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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 INTERNATIONAL ORGANISATIONS ON THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(Unesco, Interpol)

Rome, January 1992

UNESCO

These comments relate only to points where clarification or additional considerations might be useful for delegations. On many issues where it is not clear what would be the solution most conducive to the restriction of illicit traffic, no comment is made. Where experience within Unesco has suggested that certain factors should be taken into account, these are referred to in the text.

GENERAL COMMENTS

Acts committed prior to the date of the Convention

1. The Egyptian representative proposed that it would be difficult, if not impossible, to accept "that an illegal act may become legal simply because it was committed before the entry into force of the proposed Convention". The legal status of an act committed before the date of entry into force of the proposed Convention will not be changed: it only implies that the simplified provisions for return of the object to the country of theft or export will not be applicable. Nonetheless Article 11(c) provides that Contracting States shall be free to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object occurred before the entry into force of the Convention for that State. Although it is clear that many States would prefer to have earlier acts included in the general scope of the Convention, Unesco regarded it as important that the situation should be clearly regulated at least from this point on. Acts which occurred after 1970 are covered after entry into force of the 1970 Unesco *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* for Contracting States, although many States with significant markets for cultural objects are not party to that Convention. Unless agreement is reached, at least under the Unidroit Convention, there will continue to be no regulation even of future transactions for those States.

Ambit of Convention

2. Several speakers addressed the question whether the provisions should apply generally to all transactions concerning the category of cultural objects covered by the Convention, or only to transactions containing an international element. In the view of Unesco it would be preferable for the Convention to apply to all such transactions for the following reasons:

(i) it is usually very difficult to trace the exact steps of a stolen or illegally exported cultural object, and to determine whether or not there is an international element may therefore be a difficult and complicating task;

(ii) a considerable incentive for some States to accept the Convention would be that it will to some extent unify the law as regards transactions in cultural objects;

(iii) traffickers have proved adept at exploiting differences in national legislation to evade controls and in providing false provenances to take advantage of them.

Relationship of new draft with 1970 Unesco Convention

3. It was suggested during the discussion that the new draft represented a substantial change in approach from that of the Unesco Convention, which had favoured countries of origin, by shifting the balance towards the interests of importing States.

4. Delegates should be aware that the present studies within Unidroit were initiated at the request of Unesco which funded the two studies of Professor Reichelt.(1) These studies served as preparatory material for the work of the committee of experts. Unesco was concerned to improve the working of the 1970 Convention in three ways:

(i) The Convention raised, but did not solve, a number of questions of private law for which, it could be argued, Unesco, strictly speaking has no mandate. To make the Convention fully effective there was a need to have these problems (such as the rules protecting a *bona fide* purchaser of stolen objects) dealt with by an international body with expertise in private law;

(ii) The 1970 Convention has a very general obligation (Art. 3) on States Parties to regard export and theft of cultural objects contrary to national laws adopted by States Parties under the Convention together as well as specific obligations restricted to specified categories of materials (inventoried objects stolen from museums or similar institutions (Art. 7); archaeological and ethnological materials of a State whose cultural patrimony is in jeopardy (Art. 9)). This flexibility (or ambiguity) has led to diverse interpretations of the Convention, and, in some cases, to reluctance to adhere to it. It was felt that a supplementary instrument, equally specific as to stolen and as to illegally exported cultural objects, would render the obligations of States Parties clearer and respond to the sensibilities of States who felt that the 1970 Convention was not sufficiently precise;

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(1) Reichelt, G. "International Protection of Cultural Property" (1985) Uniform Law Review 43; cf. also by the same author "Second Study Requested from Unidroit by Unesco on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property in the Light also of the Comments Received on the first Study" (1988) Uniform Law Review 53.

(iii) Experience has shown that it would hinder the illicit trade if dealers and collectors would take responsibility for inquiring into the origin of the objects which they handle.

5. The Unidroit draft Convention is free of the ambiguities of the 1970 Convention, while leaving a margin of appreciation to those applying the Convention which should ensure sufficient flexibility in its operation.

