to order the return of the cultural object in question.

It is in the first place unacceptable for the Mexican Government that the Mexican State should bring a request before, and in consequence submit to, decisions of the courts of foreign countries. Such a procedure would be contrary to the fundamental principle of public international law of State immunity according to which neither a State nor its property can be submitted to the jurisdiction of a foreign court.

Second, when reference is made in the draft to a "competent authority" without specifying its nature, one could in practice reduce recourse to diplomatic channels between States designed to settle such claims which have, in Mexico's experience, proved to be effective.

Not less serious than the above-mentioned considerations would be the fact that it would be for the State addressed, through the court or other competent authority, to characterise as "cultural" the object whose return is requested.

According to the provisions both of this article and of Article 2 of the draft, a person requesting the return of a stolen cultural object - an individual, or of an illegally exported object - a sovereign State, would be powerless before an authority of the State addressed for the following reasons:

(a) it is the authority of the State addressed which is to determine whether or not an object may be characterised as "cultural", and may therefore be subject to a procedure for return contemplated by the draft Convention;

(b) the criteria for deciding whether or not an object is a "cultural" object to be found in paragraph 3 of this article and in Article 2 are vague, imprecise and include subjective elements whose evaluation rests with the responsible competent authorities of the State addressed.

As regards this article of the draft the Mexican Government is of the belief that:

(1) Provisions should be introduced concerning procedures for claims through diplomatic channels.

(2) It should be established that it is for the requesting State to determine which objects are to be characterised as "cultural" objects.

Article 6 - This article aggravates still further the situation created by the previous article in that it allows the court or competent authority of the State addressed a discretionary power to refuse to order the return of the object when it has a "closer link" with the culture of the State addressed. The Mexican Government is concerned by the language of this article as judges, in particular those of first instance, who are not familiar with the surrounding context of the claims brought before them, will decide the case in favour of local interests. If to this is added the discretionary power of Anglo-Saxon judges to which reference has already been made, then the situation will arise in which cultural objects belonging to a sovereign State will never be returned.

Article 8 - It is stated in this article that when returning the cultural object the possessor in good faith may require the payment of "fair and reasonable" compensation, may decide to retain ownership of the object or transfer it against payment or gratuitously to a person of its choice residing in the requesting State which latter may neither confiscate nor subject the object to other measures to the same effect.

As to the words "fair and reasonable" employed to describe the indemnity, the Mexican Government would reiterate its comments on Article 4.

The Mexican Government is profoundly disturbed at the notion that the draft Convention allows the possessor of a stolen or illegally exported cultural object to retain ownership and possession after the authorities of

the State addressed which have considered the case have ordered the return of the cultural object. Without entering into a more detailed analysis of the contradictions and of the consequences which would follow from the exercise of this option by the possessor of a stolen or illegally exported cultural object, it is sufficient to state that this possibility would deprive the future Convention of any value.

It is inconceivable for the Mexican Government that the same treatment should be accorded to an individual and to a sovereign State. An illegally exported cultural object belongs to the public domain, which means that it cannot be owned by private persons and if it is appropriated - clearly illegally - it must, when an action for its return is instituted, be handed over without the requesting State having to make any undertaking vis-à-vis the person who possessed it. It is for this reason that Mexico could never become a Party to an international Convention which would impose an obligation.

(a) to pay compensation to the possessor of a cultural object belonging to a State;

(b) to accept that the possessor can transfer a cultural object which is part of the patrimony of the State to a person residing in its territory and which is in consequence subject to its jurisdiction; and

(c) to restrict the authority of its governmental authorities by preventing it from recovering on its territory a cultural object belonging to it.

Moreover, the Mexican Government is of the opinion that it would be desirable to add to the draft Convention a special article specifying the measures which must be taken by the State addressed to protect and conserve cultural objects whose return is requested during the proceedings for their return, such as those contemplated in the Treaty on cooperation providing for the conservation and restitution of stolen archeological, historical and cultural property, signed by Mexico and the United States of America in July 1970.

Final observation - the Mexican Government reserves the right to submit comments on the procedure provided for in the preliminary draft Convention, especially in regard to limitation periods, at a later stage of the discussion on the questions of substance which have been the subject of observations in this document."

SWEDEN

"The draft Convention has been studied in the Ministry of Justice and in the Ministry for Education and Cultural Affairs. The joint position on the draft Convention can briefly be stated as follows.

We are reluctant to accept the idea of establishing special private law rules with regard to such a vaguely defined group of items as "cultural objects". The draft now presented gives rise to the question whether this project should be further pursued or not.

First, we wish to point out that if special provisions on the restitution of goods acquired in good faith should ever be introduced, they must indeed be limited to a well defined category of items deserving such special treatment. It is in our opinion not acceptable to give that special treatment to *anything* which might be considered as a "cultural object". On the contrary, such special regulation should be contemplated only with regard to objects of great cultural significance.

This statement does not imply that we have in mind a list of items. We agree that it is impracticable to make such a list in a document intended to be internationally implemented. The limitation of the scope could be made e.g. by using expressions such as "objects of great/outstanding cultural significance". Moreover it could be contemplated restricting the right to institute the special procedures under the Convention to Contracting States also in the case of theft. Such a rule might solve some of the problems which we foresee at the implementing stage.

Another objection concerns the time limits for instituting procedures under both Chapter II and Chapter III. We consider a period of thirty or twenty years respectively to be out of the question. The maximum period should in no case be more than ten years."

TURKEY

"The Turkish view is that the general considerations underlying the preliminary draft are not fully justified and that they are based on criteria the purpose of which is to exempt from liability those who buy and those who traffic in cultural objects belonging to other persons.

Article 3 removes any liability for theft thirty years after such theft. Article 5(2) imposes upon the requesting State an obligation to provide to the competent authority of the State addressed all material information regarding the conservation, security and accessibility of the

cultural object after its return to the requesting State.

Article 5(3) is not directed to prevention of theft, but rather calls into question the intentions of the requesting State, the legitimate owner of the object, to the advantage of the trafficker or the thief. The simple fact that the cultural object has been exported in contravention of export legislation should be a sufficient ground for the return of the object and that fact should be the sole consideration of the competent court when reaching its decision.

The effect of Article 7(b) is to legitimise illegal export twenty years after the export of the object.

Article 8(2) allows the possessor of a cultural object to dispose of it, even though the competent court may have found him to be guilty of, or responsible for, the illegal import of the object in question.

Article 10, in one way or another, proclaims an amnesty in respect of cultural objects which have been stolen or exported in contravention of export legislation prior to the entry into force of the Convention.

The content of other articles is such as to complete the process which offers protection to illicit acts in the name of the principle of the so-called free market.

Turkey proposes therefore that the preliminary draft be radically revised during the meeting of the committee of governmental experts which will be held in Rome from 6 to 10 May 1991."