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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

# COMMITTEE OF GOVERNMENTAL EXPERTS ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Working papers submitted
during the second session of the committee
(Rome, 20 to 29 January 1992)

Rome, February 1992

# I N D E X

G.E./C.P.
2nd session
Misc. 1
(Original: French/English)

PROPOSAL OF THE GREEK DELEGATION

*Article 1*

This Convention applies to claims for the restitution or return of cultural objects removed from the territory of a Contracting State by way of theft or export contrary to the legislation of that State.

*Article 5*

The possessor of a cultural object which has been illicitly exported from the territory of a member State shall return it to that State.

G.E./C.P.
2nd session
Misc. 2 rev.
(Original: French)

PROPOSAL OF THE ITALIAN DELEGATION (1)

*Article 5*

Include after paragraph (1) a new paragraph (2) worded as follows:

"In the event of the failure to act of a State whose legislation has been breached and of that State's being unable successfully to meet the conditions set out in paragraph 4 (renumbered), the State of origin of the object or a State which considers that it can satisfy the conditions set out in paragraph (4) (the requesting State) and whose object had been removed or exported to another State subject to certain restricted conditions provided by its law or by bilateral or multilateral agreements, may, in accordance with Article 9, bring an action before the court or other competent authorities of a State (the State addressed) to order the return of the object to its own territory".

Renumber the following paragraphs.

*Explanatory note*

The proposal is concerned with the case of an object which, having been removed or exported to another State in conformity with the law (for example the case of free movement within the European Community), is subsequently exported to a third State in breach of the legislation of the second State or of bilateral or multilateral agreements to which both States are Parties . In such cases, it is possible that that State will not claim the return of the object, either because it cannot meet the conditions set out in the renumbered paragraph (4) or because different interests may prevail over the interest in the affirmation of law.

The advantages of permitting the State of origin to act are:

(1) to discourage a possible lack of initiative by a State whose legislation has been breached on account of its weakness vis-à-vis interests of the illegal art market which may prevail;

(2) to establish the conditions for the protection of cultural objects against the risk of dispersion outside of a cultural, historical, economic, etc. context, however large it may be, recognised and defended by such agreements.

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(1) This proposal has been replaced by the one formulated in Misc. 54.

G.E./C.P.
2nd session
Misc. 3
(Original: English)

PROPOSAL OF THE FINNISH DELEGATION (1)

*Article 5 bis*

The requested State is not bound to order the return of the object where it has been established that the return would significantly impair the interests referred to in Article 5, paragraph (3), subparagraphs (a) - (c).

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(1) This proposal has been replaced by the one formulated in Misc. 34.

G.E./C.P.
2nd session
Misc. 4
(Original: English)

PROPOSAL OF THE HUNGARIAN DELEGATION

*Article 5 (3)*

The enumeration of the criteria obliging the State addressed to order the return of the illegally removed cultural object should also encompass requirements corresponding to the objective of the proposed treaty stated in Article 1, namely that it applies to claims of States for the return of objects removed from their territory contrary to their export legislation; and also corresponding to the condition under Article 5 (1) of submitting a request to the State addressed for the return of a cultural object, namely that it was removed contrary to its export legislation. Accordingly, it appears necessary to supplement Article 5 (3) as follows:

"The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the removal of the object from its territory violated its applicable [export] legislation and the removal of the object from its territory significantly impairs one or more of the following interests (etc.)."

G.E./C.P.
2nd session
Misc. 5
(Original: English)

PROPOSAL OF THE DELEGATION OF THE NETHERLANDS

*Article 5 (2)*

Any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessary to enable the court or other competent authority of the State addressed to determine whether the conditions laid down in paragraph (3) are fulfilled.

*For the following reasons:*

(a) "to be admissible" should be deleted because conditions for admissibility may vary very much in the States which will sign, and ratify, the Convention.

(b) For "the competent authority" read "the court or other competent authority", as that is in conformity with the wording used in Chapter III.

(c) Part two of paragraph 2 should be deleted because it would give the State addressed the possibility to refuse a request for return, when this State believes that the proposed measures for conservation, security and accessibility are not satisfactory. Especially, the condition of accessibility cannot be included in this Convention, since a State cannot and may not force a private owner to make his own cultural object accessible to the public.

G.E./C.P.
2nd session
Misc. 6
(Original: English)

SOME CONSIDERATIONS ON THE CONCEPT OF "INTERNATIONAL THEFT"
(from members of the Unidroit study group
on the international protection of cultural property)

At the suggestion of the French delegation, a tentative view was expressed that the provisions of the Convention should apply only to "thefts of an international character", and not to all thefts of cultural objects.

A decision on this issue has many important implications, and these should be carefully weighed before a final decision is taken. These issues can be raised by way of a number of hypothetical cases, as follows:

1. A cultural object is stolen from its owner, W, in England, transported by the thief to Italy, there sold to an Italian resident R. The sale is an internal one in Italy. Subsequently W. discovers the whereabouts of the object and claims it. In the original draft of the Convention this claim would be allowed. What is the effect of the introduction of the concept of the "theft of an international character" to be? (Note that the object has not been illegally exported from U.K. since it does not fall within the very limited categories of export control under U.K. laws).

2. A cultural object is stolen from its owner Y, in England and sold by the thief to a purchaser in England. Under English law the purchaser does not obtain good title. The purchaser, however, then sells it on to the present possessor in Italy. Subsequently Y discovers the whereabouts of the object and claims it back. Is this a "theft of an international character" for the purposes of the Convention? (Again there is no illegal export from U.K.)

Would the result differ depending on

(a) the sale to the Italian possessor having taken place in England

(b) the sale to the Italian possessor having taken place in Italy?

If none of these cases are to be treated as being of an "international character" a substantial number of important claims for stolen cultural objects would be denied to dispossessed owners in Common Law countries.

If in any of cases 1, 2(a) and 2(b), the claim would be denied, the chances of recovery would depend on the dispossessed English owner being able to prove the *exact* transactions between the theft and the permanent holder. In the usual nature of such a series of transactions, this is not possible. The need to do so would vastly complicate the claim and make it in many cases too expensive to pursue.

3. An object (not classified) belonging to a private owner, F, in France is stolen and sold to a purchaser in France. In the present French proposal, the rules protecting the *bona fide* purchaser being unchanged, the purchaser C may acquire good title. He sells the object to an Englishman E who takes it to England. F discovers the whereabouts of the object and claims it back. If the theft is not an "international theft" the claim would fail, since English courts currently recognises title to movables according to the *lex situs* (Winkworth v. Christie).

4. An object (not classified) belonging to a private owner, C, in France is stolen and taken by the thief to England where he sells it to a purchaser. Since a thief cannot pass a good title to a stolen object in England, C's claim would be successful.

Whether or not C will be successful will, if the French proposal is adopted, depend on C being able to trace the precise transactions between the theft and the present owner. Since this will usually be extremely difficult, it must be asked whether the proposal would in effect destroy one of the primary purposes of the Preliminary draft, which was to provide easy, almost automatic, return of a stolen cultural object to a dispossessed owner.

It will be seen that refusing to apply the rules of the Convention to thefts "not of an international character" will enable dispossessed owners in jurisdictions which protect *bona fide* purchasers to continue to recover objects in jurisdictions which do not recognise the passing of good title to stolen objects, while providing no improvement (in practical terms) for dispossessed owners in the latter jurisdictions whose stolen cultural objects are found in jurisdictions which protect the *bona fide* purchaser.

The following considerations are also relevant:

The shady side of the art trade is adept at providing false provenances and exploiting differences between national legislation: preserving these differences would encourage those practices.

Some jurisdictions may find it easier to persuade their governments to accept the Preliminary draft if it can be explained that its purpose is to do away with the current disparity between systems. The provision of a universal rule is seen as one of the principal merits of the draft by Interpol (see comments, Doc. 25, p. 12).

Most importantly, one of the most significant concerns behind the whole project, following closely the views of the French expert Professor Chatelain, the Italian expert Professor Rodotà and others, was *to alter the widely accepted practice among collectors and dealers of not rigorously checking the provenance of cultural objects offered to them*. It was felt that requiring proper diligence on their part (sanctioned by the risk of having to return an object without compensation) is the major possibility of deterring the illicit trade and discouraging theft. If the existing rules on *bona fide* purchase are left intact, a substantial body of the trade will continue their existing practices with little or no impact on the flow of stolen cultural objects.