6. It specifically provides for the return of all stolen objects (Art. 3) of artistic, historical, spiritual, ritual or other cultural significance (Art. 2) whether in private or in public hands, whether taken from a collection or an individual item, whether inventoried or not. In that sense it is wider than Art. 7 of the Unesco Convention.

7. It applies to illegally exported objects (Art. 5) of the same kind of significance (Art. 2) whose removal significantly impairs an important cultural interest (Art. 5(3)). In that sense it is narrower than Article 3 of the 1970 Convention but much more specific, and it provides a procedure applying to important illegally exported objects other than ethnographical and archaeological materials mentioned in Article 9 of the 1970 Convention. Furthermore, the obligations of the requesting States are more detailed, and should be easier and more straightforward for requesting States to put in operation, since States Parties to the 1970 Unesco Convention have adopted differing means of implementing Article 9 of that Convention.

8. The provisions of the Unidroit draft requiring diligence do not appear in the 1970 Unesco Convention. This is a key provision, for it is intended to alter the widely accepted practice among collectors and dealers of not rigorously checking the provenance of objects. It applies equally to stolen or illegally exported objects and is sanctioned by the loss of the right to any compensation to a person in possession of such an object. In this respect the Unidroit draft, if adopted, could have an important impact for the future on the flow of illegally acquired cultural objects.

9. **The Preamble should include the following elements:**

- a statement of the importance of cultural exchanges

- a statement as to the severe damage done by illicit traffic (e.g. clandestine excavation, loss of material culture from its community of origin, etc.)

- (if Article 5(2) is suppressed) a statement that States Parties are prepared to make significant changes in their national law to ensure the conservation, security and accessibility of cultural objects by ensuring their return in cases of theft or illegal export (see comment below, para. 36).

COMMENTS ON PARTICULAR ARTICLES

Article 2

10. Definition of cultural objects. Many governmental experts suggested that this definition is too wide.

11. The question of definition had been discussed by Professor Reichelt in her preparatory study [2] and had been considered by the study group at each of its sessions. Each of the existing Unesco Conventions and Recommendations has used a definition specifically tailored to the needs of that particular instrument.

12. Furthermore, there is a very broad disparity between national legislations in defining this concept, and given the great variety of definitions in international instruments it was felt unfruitful to try and pursue a detailed definition. However, this broad definition will have to be applied by the judges of States who are dealing with applications for the return of cultural objects. It is therefore in the hands of those who would have most interest in defining this concept fairly specifically and perhaps narrowly. Nonetheless it was felt that judges would be sensitive to the cultural value of an object in another society which was not so valued in his or her own. (There are notable examples of this process where judges in societies of European culture have considered objects of cultural value to indigenous communities).[3] It seems unlikely that, say, a cultural object of Sami (Lapp) culture, protected by legislation in Norway and Sweden, would not be recognised as a cultural object in other jurisdictions. Furthermore an individual or a State is only likely to bring an action under the Convention for the restitution or return of a cultural object if the importance of the object were deemed to warrant the taking of such a step. The definition is thus to a certain extent self-limiting.

There are two additional points in favour of the present type of definition. One is that this type of definition is widely used in national legislation. About 38 States use such a definition, sometimes coupled with other elements, such as illustrative cases, registration or classification procedures.

13. In general there are three types of definition used in national cultural heritage legislation: categorisation (use of a general definition) such as that described above, enumeration and classification. An

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(2) See n. 1.

(3) F.G. Charrier v. Bell 496 SO. 2d 601 (1986) concerning Native American gravegoods [United States]; Onus v. Alcoa concerning Aboriginal artefacts (1981) 36 A.L.R. 425 [Australia].

enumeration system mentions specifically each item that it is proper to protect. It is widely used in English language jurisdictions, but not only in those. About 50 States now use definitions of relative specificity of an enumerative kind. However the enormous variety of material to be covered makes this system impractical for an international agreement, as can be seen from the following examples of material specifically enumerated in existing national legislation: orators' flywhisks (Samoa); bones, feathers, other parts or eggs of the moa (New Zealand); palm-leaf or birch leaf inscriptions (Nepal); fossil footprints (Lesotho); housepost, ancestral figure, drum, religious mask (Ghana, Gambia); breast-plates of pearl or ivory, forks made for the eating of human flesh (Fiji); calligraphy, shell money, bamboo slips of ancient documents (China); amulets, objects in basketware (Burma); balafons, traditional games and toys (Burkina Faso); alabaster, feather costumes (Bolivia); war service medals, certain flags (Australia); bottles, weapon projectiles over 100 years old and excavated from Federal or Indian lands contrary to Federal, state or local law (United States); carved wooden doors and door frames in African or oriental style made before 1940 (Tanzania). Clearly no international Convention could hope to specify such a range.

