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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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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

(Germany)

Rome, January 1992

PROPOSALS FOR AMENDMENT BY THE GERMAN DELEGATION OF THE PRELIMINARY DRAFT
UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

This Convention applies to requests for the return of stolen cultural objects and of cultural objects removed from the territory of a Contracting State contrary to its export legislation.

Article 2

Proposed formulation: none, but is to be restricted.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

(1) (Unchanged)

(2) Any claim for the return of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew the location of the object or the identity of the possessor or when he ought reasonably to have known that information, and in any case within a period of ten years from the time of the theft or acquisition of the cultural object, unless the possessor knew at the time of the acquisition or if it ought to have been obvious to any reasonable acquirer that the cultural object was stolen in which case the claim shall be brought within a period of thirty years from the time of acquisition.

(3) The possessor is anyone who has the cultural object under his actual control and who, as a result thereof, is able to hand over the object to the claimant.

(4) The owner, or any other person able to derive rights of ownership from the owner, is entitled to return of the cultural object.

(5) If the stolen object is located within the territory of the State where it was stolen, only the rules of that State shall apply.

(6) Whoever takes moveable property not his own from another with the intention of unlawfully appropriating it to himself commits theft within the meaning of this Convention if the act was committed in a Contracting State.

(7) A claim for return of the cultural object is excluded if the object was acquired as a result of the enforcement of a judgment. Such a claim is also excluded if the object was acquired at a public auction unless the possessor knew at the time of acquisition or if it ought to have been obvious to any reasonable acquirer that the cultural object was stolen. A public auction is merely an auction held publicly by a court officer appointed for the place of auction, or by some other official authorised to conduct auctions.

(8) A claim for return against the current possessor is excluded if a claim against the previous possessor is also excluded or would be excluded under the terms of the preceding provisions.

Article 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled to payment at the time of restitution of compensation to the value of the cultural object. Such compensation shall, however, be limited to the value of the consideration executed by the possessor. That shall only apply where the possessor proves that he exercised the necessary diligence when acquiring the object. To the extent that the possessor does not receive compensation to the value of the object, he may claim compensation for expenditure necessary to restore, maintain or improve the cultural object; compensation shall not, however, be made for expenditure on normal maintenance. The obligations shall be fulfilled simultaneously.

(2) (Unchanged)

(3) The preconditions contained in paragraph 1, second sentence, and paragraph 2 must be fulfilled by the person acting on behalf of the possessor or on his account during negotiations on, and the conclusion of, the contract for the acquisition of the cultural object, insofar as that person was in actual fact or appeared to be acting with the authority of the possessor or where the latter approves the contract.

(4) The conduct of the possessor is of equal status to that of the previous possessor from whom the former inherited or otherwise gratuitously obtained the cultural object.

(5) The possessor within the meaning of this provision is only the person who possesses the object as if it were his own. Anyone possessing the object on behalf of another may assert the rights set out in the previous paragraphs which accrue to the possessor.

(6) Where the person entitled to return of the cultural object compensates the person in whose possession the object is at the time he asserts his claim for restitution, he is discharged by so doing even if a third party was the owner of the object, or had some other right in the object, unless the right of the third party was known to him or was not known to him by reason of gross negligence.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) Where a cultural object has been removed from the sovereign territory of a Contracting State to which the cultural object is to be ascribed nationally (State of origin) contrary to the States's export legislation, that State may claim the return of the object from its possessor before the competent court in the Contracting State where the cultural object is located (State of location).

The claim for restitution shall presuppose that it would have been clear to any reasonable acquirer that the cultural object was considered a national treasure by the particular Contracting State at the time the object was exported to another Contracting State.

A breach of export legislation within the meaning of the Convention occurs where there is a violation of substantive statutory provisions designed to ensure the object remains in the State of origin due to its cultural significance, which are in force at the time of the export, and insofar as their application is in keeping with the public order of the State in which the cultural object is located.

(2) To be admissible, any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessary to enable the competent authority of the State addressed to evaluate whether the conditions laid down in paragraph (3) are fulfilled and shall contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State.

(3) (Unchanged)

(4) Each Contracting State shall ensure that the individual against whom the request for return of the object could be made also receives effective legal protection before independent courts in clarifying the question of whether the object concerned does represent a national treasure for the Contracting State.

Article 6

(1) The court shall reject the claim for return of a cultural object if, in the court's opinion, the object has as close a, or closer, connection with the culture of the State of location or another State than with that of the requesting State.

(2) If the sale takes place within one Contracting State only, a claim for restitution exists only if upon reasonable consideration of all circumstances, pointers exist to indicate to the purchaser that:

(a) the object is a national treasure for another Contracting State, and

(b) the object was removed or exported from the State of origin in violation of legislation designed to protect national treasures before leaving the sovereign territory of the State of origin.

(3) A claim for return against the current possessor is excluded if a claim against the previous possessor is also excluded or would be excluded under the terms of the preceding provisions.

(4) Claims pursuant to Article 5 are excluded if they are to a large degree manifestly irreconcilable with the principles of law in the State where the cultural object is located. The same shall apply if the object was acquired as a result of the enforcement of a judgment. Such a claim is also excluded if the object was acquired at a public auction unless the conditions contained in Article 8, paragraph 1, second sentence are fulfilled. A public auction is merely an auction held publicly by a court officer appointed for the place of auction, or by some other official authorised to conduct auctions.