Unless this problem is resolved, one of the principal purposes of the Convention risks being frustrated.

G.E./C.P.
2nd session
Misc. 7
(Original: English)

PROPOSAL OF THE FINNISH DELEGATION

*Article 1*

This Convention applies to claims:

(a) for the restitution of stolen cultural objects; and

(b) for the return of cultural objects removed from the territory of a Contracting State contrary to its law applicable to the protection of cultural property.

G.E./C.P.
2nd session
Misc. 8
(Original: English)

PROPOSAL OF THE ISRAELI DELEGATION

*Article 5 (2)*

After the words "to enable the" has to be added "court or other", in order to use the same language as in paragraphs (1) and (3).

G.E./C.P.
2nd session
Misc. 9
(Original: English)

PROPOSAL OF THE NIGERIAN DELEGATION

*Article 1*

(1) This Convention applies to claims for the restitution of stolen cultural objects and for the return of cultural objects removed from the territory of a Contracting State contrary to its export legislation.

(2) The Convention also applies to claims for the restitution of cultural objects illegally excavated and exported from the territory of the Contracting State in which they were excavated.

G.E./C.P.
2nd session
Misc. 10
(Original: English)

PROPOSAL OF THE CANADIAN DELEGATION

*Article 5*

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its law, 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.

(2) The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State certifies that the object is of outstanding cultural importance, or if that State proves that the removal of the object from its territory significantly impairs one or more of the following interests:

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

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character, or

(d) the use of the object by a living culture.

G.E./C.P.
2nd session
Misc. 11
(Original: English)

PROPOSAL OF THE FINNISH DELEGATION

*Article 5(1)*

Replace the words "export legislation" by "law applicable to the protection of cultural property" (see also proposal in Misc. 7, Article 1(b)).

G.E./C.P.
2nd session
Misc. 12
(Original: English)

PROPOSAL OF THE NIGERIAN DELEGATION

*Article 5 (3)*

The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the cultural object had been illegally excavated and/or exported from its territory or if that State proves that the removal of the object from its territory significantly impairs any one or more of the following interests:

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

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

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

(e) the outstanding cultural importance of the object for the requesting State.

G.E./C.P.
2nd session
Misc. 13
(Original: English)

# PROPOSAL OF THE FINNISH DELEGATION (1)

*Article 6*

The State addressed may refuse to order the return of a cultural object under Article 5(3), where the object has a closer connection with the State addressed and the return of such object would be manifestly contrary to the fundamental principles on the protection of the cultural heritage of that State.

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(1) This proposal has been replaced by the one formulated in Misc. 34.

G.E./C.P.
2nd session
Misc. 14
(Original: English)

PROPOSAL OF THE ISRAELI DELEGATION

*Article 6*

(1) When a State has established its claim for the return of a cultural object under Article 5(3), the court or other competent authority may refuse to order the return of that object if it finds it has, according to the interests specified in Article 5(3), as close a, or a closer, connection with the culture of the State addressed.

(2) The court or other competent authority of the State addressed shall refuse a claim under Article 5(3), if it finds the object has a closer connection with the State addressed and if the return of such object would be manifestly contrary to the fundamental principles on the protection of its cultural heritage.

G.E./C.P.
2nd session
Misc. 15
(Original: French)

PROPOSAL OF THE ITALIAN DELEGATION (1)

*Article 8*

After paragraph (1), add a second paragraph, worded as follows:

The third State, or a third party of a public or private character furthering cultural aims may, with the consent of the requesting State, and in its place, provide for the payment of the compensation established under paragraph (1) of this article, on condition that the object is rendered accessible to the public in that same requesting State and that payment of the cost of insurance and of conservation of the object is met.

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(1) This proposal has been replaced by the one formulated in Misc. 54.

G.E./C.P.
2nd session
Misc. 16
(Original: English)

DISCUSSION PAPER OF THE DELEGATION OF THE UNITED STATES OF AMERICA

*Articles 3 and 4*

In order to further the discussion of issues, we have set forth two alternatives to the present draft Articles 3 and 4. It should be noted that the U.S. delegation has taken no position on either alternative and will assess their advantages or disadvantages after discussion has taken place.

Alternative A

*Article 3*

(1) The possessor of a cultural object which has been stolen shall return it, subject to the terms of this Convention.

(2) Any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew about the location or identity of the possessor of the object.

(3) In the trial of the case, the possessor defendant may argue that the plaintiff claimant shall be debarred from return because of failure to exercise due diligence in seeking to locate the object or the identity of the possessor, and the plaintiff may argue that the defendant possessor be debarred from retaining the object because of failure to exercise due diligence in seeking the provenance of the object, when acquiring the object.

*Article 4*

(1) The court based on all the facts in the case shall make a determination whether on the merits of the case the object shall be retained by the possessor or returned to claimant.

(2) The facts of this case shall include the relevant circumstances of the acquisition, the actions taken by the claimant after the theft, including any registration of the theft, the character of the parties involved in the acquisition, the price paid, whether any accessible registries were consulted by the possessor which it could reasonably have consulted.

(3) 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.

Alternative B

*Article 3*

(1) The possessor of a cultural object which has been proved stolen shall return it, subject to the terms of this Convention.

(2) Any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of thirty years from the time of the theft. For the purposes of determining reasonableness hereunder, the court shall consider the conduct of the claimant in reporting the theft and pursuing the object and whether or not the possessor concealed the cultural object in bad faith.

*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 fair and reasonable compensation by the claimant provided that the possessor has proved that it exercised reasonable diligence when acquiring the object.

(2) In determining whether the possessor exercised such diligence, the court or other competent authority shall consider the circumstances of the acquisition, including the character of the parties, the price paid and whether the possessor consulted any accessible register of stolen cultural objects which it could reasonably have consulted.

(3) The conduct of the predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor provided that such predecessor acquired the object after entry into force of this Convention in respect of the Contracting State where such predecessor acquired the object or had its habitual residence at the time of the acquisition.

G.E./C.P.
2nd session
Misc. 16 Add.
(Original: English)

EXPLANATIONS BY THE DELEGATION OF THE UNITED STATES OF AMERICA OF ALTERNATIVE A AND ALTERNATIVE B TO ARTICLES 3 AND 4 IN Misc. 16

In order to further the discussion of issues, we have set forth two alternatives in Misc. 16 to the present draft Articles 3 and 4. It should be noted that the U.S. delegation has taken no position on either alternative and will assess their advantages or disadvantages after discussion has taken place. The explanations below summarize arguments in favor of each.

I.

## Explanation of Alternative A to Articles 3 and 4

*Regarding Article 3(2) of Alternative A*

With respect to Article 3 those who oppose the Article focus first on the provision dealing with "ought reasonably to have known" the location of the object or the identity of the possessor. This provision sets forth the requirement of due diligence in seeking out the object or the identity of the owner.

(1) The opposers of this provision think this task is unfair since it is similar to setting up a requirement for seeking a needle in a haystack.

(2) Further it is argued that it is undesirable because it gives too much leeway for the juridical authority to cumulate a list of actions (which on second sight can be urged as actions which should have been taken) to fault a claimant, as was done recently in the famous deWeerth case in the United States.

(3) Also as one U.S. judge has said, why should we use this requirement to debar a plaintiff on the threshold of his case when we do not put on the defendant possessor a threshold duty debarring the defendant from his defense if he cannot show due diligence in seeking the provenance? The result of the existence of a due diligence requirement on the plaintiff claimant is that he may be debarred for failure to use due diligence and the defendant possessor does not have to give up the object to the

plaintiff even though he is the original thief or one who knows the object was stolen or one who was greatly negligent in not seeking provenance. It should also be noted that the situation is one where the plaintiff claimant is an innocent victim of the crime of theft whereas the defendant has voluntarily entered into the picture by making the purchase, and the law should give the innocent victim a preference when both have been faulted for negligence and certainly where the defendant is guilty of more than negligence. In short, it can be argued that it is unfair to require the claimant to show due diligence and as a threshold matter to the trial, thus permitting retention of the object by a possibly guilty possessor or, minimally, an equally negligent possessor.