14. It would be possible for the Unidroit Convention simply to specify that any cultural object protected by national legislation of a State Party to the Convention would be protected by return (if stolen) as well as any cultural object protected by national legislation, whose removal (if illegally exported) from a State Party to the Convention jeopardised an important interest of that State (as presently set out in Art. 5(3) of the Convention). This in effect leaves the definition of cultural objects to each State, with no general controlling definition. Some States, in their legislation adopting the 1970 Convention, have specified that they return cultural objects of reciprocating States which are protected by the legislation of the requesting State. That decision will in many cases cover a wider group of objects than the definition presently suggested in the Unidroit draft.

15. The third method is classification, whereby protected material is listed, item by item, on a register. It is widely used in French language systems - about 29 jurisdictions use this system.

16. A suggestion has been made that only objects classified by national legislation should be protected under the Unidroit Convention. However, a large number of States do not use classification systems. Some States have objections in principle to the classification or listing of specific cultural objects, especially those in private hands. It also requires a body of experienced cultural administrators, not always within the resources of developing States. Moreover, where such a system does not already exist and would have now to be instituted, it would be many years before the Convention could effectively operate to protect materials coming from those jurisdictions.

17. A number of jurisdictions use a combination of these methods of definition. One common example is a general definition (categorisation) amplified by some enumeration or classification or limitation. This is the pattern in fact following by the present draft. While *any* stolen cultural object must be returned (Art. 3) only those illegally exported cultural objects which meet one of the additional tests in Article 5 will be subject to the provisions of the Convention.

18. Another combination is a classification system, with the addition of a general description (categorisation) - this is often used to protect undiscovered archaeological materials which cannot, because not identifiable, be readily classified.

19. Yet another combination is a general description (categorisation) with the supplement that if there is doubt as to whether a specific object falls within the definition or not, a Minister or other national authority has the power to make the decision (Colombia, Denmark, Japan).

20. Austria uses a negative definition: objects within a general definition are subject to control, except where the Minister has determined that certain groups are not essential to be retained in the country for the national interest.

21. The difference between systems in the long run depends on the level of generality of the definition; enumeration being the only one which relates to individual objects, though "control list" systems, (Australia, Canada, United Kingdom) do provide a decision process for individual items within closely specified categories.

22. A further point has been raised about the consistency of this definition with that in the new draft EEC Directive. As far as this is concerned, see comments under para. 24 (Relationship of new draft with new EEC Directive).

23. It can be seen that the question of the type of definition to be used is by no means a simple one. If the experts are agreed that there should be an international legal instrument to protect stolen and illegally exported cultural objects, a debate on the type of definition to be used could delay its completion indefinitely. The study group closely studied this problem, and the solution it reached, although it will not reflect the national practice of many States, is a workable one.

Relationship of Unidroit draft Convention with new EEC Directive

24. Article 36 of the Treaty of Rome allows member States to protect their national cultural treasures by means of "prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; ... the protection of national

treasures possessing artistic, historic or archaeological value". This article remains in force after 1992 but the national measures can no longer use border controls to ensure this protection. The EEC directive being drafted has the limited goal of replacing internal border controls. It is designed only to cover actions by member States (not by owners), to cover cultural objects protected according to Article 36 of the Treaty and to deal with restitution between States members. The Unesco or Unidroit conventions may cover other issues, and also deal with relations within a wider group of States.

25. The new EEC directive will therefore apply in principle only to national cultural treasures exported illegally from one EEC member State to another and deal with the return to that State. It does not deal with stolen cultural treasures at the suit of the owner; these are covered by the Unidroit draft. It does not deal with stolen objects of cultural significance which are not "national treasures"; these are covered by the Unidroit draft. It does not deal with stolen or illegally exported cultural objects coming from States outside the EEC; these are covered by the Unidroit draft.