Article 7

(1) No claim shall exist pursuant to Article 5 if the cultural 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.

(2) Similarly, no claim shall exist pursuant to Article 5 where:

(a) no request for the return of the object has been brought before the competent court within a period of three years from the time when the State of origin knew or ought reasonably to have known the location or the identity of the possessor of the cultural object;

(b) no claim for the return of the object was brought before the competent court within ten years from the time when the cultural object was exported or the time the object was acquired, unless the object originates from an unlicensed archaeological excavation or the conditions of Article 8, paragraph 1, second sentence are fulfilled; a period of thirty years from the time of export or acquisition of the object shall apply to the latter.

(3) No claim may be brought when the export of the object in question is no longer illegal at the time the return is requested.

(4) The preconditions contained in paragraph 2 letter (b) must be fulfilled by the person acting on behalf of the possessor or on his account during negotiations on, and the conclusion of, the contract for the acquisition of the cultural object, insofar as that person was in actual fact or appeared to be acting with the authority of the possessor or where the latter approves the contract.

(5) The conduct of the possessor is of equal status to that of the previous possessor from whom the former inherited or otherwise gratuitously obtained the cultural object.

Article 8

(1) When returning the cultural object, the possessor may require payment of compensation to the market value of the object, such compensation being limited however to the consideration executed in acquiring the object. This shall not apply if the possessor knew at the time of acquisition or if it ought to have been obvious to any reasonable acquirer, that the cultural object was exported in violation of export legislation of

the requesting State. Where the possessor does not receive compensation to the value of the object, he may claim compensation for expenditure necessary to restore, maintain or improve the cultural object; compensation shall not, however, be made for expenditure on normal maintenance.

(2) When returning the cultural object the possessor may, instead of receiving compensation, require that the State of origin agree to him retaining ownership of the object or to ownership being transferred to a person of his choice residing in the State of origin's sovereign territory. In such cases, the State of origin may neither confiscate the cultural object nor subject it to any measure having the same effect. In such cases, the possessor is entitled to payment of compensation, account being taken of his legal position once the cultural object has been returned to the State of origin.

(3) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State. The return of the cultural object to the State of origin and the payment of compensation are to be effected at the same time.

(4) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

(5) Where the State of origin compensates those individuals possessing the object at the time it asserts its claim for restitution, it is discharged by so doing even if a third party was the owner of the object, or had some other right in the object, unless the right of the third party was not known to it by reason of gross negligence.

(6) It shall be left to Contracting States' own legislation to regulate the possessor's right of recourse.

(7) The preconditions contained in paragraph 1, second sentence must be fulfilled by the person acting on behalf of the possessor or on his account during negotiations on, and the conclusion of, the contract for the acquisition of the cultural object, insofar as that person was in actual fact or appeared to be acting with the authority of the possessor or where the latter approves the contract.

(8) The possessor within the meaning of this provision is only the person who is holding the object as if it were his own. Anyone possessing the object on behalf of another may assert the rights set out in the previous paragraphs which accrue to the possessor.

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

(1) The claimant may bring an action pursuant to Article 3 or Article 5 before the courts of the State where the cultural object is located at the time the action is brought. The court designated in sentence one shall also have jurisdiction for the submission of compensation claims pursuant to Article 8. The jurisdiction of courts set out under sentence one and sentence two applies for actions filed pursuant to Article 5 only. Sentences one to three apply *mutatis mutandis* to local competences.

(2) However the parties may agree in writing to submit the dispute to a different court than that stipulated in paragraph 1, or to arbitration.

(3) The State of origin may only submit a request pursuant to Article 3 if it was already the owner of the cultural object within the meaning of the civil code before it was exported.

(4) Claims by the State of origin shall remain unaffected by the fact that the requested cultural object is stolen and has also been illegally exported from the State of origin.

(5) Anyone against whom, as possessor of a cultural object, an action for restitution has been filed pursuant to Article 3 or Article 5 and who maintains that his possession of the cultural object is based on a time-limited legal relationship to a third party as borrower, custodian or holder of a lien may call upon the third party to participate in the action. He may return the cultural object to the plaintiff if, despite warning the third party that he will comply with the request for return, the third party does not enter the action. The third party is authorised to take over the action instead of the possessor. Where the third party has taken over the action, the possessor may at his request be released from the action.

The court's decision on the return of the cultural object then becomes effective and enforceable against the possessor.

(6) Otherwise, judicial proceedings are determined according to provisions applicable in the State which is competent pursuant to paragraph 1.

CHAPTER V - FINAL PROVISIONS

Article 10

This Convention shall apply only when a cultural object has been stolen, or removed from the territory of a Contracting State contrary to its legislation concerning protection of a cultural object against removal after the entry into force of the Convention in respect of the Contracting State to whose courts a claim for the return of such an object has been submitted.

Article 11

Each Contracting State shall remain free in respect of claims brought before its courts:

(a) (Unchanged)

(b) (Unchanged)

(c) (Unchanged).