*Regarding Article 3(2) (Repose provision) of Alternative A*

Those who oppose Article 3 secondly focus on the repose provision. Is it long enough at thirty years or forty years or fifty years? It is noted that we have recently witnessed the surfacing of certain stolen treasures forty-five years after the theft occurred. Further, whatever term is in the repose provision if it remains unqualified, it means that it can be satisfied in the case where a possessor hides the cultural object away in a basement or a vault for the whole repose period. Even if the provision is conditioned on open and notorious possession, this latter phrase may be one that can be satisfied by keeping the cultural object in the living room of the possessor in a little obscure town in Texas as happened in the Quedlinburg case. It should also be pointed out that often times we are dealing with national treasures close to the hearts of the nationals of the country concerned and part of their cultural patrimony which they feel very sensitive at losing and object to any prescriptive period. In the circumstances it can be urged that a repose provision not be imposed. Instead it should be permitted that the trial proceed and the claimant be turned down where there is a showing of specific and substantial prejudice to the possessor in the length of time that has elapsed, so that it would be unfair for the claimant now to recover.

*Regarding Article 4 of Alternative A*

There is opposition further to the provision of payment of compensation as required by Article 4 for cases where the possessor does not have title but is a *bona fide* purchaser. Our common law jurisprudence has the rule that a thief cannot give good title and that the *bona fide* purchaser must return the cultural object and the possessor is not entitled to any compensation. The virtue of the common law provision is that the duty to return without compensation has a chilling salutary effect on would-be buyers who may feel that they have little to lose by entering into a purchase because if they have made a mistake they will get their money back or at least a part of it. Further, for an age which is maybe in-

creasingly solicitous of assisting countries in getting their cultural treasures back, it is a preferable rule to embody in any international agreement. Also, it is argued that it would take care of countries who would have difficulty in finding foreign exchange to pay for recovery of their States' illegally reported cultural object.

II.

## Explanation of Alternative B to Articles 3 and 4

*Regarding Article 3(2) of Alternative B*

Here, Alternative B varies considerably from Alternative A.

First and foremost, Alternative B respects the main draft text in allowing absolute repose of the cultural object after the passage of a fixed period of time. (In fact, many commentators take the view that thirty years is too long a period of time for repose.)

In many countries, the repose provision in the draft Convention represents a significant if not radical change in the law in favor of the claimant. It may not be possible to reach international harmony of law on this point if repose were not available.

Second, in contrast to Alternative A, Alternative B preserves the language "or ought reasonably to have known" in connection with starting the Statute of limitations. It is a requirement of the Unesco Convention of 1970 that States act to protect their cultural property; it is a matter of the law and equity in most jurisdictions that reasonable diligence be used by persons filing claims to recover property or collect damages from the defendant before expiration of the period of limitations; and it is a matter of increasing international equity that theft victims take steps to notice and report promptly the theft of important property so as to prevent unreasonable impacts on later good faith possessions. Therefore this language should not be eliminated.

In addition, considering the consequences of eliminating these words, we would turn the international law of property upside down by placing no temporal bounds on the time within which a claimant would be required to sue for recovery. It could be 200 years after a theft before a claimant which does not try to find the object actually locates it, through no fault of the possessor. Because of the wide array, and somewhat unclear list, of objects to which this Convention would apply, private rights of ownership, tax, inheritance, etc. would be in international and unacceptable chaos without the necessity for the victim of a theft to be charged with responsibility to search for the object.

So as to make clear what is meant by "reasonable" in this section, Alternative B states that this word includes the conduct of the claimant in reporting the theft and pursuing the object and whether or not the possessor concealed the object in bad faith.

*Regarding Article 4(1) of Alternative B*

Even though application of the *nemo dat* rule in current American law omits the requirement of payment of compensation to the good faith purchaser who must return a stolen object, this is certainly not the rule in civil law countries which do not require the return at all, or do so for only a few years. The United Kingdom, also, allows a good faith purchaser to keep the object after six years have elapsed.

The purpose of the Convention is to achieve international harmonization of private law with respect to stolen and illegally exported cultural objects. This goal is simply not achievable under the current American rule.

Moreover, the radical changes in American and other laws which would be required by adoption of Chapter III of the Convention require that the entire Convention in both parts be fully balanced and parallel to each other. If compensation is owed for return of an illegally exported object, the same should be true for a stolen object. If the Convention were to do otherwise, claimants would naturally strain to characterize all possible claims as thefts rather than illegal exports so as to avoid having to pay compensation. This would impose an undue burden on the forum's courts and lead to confused decisions.

Most important, as a matter of fairness, it can be argued that the good faith purchaser who has held his or her object for a long period of time - longer than the warranty period under the American Uniform Commercial Code - should be repaid his purchase money when returning a stolen cultural object. The Convention, as drafted, applies to the least expensive object and the most humble of buyers. While good faith is to be determined on a case by case basis, the reward for that good faith is compensation in all cases as it should be in order to encourage all necessary conduct by buyers to protect that right. In other words, the expectation of compensation is the incentive necessary to encourage the type of caution on the part of buyers which will improve the overall situation internationally.

*Regarding Article 4(3) of Alternative B*

Alternative B, unlike Alternative A, amends this section by adding language to enhance fair dealing with the gratuitous possessor. Although it

may be a matter of expedience to impute to a donee or heir the conduct of its predecessor possessor, this would not be so in a situation in which the predecessor acquired the object a long time ago.

For example, a museum or university which receives the archives of a person who acquired the objects over fifty years ago but died after the Convention entered into force and willed the archive to the museum or university should not be held to the same standard as such an heir or donee accepting property from one who herself acquired it after the Convention went into effect. Almost no gratuitous recipients can afford the same level of diligence in connection with gifts of objects purchased long ago. In addition, the proposed language would cover the situation most difficult for claimants, i.e. the purchase not accomplished by but directed by the gratuitous recipient.

G.E./C.P.
2nd session
Misc. 17
(Original: English)

PROPOSAL OF THE AUSTRALIAN, CANADIAN AND NETHERLANDS DELEGATIONS

*Article 11 (b)*

Include at the end of Article 11 (b) the following:

(iii) to require that the costs referred to in Article 8 (3) be borne by other than the requesting State.

*Rationale*:

The proposed Article 11 (b) (iii) would allow Contracting States a degree of flexibility, consistent with the apparent intent of Article 11 as a whole.

G.E./C.P.
2nd session
Misc. 18 rev.
(Original: English)

PROPOSAL OF THE AUSTRALIAN DELEGATION

*Article 11*

Include after paragraph (b) (ii) the following new paragraphs:

(iii) to apply its national law when this would disallow the possessor's right to compensation contemplated by Article 8;

(iv) to apply its national law when this would deny the possessor the options provided for in Artice 8(2).

G.E./C.P.
2nd session
Misc. 19 rev.
(Original: French)

PROPOSAL OF THE CHINESE, CYPRIOT, EGYPTIAN, GREEK, SPANISH AND TURKISH DELEGATIONS (1)

*Article 6*

When the conditions of Article 5 (3) have been met, the court or other competent authority may only refuse to order the return of the cultural object if it finds that it has a manifestly closer connection with the culture of or that its territorial origin is in

(a) the State addressed, or

(b) another Contracting State which, in such a case, will be informed, so that it may bring a claim for return of the object to it in accordance with Article 5 (3).

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(1) The original reference to Italy as a co-sponsor of the proposal has been deleted at the request of the Italian delegation.

G.E./C.P.
2nd session
Misc. 20
(Original: English)

PROPOSAL OF THE TURKISH DELEGATION

*Article 6*

When a State has established its claim for the return of a cultural object under Article 5 (-) the court or competent authority may refuse to order the return of that object only if:

(a) the court finds that it has a closer connection with the culture of the requested State, and

(b) the object is proven to be removed from its original context on the requested State's territory.

G.E./C.P.
2nd session
Misc. 21
(Original: French)

PROPOSAL OF THE DELEGATIONS OF GREECE, THE ISLAMIC REPUBLIC OF IRAN, MEXICO, NEPAL AND TURKEY

*Article 1*

This Convention applies to claims for:

(a) the restitution of stolen cultural objects;

(b) the restitution of cultural objects, the ownership of which has been illicitly transferred;

(c) the restitution of cultural objects from illegal excavations which, for the purposes of this Convention, are to be considered as having been stolen;

(d) the return of cultural objects exported from the territory of a Contracting State in breach of its legislation concerning the protection of cultural objects.

*Article 2*

For the purposes of this Convention, cultural objects are those objects designated by each Contracting State as being of anthropological, prehistoric, ethnological, archaeological, artistic, historical, literary, cultural or scientific significance or of significance for the natural heritage.