26. There is nothing to prevent States members of the EEC becoming Parties to the Unidroit draft, since it covers matters other than those dealt with in the EEC Directive; e.g. the rules as to stolen objects are presently provided by the private law of the national States, which have the power to change those rules if they so wish.

Time limits (Art. 3(2), Art. 7(b))

27. Since there will be many cases where articles are both stolen and illegally exported, it would seem best to have the same limitation periods applicable to each. In view of the number of cases of important cultural objects stolen during World War II which have come to light recently, a period of only 30 years would enable much illegally acquired material to be openly traded.(4)

28. Moreover, many countries already have indefinite periods for the recovery of cultural objects. In France, where museum collections are in public hands, cultural objects stolen from them are inalienable and imprescriptible. This covers a very significant mass of cultural objects. Unfortunately in most English speaking countries museum collections are usually vested in a trust and regarded in law as private property. A short

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(4) The Quedlinburg treasures, early Gospels, reliquaries etc. were stolen from a Convent church at the end of World War II and were being sold by the thief's successors in 1990, 45 years later. IFA Reports No. 4, July 1990.

limitation period, if the rules as to ownership of public collections are not changed, will mean that most museum collections in these countries will continue to have much less protection than museum collections in countries such as France.

29. It is clear that the selection of the limitation periods will have to be a compromise, since there are some States which would prefer no limitation at all, and others which would prefer it as short as possible. Either 5/50 or 3/30 years would be a line of compromise. However, it does seem desirable that the limitation for claims for stolen and claims for illegally exported cultural objects should be approximately the same. For one thing, some objects will be both stolen and illegally exported. For another, there does not seem to be any good reason why stolen cultural objects should have a shorter limitation period imposed than illegally exported cultural objects.

30. The suggestion was made by one delegation that there should be an obligation on a dispossessed owner to be diligent in taking action to find the object, and that this could be supported by an obligation on the possessor to publicise his holding of the object. However, the point of the shorter time limit was in fact to require a dispossessed owner to take action as soon as he or she "could reasonably have known" - this would enable account to be taken of dilatory behaviour. It would be unwise, however, to deprive him of a remedy because an owner had publicised his possession of the object, since no measure is given of the kind of publicity required. Particularly with objects taken from clandestine excavations, or ethnographic objects taken from indigenous communities, it is difficult to think of an appropriate form of publicity which could be fairly assumed to have been brought to the notice of the original owners. A request by the Intergovernmental Committee for Promoting the Return to its Countries of Origin or its Restitution in case of Illicit Appropriation to collect auction catalogues was considered by the Unesco Secretariat and ICOM a few years ago and found to be impractical. It should therefore be left to judicial determination to decide whether, in all the circumstances, it is reasonable to expect the dispossessed owner or country of illegal export to have known of the whereabouts of the item.

Article 4 - "compensation"

31. It was suggested that even a bad faith possessor should be entitled to compensation for costs of conservation. While understanding the desire to encourage a holder, even a bad faith holder, to be responsible for the good condition of the cultural object, it should be noted that, because of the wide variety of persons acting as "restorers" or "conservators", who do not in fact have expert qualifications, such a provision could be dangerous. One case occurred where a "restoration" took place in the hands of a holder which was considered by experts to have destroyed the integrity of the object, so that it had lost its value to the cultural heritage of

the nation. Such a provision might therefore have the opposite effect of ensuring that a holder first undertook work to increase his or her chances of retaining the work because the claimant would not want to compensate him and second, that the work should destroy its value for the cultural heritage, since the claimant would then no longer be interested in having it returned.

32. On the question of the measure of compensation, the suggestion that the compensation should be "fair and reasonable *in all the circumstances*" seemed to have merit in meeting a number of objections which had been made to the existing text.

33. The suggestion that "fair and reasonable compensation" should take account of the cost of clandestine excavation and transport is also a dangerous one. In a case where the facade of a Mexican temple had been removed and transported to the United States, the costs of the expedition into the jungle, solely for the purpose of illegal removal, detachment of the facade and transport to the United States amounted to some $80,000. That such a facade could be acquired *bona fide* if the required diligence were used is difficult to imagine, but in any event, it seems unreasonable to suggest that the State claiming return should have to pay any such sum.

34. The suggestion that the words "possessor" should be replaced by "a person who has a right of ownership" was based on the view that even where a possessor was in a legal system which did not give the good faith possessor ownership would be entitled under Art. 4 to seek compensation. The study group had no intention of changing the law in this respect, and the interests of those countries in keeping the full protection of the original owner intact, and not according compensation to a possessor, would be preserved by their option, under Art. 11(a)(iii).

35. As to the right of recovery for the cost of compensation against the seller in bad faith, while this would be desirable, it has to be accepted that in many cases, the person in bad faith cannot be found at the time when the cultural object is found to have been stolen. Recovery would in most systems be available in any event by way of remedies for fraud.

Article 5

36. In respect of the proposal to suppress Art. 5(2), while the reasons for suppression are understood, it did respond to the concerns expressed at various times in discussions of return that States may be depriving their own citizens of existing rights to return cultural objects to States of origin, only to see them returned to the international market. Further, it was a support to conservators and curators in requesting States, to ensure that returned objects are respected for their cultural significance. It was never intended as a ground for refusing return. If this subclause is

dropped, it would seem desirable, as a minimum, to place a clause in the Preamble explaining the significance of return (see para. 9 above).

37. An alternative would be to adopt the suggestion to substitute a clause as proposed in Unidroit Secretariat Report of Proposals for Amendment and Principal Issues Raised:

> The requesting State undertakes, if its claim is successful, to subject the object whose return it has obtained to minimum conditions of conservation [and security] and likewise undertakes to make it accessible to the public.

38. In respect of the proposal of China, Egypt, Belgium and Austria for a new form of wording, the deletion of what was at present Art. 5(3)(e) concerning the outstanding cultural importance of an object for the requesting State, it should be recalled that this subclause was inserted by the study group to cover the case of certain exceptional cultural objects which might nevertheless not fall within one of the other subclauses. It was adopted with the case of *Attorney-General of New Zealand v. Ortiz*[5] in mind, where the New Zealand Government failed to obtain the return to it of important Maori carvings which had been illegally exported from New Zealand and were on sale at Sotheby's. These panels, buried in the 1820's or 1830's by a tribe under attack by a neighbouring tribe and not recovered, had been excavated from a swamp in New Zealand and kept in a garage for some six years, after which they had been illegally exported by a dealer, having paid the illegal excavator a derisory sum of NZ $6,000. Little more than five years later their estimated sale value when they were displayed at Sotheby's London was £300,000.00. These panels would not have fallen within the description of the other four interests mentioned, yet they were of extraordinary importance for the cultural heritage of New Zealand. They represented a unique style of carving (the Taranaki style) which was no longer in use. The Government was active to promote traditional crafts among Maori young people, and this would clearly serve as a stimulation and inspiration. Thus, although they were intended, on recovery, to be used by a living culture, they were not being so used at the time of illegal export, and would not necessarily have been considered to fall within Art. 5(3)(d) of the present Unidroit draft. In addition the five separate panels were of different dates. Some had been carved only with traditional tools, but others had been recarved with tools with metal edges, allowing the panels to be dated before and after European contact. Although this case is unique, such is the nature of important cultural objects that one cannot always foresee the kinds of circumstances as to when an object of outstanding significance for a national cultural heritage will be in issue and yet a case such as this should, it seems, be included in those covered by the return provisions of the Unidroit Convention.

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(5) 1982 1.Q.B. 349; [1982] 3 W.L.R. 571 (C.A.) [United Kingdom].

Article 10

39. Concern has been expressed that the restriction of the operation of the Convention to objects that had been stolen or removed from the territory of a Contracting State contrary to its export legislation prior to the entry into force of the Convention would "effectively declare an amnesty in respect of such illegal acts and set a seal of legitimacy upon them". While this is in no way the purpose of the Convention, it has to be understood that certain States would find a retrospective application unacceptable. It could clearly be stated in this article, or in the Preamble, that such acts prior to 1970 were not legitimised, but simply outside the ambit of the Convention. This means that claimant States are free to pursue their remedies, as now, in private law, by diplomatic means, inter-institutional arrangements or through the procedures of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries or Origin or its Restitution in Case of Illicit Appropriation.