G.E./C.P.
2nd session
Misc. 22
(Original: French)

PROPOSAL OF THE DELEGATION OF THE ISLAMIC REPUBLIC OF IRAN

*Article 4*

(1) The possessor of a stolen cultural object who is required to return it shall not be entitled to payment of compensation.

(2) In cases where the possessor of a stolen cultural object has incurred expenses in the protection and restoring of the object, it shall be entitled to claim reimbursement of the expenses so incurred from the requesting State.

(3) The cost of returning the cultural object shall be borne by the requesting State.

G.E./C.P.
2nd session
Misc.23
(Original: French)

PROPOSAL OF THE DELEGATION OF THE ISLAMIC REPUBLIC OF IRAN

*Article 5*

(1) (Unchanged).

(2) Contracting States shall prohibit the import of cultural objects in the absence of an authorisation issued by the State of origin of such objects.

(3) Any claim brought in accordance with paragraph (1) of this article shall be accompanied by the particulars necessary to enable the competent authority of the State addressed to determine whether the object falls within one of the categories of objects referred to in Article 2 and whether there has been a breach of the export legislation of the requesting State.

(4) (Former paragraph (3) of Article 5: unchanged).

*Article 8*

(1) On the occasion of the return of a cultural object, the possessor may not require the payment of compensation by the requesting State.

(2) In cases where the possessor of a cultural object exported in breach of the export legislation of the requesting State has incurred expenses in the protection and restoring of the object, it shall be entitled to claim reimbursement of such expenses from the requesting State.

(3) The cost of returning the cultural object shall be borne by the requesting State.

G.E./C.P.
2nd session
Misc. 24
(Original: English)

PROPOSAL OF THE DELEGATIONS OF AUSTRIA, BELGIUM, DENMARK, FINLAND, GERMANY, IRELAND, NETHERLANDS, POLAND, SWEDEN, SWITZERLAND AND THE UNITED KINGDOM

*Article 2*

For the purpose of this Convention, "cultural object" means any material object of outstanding cultural significance, for example, in an archaeological, artistic, historical, spiritual or ritual area.

G.E./C.P.
2nd session
Misc. 24 Add.
(Original: English)

PROPOSAL OF THE FINNISH DELEGATION

*Article 2*

The delegation of Finland proposes that a new paragraph 2 be added to Article 2 of the Convention as follows:

(1) For the purpose of this Convention, "cultural object" means any material object of outstanding cultural significance, for example, in an archaeological, artistic, historical, spiritual or ritual area.

(2) In the application of this Convention each Contracting State shall take duly into account the law relating to the protection of cultural objects of the Contracting State from the territory of which the cultural object was removed.

G.E./C.P.
2nd session
Misc. 25
(Original: French)

PROPOSAL OF THE TURKISH DELEGATION

*Article 8*

(1) When returning the cultural object the possessor may require that, at the same time, the requesting State pay it fair and reasonable compensation, unless the possessor is unable to present a certificate of origin issued by the competent authorities of the requesting State.

G.E./C.P.
2nd session
Misc. 26
(Original: English)

PROPOSAL OF THE DELEGATION OF THE UNITED KINGDOM

*Article 3(2)*

(2) Any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of six years from the time of the theft.

*Explanation*:

The proposal reduces the 30 year limitation period in this article to 6 years. States could apply their national law, if they wished, under Article 11(a)(ii) to extend this limitation period.

*Article 7(b)*

(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 from the time when the requesting State knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of six years from the date of the export of the object, or

*Explanation*:

The proposal reduces the 20 year limitation period in this article to 6 years. States could apply their national law, if they wished, under Article 11(b)(ii) to extend this limitation period.

G.E./C.P
2nd session
Misc. 27
(Original: English)

PROPOSAL OF THE EGYPTIAN DELEGATION

*Article 1*

This Convention applies to claims for the restitution of stolen cultural objects and for the return of cultural objects illegally excavated and exported from the territory of a Contracting State contrary to its own applicable legislation.

*Article 2*

For the purpose of this Convention, "cultural object" means any material object of artistic, historical, spiritual, ritual or other cultural significance, in accordance with the law of the requesting State.

*Article 3*

(1) The possessor of a cultural object which has been stolen shall return it.

(2) Any claim for the restitution of a stolen cultural object shall be brought within a period of five years from the time when the claimant knew or ought reasonably to have known the location or the identity of the possessor of the object. There is no limit for the return of a stolen cultural object.

G.E./C.P.
2nd session
Misc. 28
(Original: English)

PROPOSAL OF THE IRISH DELEGATION

*Article 6*

To amend

1. By deleting the words "of a State other than the requesting State"

and

2. By adding as sub-paragraph (2) the following:

(2) If, during the evaluation by the court or other competent authority of the State addressed under Article 5, it appears to the court or competent authority that the cultural object may have been removed from the territory of a third Contracting State (the third State) contrary to its legislation and that the cultural object may also have as close as, or a closer connection with the culture of the third State, the court or competent authority may inform the relevant authorities of the third State, and may invite those authorities to bring an application to the court or competent authority under Article 5.

G.E./C.P.
2nd session
Misc. 29
(Original: English)

PROPOSAL OF THE ISRAELI DELEGATION

*Article 7 (b)*

The words "the export of the object" at the end of the provision should be followed by:

> "; the time limits mentioned in this paragraph shall not apply to a State which cannot bring its arguments to the court of the State addressed, and application of the time limits concerned shall be postponed until it can bring its arguments to that court."

*Reason*:

A State whose cultural object has been unlawfully exported to a State with whom the first State has no diplomatic relations, or to an enemy State, may be in a position (for instance, when it knows the location of the object) that on the one hand the time limit is in force, and on the other that it cannot bring its arguments to the court of the State in which the object is located. The proposed solution would be a fair arrangement until the circumstances changed.

G.E./C.P.
2nd session
Misc. 30
(Original: English)

PROPOSAL OF THE HUNGARIAN DELEGATION

*Article 11*

1.

If the suggestion made in Doc. G.E./C.P. 1st session, Misc 5 rev., paragraph 9 was not adopted, the application of the national law of the State addressed, insofar as it provides more favourable treatment to claimants than required under the proposed Treaty, should be made obligatory at least in respect of the cases presently provided for in sub-paragraphs (a)(ii) and (b)(ii) of Article 11.

2.

To this end Article 11 should be divided into two paragraphs.

Paragraph (1) should contain the present text of the Article, with the exclusion of the two sub-paragraphs mentioned above. Those sub-paragraphs should be included in a new paragraph (2) of Article 11, to be composed as follows:

"(2) Each Contracting State shall, in respect of claims brought before its courts or competent authorities:

(a) for the restitution of a stolen cultural object, apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3(2);

(b) for the return of a cultural object removed from the territory of another Contracting State contrary to the [export] legislation of that State, apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7."

3.

*Explanation:*

The suggested amendment corresponds to the objective of the proposed Treaty which consists in furthering the return of cultural objects illegally removed from the requesting State rather than in confining the applicable means already available to this end under the national law of the State addressed.

G.E./C.P.
2nd session
Misc. 31
(Original: French)

PROPOSAL OF THE CYPRIOT, GREEK AND TURKISH DELEGATIONS

*Article 3*

(1) The possessor of a stolen cultural object or an object obtained from illegal excavations or unlawfully from legal excavations shall return it.

(2) Any claim for the restitution of a stolen cultural object or an object obtained from illegal excavations, or unlawfully from legal excavations, must be brought within a period of five years as from the time the requesting party had knowledge of the place where the object was and of the identity of the possessor.

*Article 4*

(1) The rights of the *bona fide* possessor *vis-à-vis* his predecessor in the case of Article 3 paragraph 1 are reserved.

G.E./C.P.
2nd session
Misc. 32
(Original: English)

PROPOSAL OF THE EGYPTIAN DELEGATION

*Article 5*

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its own applicable legislation, 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.

*Article 8*

(2) When returning the cultural object the possessor may, instead of requiring compensation, decide to retain ownership and possession or to transfer the object against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees based on the approval of that State. In such cases the object shall neither be confiscated nor subjected to other measures to the same effect.

G.E./C.P.
2nd session
Misc. 33 rev.
(Original: English)

PROPOSAL OF THE DELEGATIONS OF CANADA AND THE NETHERLANDS

*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 fair and reasonable compensation by the claimant provided that the possessor prove that it exercised due diligence when acquiring the object.

(2) In determining whether the possessor exercised due diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted any accessible register of stolen cultural objects, the relevant legislation of the requesting State and other relevant information which could reasonably have been consulted.

(3) (Unchanged).

*Comment*:

This proposal is consistent with the approach recommended for Chapter III, in Misc. 42, and is explained in pages 2 and 3 of document Study LXX - Doc. 24.

NOTE Article 8 should have an additional paragraph along the lines of Article 4(2).

G.E./C.P.
2nd session
Misc. 34
(Original: English)

PROPOSAL OF THE FINNISH DELEGATION (1)

*Article 6*

The return of the cultural object under Article 5(3) may only be refused where:

(a) the object has a closer connection with the State addressed and the return of that cultural object would be manifestly contrary to the fundamental principles on the protection of the cultural heritage of that State; or

(b) it has been established that the return would significantly impair the physical preservation of the object or of its context; or

(c) the State addressed has established its claim for the return of the cultural object under Article 5(3).

NOTE Delete the second part of Article 5(2), "and shall contain all material information".

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(1) This proposal replaces the proposals made in Misc. 3 and Misc. 13.

G.E./C.P.
2nd session
Misc. 35
(Original: French)

PROPOSAL OF THE ITALIAN DELEGATION (1)

*Article 5 (4)*

This proposal replaces that formulated in Misc. 2 rev.

(4) The claim may also be brought, in conformity with paragraphs (2) and (3) of this article, by a Contracting State from whose territory a cultural object has been legally exported when, following one or more successive exports not contemplated by law or export authorisation of that State or by an international agreement, the same effect is produced as if the object had been illegally exported to a Contracting State.

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(1) This proposal has been replaced by the one formulated in Misc. 54.

G.E./C.P.
2nd session
Misc. 36
(Original: English)

PROPOSAL OF THE GERMAN DELEGATION

*Article 1*

This Convention applies to claims

(a) for the <u>return</u> of stolen cultural objects; and

(b) for the return of cultural objects removed from the territory of a Contracting State contrary to its law applicable to the protection of cultural property <u>as a national cultural treasure.</u>

G.E./C.P.
2nd session
Misc. 37 rev.
(Original: English/French)

ARTICLES 1 TO 8 PREPARED BY THE UNIDROIT SECRETARIAT
IN ACCORDANCE WITH THE DIRECTIVES OF THE DRAFTING COMMITTEE

and

ARTICLES 9 TO 11 PREPARED BY THE UNIDROIT STUDY GROUP

# PRELIMINARY DRAFT UNIDROIT CONVENTION ON [THE INTERNATIONAL RETURN OF] STOLEN OR ILLEGALLY EXPORTED CULTURAL [OBJECTS] [PROPERTY](1)

## CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

### ARTICLE 1

ALTERNATIVE I

This Convention applies [in international situations referred to in Article 9] to claims for:

(a) the restitution of stolen cultural objects or cultural objects the ownership of which is otherwise illegally transferred;

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its [export legislation] [legislation] [law applicable to the protection of cultural objects].(2)

ALTERNATIVE II

This Convention applies to claims for:

(a) the restitution of cultural objects stolen or illegally removed by excavation on the territory of a Contracting State and found on the territory of another Contracting State;

(b) the return of cultural obejcts removed from the territory of a Contracting State contrary to its [export legislation] [legislation] [law applicable to the protection of cultural objects].

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(1) In the light of the decision to be taken by the Committee in regard to the choice between these two terms, it may be necessary to replace the word "object" by "property" throughout the English version of the draft.

(2) In the light of the decision to be taken by the Committee, it may be necessary to replace the term "export legislation" in the relevant provisons of the draft by one of the alternatives.

**ARTICLE 2**

ALTERNATIVE I (Misc. 24)

For the purpose of this Convention, "cultural object" means any material object of outstanding cultural significance, for example, in an archaeological, artistic, historical, spiritual or ritual area.

ALTERNATIVE II (Misc. 21)

For the purposes of this Convention, cultural objects are those objects designated by each Contracting State as being of anthropological, prehistoric, ethnological, archaeological, artistic, historical, literary, cultural, ritual or scientific significance or of significance for the natural heritage.

ALTERNATIVE III (Study LXX - Doc. 24, p. 1)

For the purposes of this Convention, "cultural object" means any material object designated by legislation as being of significance to the cultural heritage of a State.

ALTERNATIVE IV (Based on an oral proposal made to the Committee)

For the purpose of this Convention, "cultural object" means any material object of an artistic, historical, spiritual, ritual [,archaeological, ethnological, literary, scientific] nature which is of importance, is more than 100 years old, and belongs to the following categories (categories set forth in Article 1 (a) through (k) of the 1970 Unesco Convention).

*Proposed new paragraph (2)*
(Misc. 24 rev.)

In the application of this Convention each Contracting State shall take duly into account the law relating to the protection of cultural objects of the Contracting State from the territory of which the cultural object was removed.

## CHAPTER II - RESTITUTION OF STOLEN[3] CULTURAL OBJECTS

### ARTICLE 3

(1) The [physical] possessor[4] of a cultural object which has been stolen shall return it [to its owner].

(2) Any claim for restitution shall be brought within a period of [three][five] years from the time when the claimant knew [or ought reasonably to have known] the location [or,] [and] the identity of the possessor [,] of the object [, and in any case within a period of [six], [ten] [thirty] [fifty] years from the time of the theft].[5]

### ARTICLE 4

ALTERNATIVE I

(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 fair and reasonable compensation by the claimant provided that the possessor prove that it exercised [the necessary] [due] diligence when acquiring the object.[6]

OR (Misc. 31 amended)

(1) In the event of restitution, the rights of the *bona fide* possessor *vis-à-vis* his predecessor are reserved.

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(3) Depending upon the formulation of Article 1(a), it may be necessary to develop the references to "stolen" cultural objects and to "theft".

(4) The Committee will decide whether a definition should be included in the draft of such terms as "possessor" and "owner".

(5) For substitution of paragraph (2), see Article 3(2) and (3) set forth in Alternative A in United States Discussion Paper, Misc. 16, p. 1.

(6) For substitution of paragraph (1), see Article 4(1) set forth in Alternatives A and B in United States Discussion Paper, Misc. 16, pp. 1 and 2.

(2) In determining whether the possessor exercised [such] [due] diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted any accessible register [or data base] of stolen cultural objects [or cultural property legislation] which it could reasonably have consulted.

(3) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously [provided that the latter person acquired the object after the entry into force of this Convention in respect of the Contracting State where such person acquired the object or had its habitual residence at the time of the acquisition].(7)

[(4) A third State, or a third party of a public or private character furthering cultural aims may, with the consent of the requesting State, and in its place, provide for the payment of the compensation established under paragraph (1) of this article, on condition that the object be rendered accessible to the public in that same requesting State and that payment of the cost of insurance and of conservation of the object be met.] **(Study LXX - Doc. 22, Misc. 3 amended)**

ALTERNATIVE II (Misc. 22 amended)

(1) The possessor of a stolen cultural object who is required to return it shall not be entitled to payment of compensation from the claimant.

(2) In cases where the possessor of a stolen cultural object has incurred expenses in the protection and restoring of the object, it shall be entitled to claim reimbursement of the expenses so incurred from the claimant.

(3) The cost of returning the cultural object shall be borne by the claimant.

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(7) Text based on Article 10 of the draft EEC Directive and Article 4(3) of Alternative B of the United States Discussion Paper, Misc. 16, p. 2.

## CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

### ARTICLE 5

ALTERNATIVE I

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its export legislation, that State may request the court [or other competent authority][8] of a State acting under Article 9 (the State addressed) to order the return of the object [to the requesting State].

(2) [To be admissible,] any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessary to enable the court or other 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] ].[9]

*Paragraph (3)*

Alternative A

(3) The court or other competent authority of the State addressed shall order the return of the cultural object [to the requesting State] if that State [certifies that the object is of outstanding cultural importance or if that State] proves that the removal of the object from its territory significantly impairs one or more of the following interests:

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

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

(d) the use of the object by a living culture [,

(e) the outstanding cultural importance of the object for the requesting State].

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(8) Pending a decision of the Committee on the proposal to delete the expression "other competent authority", it has been provisionally retained throughout the text.

(9) In connection with the proposed deletion of the last three lines see Misc. 34.

Alternative B (Misc. 12)

(3) The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the cultural object has been illegally excavated and/or exported from its territory or if that State proves that the removal of the object from its territory significantly impairs any one or more of the following interests:

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

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

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

(e) the outstanding cultural importance of the object for the requesting State.