Article 11

40. One delegation suggested the more general formula of reserving the right to apply "a more favourable regime". This may not be sufficiently precise: it seems clearer to leave the text as it stands, or else to specify that the requested State may apply a regime more favourable to the claims of dispossessed owners or requesting States than those set out as the minimum provisions required by the text of the Convention. For the same reason, the suggested formulation in para. 163 of the commentary seems to give rise to some problems, since the phrase "beneficiaries of rights in cultural objects" would appear on its face to apply to *bona fide* purchasers under present systems of law and thus call into question the whole rationale of the Convention.

Proposed new Article 12

41. While appreciating the concern of the proposer of this provision to cover objects taken from clandestine excavations, this suggested article may have a deterrent effect on States' willingness to become party to the Convention. As the text presently stands, clandestinely excavated goods are likely to be considered stolen if the State in which they have been excavated has declared them to be State property, or if the landowner is deemed to be their owner (in some cases, the State may be prepared to sue in the landowner's name). Whether they will be considered as stolen depends, in the present Unidroit text, on whether the courts or other competent authority of the requested State, applies the law of the requested State to determine the meaning of "stolen". (See paras. 54-56 of the Unidroit Report on the first session.)

42. In addition, clandestinely excavated cultural objects would be covered by Art. 5(3)(a) and (c), since clandestine excavation destroys context and scientific and historical information. At the same time it has to be recognised that it is almost impossible to identify some materials illegally excavated as having come from a particular site or territory of a State: many cultures cross national boundaries and expert opinion identifying e.g. ceramics, is by no means uniform, especially when no scientific information is preserved or location details disclosed by the clandestine excavators.

43. In this respect therefore, neither the provisions as to theft nor the provisions as to illicit export will necessarily ensure the return of the less significant items of the cultural heritage (potsherds, minor gravegoods, items whose origin cannot be precisely located). It seems doubtful whether the suggested article would really improve the recovery of illegally excavated cultural objects.

INTERNATIONAL CRIMINAL POLICE ORGANIZATION
(ICPO - Interpol)

We are of the opinion that Unidroit has adopted the right approach to the complex subject of regulating the trade in cultural property by separating the two main issues of restitution of stolen cultural objects and return of illegally exported cultural objects.

There is no doubt that the state of the law under the principal legal systems that have influenced business transactions in many parts of the world today needs to be streamlined so that the protection of legitimate owners of goods will not be eclipsed by the demands of trade and commercial convenience. The Unidroit draft Convention has the merit of proposing to the international community that the doctrine *caveat emptor* will be universally followed in respect of the purchase of stolen cultural property and that the principle of good faith will be relevant only to obtain fair and reasonable compensation for the restitution of such property to their rightful owners.

We believe that Article 2 of the draft Convention quite rightly restricts the definition of "cultural objects" to material objects. However, the broad definition of such objects as given in Article 2 is too abstract and imprecise to facilitate any practical assessment of the extent of the "objects" covered by the draft Convention.

The rule relating to prescription of claims for the restitution of stolen objects has our approval. But, though there is a reference in paragraph 2 of Article 3 to "claimant", it is not clear who is entitled to

claim. Can a State bring a claim on behalf of a dispossessed owner? These are some of the issues that need clarification.

We are satisfied with the principle in paragraph 2 of Article 4 which, after requiring a buyer or possessor against whom a claim is brought to exercise diligence, makes the consultation of an accessible register of stolen cultural objects an element in the determination of such diligence. We wonder whether this rule should not be widened to include a reference to registers of protected or inalienable cultural objects which many States have begun compiling in order to give effect to the provisions of the Unesco Convention of 1970.

In paragraph 2 of Article 8 (line 2), it would seem to us that the words "and possession" after "ownership" should preferably be deleted as they serve no useful purpose.

The above observation leads us to the conclusion that certain legal concepts such as "possession" might need to be defined in the text of the draft Convention in order to avoid the risk of difficulties arising in the application and interpretation of the Convention.