Alternative C (Study LXX, Doc. 22, p. 18, Article 8(2) amended)

(3) The court or other competent authority of the State called upon to adjudicate upon the request for the return of the [illegally exported] cultural object shall order such return [if the export [significantly] impairs the interests of the requesting State because of the outstanding cultural importance of the object for such requesting State, having regard [also] to one or more of the following interests:

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

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

(d) the use of the object by a living culture].(10)

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(10) The deletion of the square-bracketed language from line 3 to the end of the paragraph reflects the idea contained in Misc. 1.

ALTERNATIVE II (Misc. 23)

(1) (Unchanged)

(2) Contracting States shall prohibit the import of cultural objects in the absence of an authorisation issued by the State of origin of such objects.

(3) Any claim brought in accordance with paragraph (1) of this article shall be accompanied by the particulars necessary to enable the competent authority of the State addressed to determine whether the object falls within one of the categories of objects referred to in Article 2 and whether there has been a breach of the export legislation of the requesting State.

(4) (Former paragraph (3) of Article 5: unchanged)

*Proposed new paragraph (4)*
(Misc. 35)

(4) The claim may also be brought, in conformity with paragraphs (2) and (3) of this article, by a Contracting State from whose territory a cultural object has been legally exported when, following one or more successive exports not contemplated by the law or export authorisation of that State or by an international agreement, the same effect is produced as if the object had been illegally exported to a Contracting State.

*Proposed new paragraph (5)*
(Study LXX - Doc. 27, Article 5(4))

(5) 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**

ALTERNATIVE I

When a State has established its claim for the return of a cultural object under Article 5 (3) the court or competent authority [may only][11] [shall] refuse to order the return of that object when it finds that it [manifestly] has [as close a, or] a closer [,] connection with the culture of the State addressed [or of a State other than the requesting State].

*Proposal for a new paragraph (2)*
(Study LXX - Doc. 24, p. 7)

[(2) When the court or other competent authority finds that the cultural object has a close or closer connection with the culture of a third State, the State addressed has an obligation to give notice regarding the return of that object to the third State without undue delay.]

OR (Misc. 28)

[(2) If during the evaluation by the court or other competent authority of the State addressed under Article 5, it appears to the court or competent authority that the cultural object may have been removed from the territory of a third Contracting State (the third State) contrary to its legislation and that the cultural object may also have as close a, or a closer, connection with the culture of the third State, the court or competent authority may inform the relevant authorities of the third State, and may invite those authorities to bring an application to the court or competent authority under Article 5.] (Misc. 28)

*Proposal for new paragraphs (2) to (4)*
(Etude LXX - Doc. 27)

[(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

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(11) In the event of this solution being preferred, proposals were submitted with a view either to deleting the word "only", or to replacing it by the word "nevertheless".

(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. ]

ALTERNATIVE II (Misc. 19 rev)

When the conditions of Article 5 (3) have been met, the court or other competent authority may only refuse to order the return of the cultural object if it finds that it has a manifestly closer connection with the culture of, or that its territorial origin is in,

(a) the State addressed, or

(b) another Contracting State which, in such a case, shall be informed, so that it may bring a claim for return of the object to it in accordance with Article 5(3).

**ARTICLE 7**

The provisions of Article 5 shall not apply where:

(a) the cultural 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 [three] [five] years from the time when the requesting State knew [or ought reasonably to have known] the location [, or] [and] the identity of the possessor, of the object [, and in any case within a period of [six] [ten] [twenty] [thirty] years from the date of the export [or the acquisition] of the object, [whichever is the earlier]],[12] or

(c) the export of the object in question is no longer illegal at the time at which the return is requested.

**ARTICLE 8**

(1) When the return of the cultural object is ordered, the possessor [who knew [or ought to have known] at the time of acquisition that the object had been exported contrary to the export legislation of the requesting State] shall not be entitled to claim compensation. **(Study LXX - Doc. 24, p. 9)**

[(2) When returning the cultural object the possessor may require that, at the same time, the requesting State pay it fair and reasonable compensation unless the possessor knew [or ought to have known] at the time of acquisition that the object would be, or had been, exported contrary to the export legislation of the requesting State [or that that fact ought to have been obvious to any reasonable acquirer].] **(Former paragraph (1))**

[(3) In cases where the possessor of a cultural object exported in breach of the export legislation of the requesting State has incurred expenses in the protection and restoring of the object, it shall be entitled to claim reimbursement of such expenses from the requesting State.] **(Misc. 23, Article 8(2))**

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(12) It was suggested that if the additional language proposed in Misc. 29 were to be accepted, it should be inserted in the final clauses.

[(4) When returning the cultural object the possessor may, instead of requiring compensation, decide to retain ownership [and possession][13] or to transfer the object against payment or gratuitously to a person of its choice residing in the requesting State [and who provides the necessary guarantees based on the approval of that State ]. [In such cases the object shall neither be confiscated nor subjected to other measures to the same effect.] [In such cases, the possessor has the right to payment of compensation, account being taken of its legal position once the cultural object has been returned to the requesting State.] **(Former paragraph (2))**

OR

[(4) If it has not been established that the possessor knew or ought to have known of the illegal character of the export, it may either:

- retain ownerhip of the cultural object on condition that it return it to the territory of the requesting State;

- transfer ownership of the object to a person of its choice residing in the requesting State who provides the necessary guarantees, on condition that such person return the cultural object to the territory of the requesting State, or

- transfer ownership to the requesting State after payment by that State of fair and reasonable compensation.] **(Study LXX - Doc. 24, p. 9, Article 8(2))**

(5) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State. **(Former paragraph (3)).**

[(6) The third State, or a third party of a public or private character furthering cultural aims may, with the consent of the requesting State, and in its place, provide for the payment of the compensation established under paragraph (1) of this article, on condition that the object be rendered accessible to the public in that same requesting State and that payment of the cost of insurance and of conservation of the object be met.] **(Misc. 15)**

(7) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously [provided that the latter acquired the object after the entry into force of this Convention in respect of the Contracting State where such person acquired the object or had its habitual residence at the time of the acquisition].

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(13) It has been suggested that these words, which appear in the English text only, be deleted.

## CHAPTER IV - CLAIMS AND ACTIONS

### ARTICLE 9

(1) The claimant may bring an action under this Convention before the courts or other competent authorities of the State where the possessor of the cultural object has its habitual residence or those of the State where that object is located at the time a claim is made.

(2) However the parties may agree to submit the dispute to another jurisdiction or to arbitration.

## 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 export legislation, after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim is brought for the restitution or return of such an object.

### ARTICLE 11

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

(a) for the restitution of a stolen cultural object:

(i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object;

(ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3 (2);

(iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by Article 4 (1).

(b) for the return of a cultural object removed from the territory of another Contracting State contrary to the export legislation of that State:

(i) to have regard to interests other than those material under Article 5 (3);

(ii) to apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7.

(c) 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.

G.E./C.P.
2nd session
Misc. 38
(Original: English)

PROPOSAL OF THE DELEGATION OF THE UNITED STATES OF AMERICA

*Article 3*

Change Article 3(1) to read as follows:

(1) The possessor of a cultural object which has been stolen shall return it, subject to the terms of this Convention.

*Explanation:*

It is clear from later provisions that in certain circumstances (e.g. time limitations) a return need not be made. The amendment proposed is desirable in the interests of clarity and candor.

G.E./C.P.
2nd session
Misc. 39
(Original: English)

PROPOSAL OF THE DELEGATION OF THE UNITED STATES OF AMERICA

*Article 11*

Amend Article 11 by adding at the end of subparagraph (a) a fourth category as follows:

(iv) to apply its national law when this would require just compensation in the case where the possessor has title to the cultural object.

*Explanation*:

Our Constitution requires just compensation if a person having title to an object is required to give it up.

G.E./C.P.
2nd session
Misc. 40
(Original: English)

PROPOSAL OF THE FINNISH DELEGATION

*Article 4*

Add a new paragraph (4) to the article as follows:

(4) The provisions of this article do not apply where the possessor, under the law applicable, shall return the cultural object without compensation.

G.E./C.P.
2nd session
Misc. 41
(Original: English)

PROPOSAL OF THE GREEK DELEGATION

*Article 9*

(1) The claimant may bring an action under this Convention before the court or other competent authorities

(a) of the State where the possessor of the cultural object has its habitual residence, or

(b) of the State where the object is located, or

(c) of the State where the illegal act (theft, illegal excavations, illicit export) was committed.

(2) (Unchanged).

*Article 9 bis*

(1) A decision rendered in a Contracting State shall be enforced in another Contracting State

(a) if it was rendered by an authority considered to have jurisdiction under Article 9;

(b) if it is no longer subject to ordinary forms of review in the State of origin; and

(c) if it is unforceable in the State of origin.

(2) Provisionally enforceable decisions and provisional measures shall be enforced in the State addressed even if they are subject to ordinary forms of review.

*Article 9 ter*

Enforcement of a decision may, however, be refused in the following cases:

(a) if the decision was obtained by fraud in connection with a matter of procedure; or

(b) if it is established that the restitution of the cultural object would significantly impair the interests mentioned in Article 5(3), (a) and (c).

*Article 9 quater*

Enforcement may not be refused for the sole reason that the court of the State of origin has applied a law other than that which would have been applicable according to the rules of private international law of the State addressed.

*Article 9 quinques*

There shall be no review of the merits of the decision rendered by the court of origin.

G.E./C.P.
2nd session
Misc. 42
(Original: English)

PROPOSAL OF THE DELEGATIONS OF CANADA AND THE NETHERLANDS

*Article 8*

In the appropriate place within Article 8, the following should be inserted:

( ... ) In deciding whether the possessor [knew or] ought to have known that the object would be or had been exported contrary to the export legislation of the requesting State, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted the relevant legislation of the requesting State and other relevant information which could reasonably have been consulted.

*Comment*:

This is consistent with the approach in Chapter II, as proposed in Misc. 33 Rev.

G.E./C.P.
2nd session
Misc. 43
(Original: English)

PROPOSAL OF THE AUSTRALIAN, CANADIAN AND NETHERLANDS DELEGATIONS

*Article 6*

When a State has established its claim for the return of a cultural object under Article 5(3), the court [or the competent authority] may only refuse to order the return of that object if it finds that the object has a closer connection with the State addressed and that returning the object would be manifestly contrary to the moral obligation of the State addressed to protect its cultural heritage.

*Comment*:

This formulation represents a compromise between the various positions espoused.

G.E./C.P.
2nd session
Misc. 44
(Original: French)

PROPOSAL OF THE SECRETARY GENERAL OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW AND THE DELEGATION OF THE NETHERLANDS

*Article 9*

(1) Without prejudice to the normal rules, or rules established by Conventions, concerning jurisdiction in force in the Contracting States, the claimant may in all cases bring a claim under this Convention before the courts or competent authorities of the Contracting State where the cultural object is located.

(2) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or return of the object is brought before the courts or competent authorities of another Contracting State.

G.E./C.P.
2nd session
Misc. 45
(Original: English/French)

PROPOSAL OF THE GREEK DELEGATION

*Article 10*

Add a second paragraph drafted as follows:

This does not in any way preclude any future extension of the Convention so as to apply to objects stolen or illegally removed from the territory of a Contracting State by excavation or contrary to its legislation, before the entry of the Convention into force.

G.E./C.P.
2nd session
Misc. 46
(Original: English)

PROPOSAL OF THE NIGERIAN DELEGATION

*Article 10*

Add a second paragraph, drafted as follows:

(2) The provisions contained in the preceding paragraph are without prejudice to the right of a State to address a claim to another State outside the framework of this Convention, in respect of an object stolen or illegally exported before the coming into force of this Convention.

*Objective:*

The objective underlying the proposed paragraph (2) of Article 10 is to allay the fears of some States that the new Convention has completely shut the door against any claim which they might legitimately wish to make in respect of objects stolen before the coming into force of the Convention. If this paragraph (2) is adopted the Convention would be more attractive to such States.

G.E./C.P.
2nd session
Misc. 47
(Original: English)

PROPOSAL OF THE EGYPTIAN DELEGATION

*Article 9*

(1) The claimant may bring an action under this Convention before the courts or other competent authorities of the State where the possessor of the cultural object has its habitual residence or those of the State where that object is located at the time a claim is made. The cultural object in this case should be safeguarded by the latter court or competent authority in accordance with the rules applicable in that State.

(2) (Unchanged).

G.E./C.P.
2nd session
Misc. 48
(Original: English)

PTOPOSAL OF THE FINNISH DELEGATION

*Article 8 bis*

The court or other competent authority of the State addressed, in ascertaining whether there has been an illicit removal of a cultural object in the meaning of Article 5, may request that the requesting State obtain from the court or other competent authority of the requesting State a decision or other determination that the removal of the object was illicit under Article 5.

G.E./C.P.
2nd session
Misc. 49
(Original: French)

PROPOSAL OF THE DELEGATION OF THE ISLAMIC REPUBLIC OF IRAN

*Article 3*

(1) The possessor of a cultural object which has been stolen shall return it to its owner.

(2) The question of who is the owner shall be determined by the court or other competent authority referred to in Article 9.

(3) Claims for the restitution of stolen cultural property shall not be subject to prescription.

G.E./C.P.
2nd session
Misc. 50
(Original: French)

OBSERVATIONS OF THE SECRETARY GENERAL OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ON THE JOINT PROPOSAL CONCERNING ARTICLE 6 SUBMITTED BY A NUMBER OF DELEGATIONS (Misc. 19 rev.)

Under this proposal, when State A, from whose territory a cultural object has been illegally exported to State B, claims the return of the object, an authority in State B may so inform an authority in State C - whose rules governing export have not, it may be assumed, been infringed - so as to permit it to submit a claim for return of the object to its own territory on condition that the requirements of Article 5(3) have been met, that is to say that there is a manifestly closer connection with the culture of State C.

A number of objections may be made to this proposal:

1. Cultural difficulties:

The proposal is a potential source of serious complication and of embarrassment to State B whenever the object has a connection with more than one culture. Should a German judge be called upon to decide whether a canvas painted by Picasso at Vallauris is a French or Spanish "work" or whether one of van Gogh painted in Arles is French or Dutch? Again, should a statue of Aphrodite found in Ephesus or in Sicily be considered to be Greek, Turkish or Italian? Is an imported bronze representing King Juda II found in Morocco to be regarded as Moroccan or Italian? (see the exhibition at present on show at the Capitolean Museum).

2. Diplomatic difficulties:

The proposal would amount to encouraging Government B, at the request of Government A, to call in Government C to engage A and C in a sort of judicial combat with B as the referee! The purpose of an international Convention is to smooth out international relations and not to be a source of conflict. B's intervention might serve only to create animosity between A and C and its passivity could be a cause of reproach and a source of animosity between B and C.

3. Technical difficulties relating to international Conventions:

What in the basis, in this proposal, for the interest of Contracting State C to intervene, whether it be called upon to do so or act on its own initiative? Let us suppose that a cultural object indisputably connected with the culture of State C - for example a Ming vase removed during the sacking of the Summer Palace - has been exported from European State A to State B and that A authorises such export or has no rules restricting such export. It is evident that within the framework of the Convention C can in no way claim restitution of the object. Under the proposal, C would have an interest in lodging a claim only in those cases where A would bring a claim before B. Such a result would be at odds with the concept underlying the Convention as C's claim would have no relation with the mechanism contemplated by Chapter III, namely the breach of a rule of State A as regards export (see Articles 1 and 4(1)).

4. In actual fact, the proposal is misplaced in this Convention. State C's interest in bringing a claim is the same on the cultural level whether the export of the object from State A to B is legal or not! That interest remains the same even if the object is not exported at all! In these circumstances the Convention would become one on the restitution of cultural objects which have on account of past mistakes been scattered throughout the world. That is not the aim of the Convention at present under study.

The proposal which is the object of this criticism is a source of confusion and might impede progress on the draft.

G.E./C.P.
2nd session
Misc. 51
(Original: English)

PROPOSAL OF THE ISRAELI DELEGATION

Article 11 should be followed by new Articles 12 and 13:

*Article 12*

Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural objects removed, whatever the reason, from the territory of each State, before the entry into force of this Convention for the States concerned.

*Article 13*

States Parties shall impose no customs duties or other charges upon

(a) claims pursuant to this Convention;

(b) cultural objects returned pursuant to this Convention.

G.E./C.P.
2nd session
Misc. 52
(Original: French)

PROPOSAL OF THE DELEGATION OF THE ISLAMIC REPUBLIC OF IRAN

In order on the one hand to prevent the theft of and the illicit traffic in cultural objects, and on the other hand to slow down the increasing "black market" in these objects, the necessity of establishing an international identity card has been raised by the Iranian delegation at this session of the committee of governemental experts on the international protection of cultural property.

The President, Mr Lalive, suggested that such a proposal be considered by a special committee, set up in the framework of the International Institute for the Unification of Private Law.

With a view to creating a genuine order in the international trade in cultural objects, we propose that a uniform identity card be constituted by the "Contracting States" for the objects encompassed within the following categories:

(1) Cultural objects which have a universal value (cf. the Unesco Convention of 1972 concerning the Protection of the World Cultural and Natural Heritage);

(2) Cultural objects which have a value for various civilizations;

(3) Cultural objects which have a national value.

Such an identity card should indicate, for the objects concerned:

- its particulars (tecnical, historical, cultural ... etc.)
- the identity of the owner or owners,
- the authorisation or prohibition of export.

In this context, if the "Contracting States" were to agree to such a proposal in the framework of the Unidroit Convention on stolen or illegally exported cultural objects, the purchase, sale or import of cultural objects made in the absence of the relevant identity card should be forbidden by Contracting States.

Insofar as this proposal raises some questions with respect to international public and private law, also from a cultural point of view, it could be studied with the assistance of the members of Unidroit, within

a commission, whose report could be considered by the representatives of States at the next session.

The National Organisation of Cultural Heritage of the Islamic Republic of Iran undertakes to make its best efforts to contribute to the work of the aforesaid commission.

G.E./C.P.
2nd session
Misc. 53
(Original: English)

PROPOSAL OF THE DELEGATION OF THE UNITED STATES OF AMERICA

*Article 9*

(1) A claim may be brought under this Convention by a claimant who is a habitual resident a Contracting State against the possessor before the courts of another Contracting State where the stolen cultural object is located.

(2) A claim may be brought under this Convention by a claimant who is a habitual resident of a Contracting State against a possessor who is a habitual resident of another Contracting State in the courts of that State, in a case where the stolen object is located outside any Contracting State.

(3) Neither paragraph 1 or 2 shall apply to a case involving a claimant who is a habitual resident of a Contracting State bringing suit against a habitual resident of the same Contracting State in the courts of that State.

(4) Paragraph 1 shall not apply to a claim by a habitual resident of one Contracting State brought against the possessor who is a habitual resident of another Contracting State where the stolen cultural object is located in that State and has never moved out of that State.

G.E./C.P.
2nd session
Misc. 54
(Original: French)

AMENDMENTS AND SOLUTIONS PROPOSED BY THE ITALIAN DELEGATION

**This document replaces all proposals submitted solely or jointly by the Italian delegation**

*Summary of aims:*

1. To ensure that the Convention applies to any object not only of inherent cultural interest but also of interest given that its use is essential to the development of the cultural life of a people. If necessary, Article 2 could, apart from these categories which might be specified, make provision for categories of objects of scientific, archival and bibliographic interest which are already contemplated by the 1970 Convention (Art. 1). Such a specification would not be necessary if a very broad formula encompassing these types of objects were to be adopted.

2. To ensure that an instrument intended to settle disputes arising out of the illegal removal of cultural objects from one country to another may at the same time serve the promotion of culture. In this perspective, provision has been made for the possibility of sponsorship with a view to the payment of compensation to *bona fide* possessors not by claimants themselves when they cannot afford to pay such compensation, but by a third party who undertakes to ensure:

- the public use of an object in the requesting State (or by the claimant)

- the consequential insurance cover and proper conservation.

We believe that such a mechanism could facilitate the resolution of disputes and at the same time permit the protection of the object in an appropriate cultural context under optimal conditions, from the viewpoint of cultural promotion.

This objective could be attained by the following proposals:

*Article 4*

Add the following paragraph (1)bis to Article 4:

When the dispossessed owner is unable to pay the compensation awarded, a third party of a public or private character, which is not necessarily the State of the claimant, pursuing cultural aims, may guarantee payment of the sum in question, on condition that the object returned to its legitimate owner be made accessible to the public in the owner's State, and that the third party undertake to meet the cost of insurance and of the proper conservation of the object in question.

*Article 8*

After paragraph (1), add a second paragraph worded as follows:

A third State, or a third party of a public or private character pursuing cultural aims may, with the consent of the requesting State, and in its place, provide for the payment of the compensation established under paragraph (1) of this article, on condition that the object be rendered accessible to the public in that same requesting State and that payment of the cost of insurance and of conservation of the object in question be met.

3. Ensure that the Convention be an instrument safeguarding cultural interests damaged by the infringement of national law relating to export or the protection of cultural objects, or by subsequent export from another State in violation of multilateral agreements governing the movement of cultural objects between different States, including the first two States. In such circumstances (and while avoiding that a court of a third State be called upon to determine disputes involving other States), it should be provided that in place of the State directly concerned by the infringement of its law, and only if that State either does not, or is unable to, bring an action for recovery, the other State with an interest in the question may bring an action for recovery subject to all the other requirements established by the Convention.

This intention could be met by the following proposals:

*Article 5*

Proposal to add a new Article 5 bis:

The claim may also be brought, in conformity with the provisions of Article 5(2) and (3), by a Contracting State from whose territory a cultural object has been legally exported when, following one or more subsequent exports not contemplated by law or by the export authorisation of that State or by an international agreement, the same effect is produced as would have been by the illegal export of the object to a Contracting State or by an infringement of cultural interests protected by the conditions which would have permitted the export of the object.

*Article 6*

When the requirements of Article 5(3) have been met, the court or other competent authority may only refuse to order the return of the cultural object if it finds that it has a manifestly closer connection with:

(a) the State addressed, or

(b) another Contracting State which, in such a case, will be duly informed so that it may bring a claim for return in accordance with Article 5 bis (new).

G.E./C.P.
2nd session
Misc. 55
(Original: English)

REMARKS OF THE GREEK DELEGATION ON THE COMMENTARY OF THE SECRETARY-GENERAL OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Misc. 50) ON PROPOSAL Misc. 19 rev. CONCERNING ARTICLE 6

The Greek delegation would like to make the following observations on the arguments put forward in the aforementioned commentary of the Secretary-General of the Hague Conference:

1) Suggested difficulties on a cultural level:

Pointing out a few extreme, marginal and hypothetical examples does not change either the substance or the merits of the proposal (Misc. 19 rev.). The same difficulties may certainly occur where the judge (or competent authority) decides that the object has a stronger link with the culture of his own country. Furthermore, the word "manifestly" which is included in the text will eliminate most difficulties in this respect.

2) Suggested difficulties on a diplomatic level:

There is no such fear, for the following reasons:

(a) States would appear in front of the requested State's court acting mostly *iure gestionis*, that is as private individuals or entities, and not in their capacity of States, that is to say not *iure imperii*.

(b) International conventional practice knows of many instances where more than one State appears in front of courts of another State, even acting in their official capacity (*iure imperii*) to defend the same case, and this does not seem to have created any problems to them or between them, or to the drafters of such conventions. Suffice it to mention the case of possible concurrent requests of two or more States for the extradition of the same person to them. These can be and usually are highly politicized cases and still international conventional law has not hesitated to confer on the judge of a third country the power to decide on such concurrent requests of States acting *iure imperii*.

(c) The possibility for concurrent and conflicting requests exists already now under either Chapter II or Chapter III. The judge may very well, therefore, have to decide on such requests even without the possibility for a third State involvement.

3) Suggested difficulties on the level of conventional technique:

The proposed arguments are rather confusing: however,

It is true that the third State (State C) would have an interest in the object irrespective of the legality or illegality of its export between two other States (States A and B). It does, nonetheless, need the Convention insofar as the proposal assumes that State C did not know of the whereabouts of the object before its export from State A to State B, which is the reason why the judge of State B will have, first of all, to inform State C concerned. If the court proceedings are not made known to State C, as the text now suggests, it is very probable that State C will never know of the whereabouts of the object so as to be able to claim it. Do we consider that fair?

In conclusion, we think that the fears expressed in Misc. 50 are exaggerated. We think, indeed, that more trust should be given to the judge of the requested State who, in the last analysis, will do nothing more than inform another State of the request submitted to it if, in his own honest appreciation, such a third State has a manifest cultural link with the object or its territorial origin is in that third State. The alternative is to allow the requested State to keep the object and this, in our view, can have neither a moral nor a legal justification.