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COMMITTEE OF GOVERNMENTAL EXPERTS
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

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

(Finland, Netherlands, Sweden, Turkey and Venezuela)

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FINLAND

I. GENERAL OBSERVATIONS

1. The Draft, as indicated in its title as well as in Article 1, is divided into two parts: the restitution of stolen cultural objects (Chapter II) and the return of cultural objects unlawfully removed from the territory of a Contracting State (Chapter III). The proposed rules on the restitution of stolen cultural objects (Chapter II) would apply also in cases where the removal of a stolen cultural object outside the territory of a Contracting State was not in itself unlawful in the sense of Article 1, subparagraph (b) and where, in consequence, the provisions of Chapter III do not apply.

As to Chapter II, it seems to contain two basic substantive rules of fundamental importance:
First, the claim for restitution shall be brought within a period stipulated by the Convention.
Second, a *bona fide* possessor shall, subject to the requirements provided by the Convention, be entitled to compensation.

Under the Draft Convention, the first rule means that a Contracting State is not allowed to apply a *shorter* period than that stipulated in the Convention. Respectively, the second rule means that a Contracting State is not allowed to be more "generous" towards a *bona fide* possessor than the Convention, i.e. the courts or other competent authorities of a Contracting State are not allowed to order compensation to be paid in cases where the possessor under the Convention is *not* entitled to compensation and that the amount of compensation shall not be *higher* than that provided by the Convention. The scope of application of these rules is, however, limited to *international* situations. Furthermore, Contracting States seem to be bound by these rules even in international cases where the law otherwise applicable to the transfer of title under the ordinary choice of law rules (*lex situs* at the time of transfer) would be the law of a non-Contracting State. In other words these rules may be characterised as *uniform mandatory minimum rules for the protection of the interests of the lawful owner of a cultural object in international cases.*

These suggested mandatory minimum rules on the restitution of stolen *cultural* objects might be difficult to understand by national legislators, courts and other competent authorities for several reasons. First, there are hardly any legal systems which in purely internal cases make a distinction between the restitution of stolen objects on the basis of whether the object shall be considered *cultural* or *non-cultural* in the meaning of the Draft. It might therefore be rather difficult to accept that such a distinction should be made solely on the ground that the case is, or has later become, *international*.

Second, if it is considered that the existing internal substantive law rules and choice of law rules do not give adequate protection for the interests of the lawful owner of stolen or otherwise illegally acquired objects, the problem does not seem to be limited to stolen cultural objects and certainly not to stolen cultural objects in international cases only. Therefore it seems to be extremely difficult to find any valid and acceptable justifications for the approach adopted in the Draft that the efforts to create uniform mandatory minimum rules be limited to the protection of the owner of a cultural object in an international case. We also fear that the solution suggested in the Draft might be deemed to be arbitrary and just to the extent that Governments, when considering the ratification of the Convention and anticipating the reactions of their respective parliaments, might conclude that the ratification of the Convention would only be possible if the mandatory minimum rules for the protection of the interests of the lawful owner were through their internal legislation extended to apply in all cases, irrespective of whether the stolen object is cultural or not and whether the case is international or not. This again would require a general revision of their property law and choice of law rules applicable to the transfer of title of stolen property which in turn would hardly be feasible in several States.

For these reasons we are at this stage in principle in favour of deleting Chapter II. However, in case a large majority of delegates are strongly in favour of maintaining Chapter II or, as the case may be, similar modified mandatory rules, we would not be opposed, provided that the Convention would allow a Contracting State *to reserve the right to exclude the application of Chapter II*.

2. The purpose of the Convention is to secure and facilitate the restitution and the return of stolen and unlawfully removed cultural objects. The restitution and the return is, however, subject to several conditions and restrictions. The Convention is only applicable to the restitution and return of such objects as are cultural objects within the meaning of Article 2; the Convention does not apply where the theft or unlawful removal occurred before the entry into force of the Convention in respect of the State of the forum (Article 10, para. (1)); a claim for restitution shall be brought within a certain period from the time of the theft (Article 3, para. (2)); the *bona fide* possessor shall be entitled to fair and reasonable compensation, to claim reimbursement of expenses; the costs of returning the stolen object shall be borne by the claimant (Article (4)); under Article 6 the requested State may in certain cases refuse to return the unlawfully removed cultural object; the obligation to return the cultural object under Article 5 does not exist in the cases enumerated in Article 7 and, finally, under Article 8, a *bona fide* possessor may claim compensation and the costs of returning the cultural object shall be borne by the requesting State. In other words, the Draft is mainly concentrated on the creation of obstacles to and restrictions on the restitution, or respectively the return, of a cultural object.

On the other hand, the Draft also contains a large number of detailed provisions which *allow* a Contracting State to order the restitution of a stolen cultural object or the return of an unlawfully removed cultural object even where not *required* to do so and to apply certain rules *more favourable* towards the restitution and return *than the Convention*. This cascade of altogether eight rules is contained in Article 11 (a)(i)-(iii), (b)(i)-(iv) and (c). In our opinion this method is unnecessarily complicated and difficult to read because of the great number of the rules and numerous cross-references. Furthermore, because of the detailed drafting techniques, seldom used in international conventions, some of these rules seem to be unnecessarily narrow, leaving outside their scope certain situations which quite obviously should be therein.

Article 11 (a)(ii), for instance, provides that each Contracting State shall be free to apply its *national* law when this would permit an *extension of the period* within which a claim for the restitution of the object may be brought under Article 3(2). Does this mean that the State of the forum is *not* allowed to apply its national law if that law - as the case is in Finnish law - does not know *any* time limits at all? Is it required, under this rule, that there must be a certain period provided by national law, however long, and that a Contracting State is not allowed to apply its own internal law which does not contain any limitations at all? Second, the rule above seems to suggest that the State of the forum may only apply its own internal substantive law which provides for a longer period, but not any *foreign* law even if that law, under the ordinary choice of law rules of the forum, would otherwise be applicable. Having regard to the purposes of the Convention, why should it prevent a Contracting State from applying a rule of foreign law designated by its ordinary conflict of law rules, if that rule would be more favourable to the restitution than the Convention and would be applied if the stolen object were not a cultural object within the meaning of the Convention?

Again, under Article 11 (a)(iii), the State of the forum may apply its *national law*, if that law does not require compensation to be paid to the *bona fide* possessor. This rule would obviously lead to rather curious results. Let us assume that a cultural object has been stolen and sold in Finland to a *bona fide* buyer who also obtains possession of the object in Finland and after that takes the object to Sweden. Under Swedish law the purchaser is entitled to compensation, whereas under Finnish law even a *bona fide* buyer has to return the object without any compensation whatsoever. This means obviously, that Swedish courts could not disallow the possessor's right to compensation under subpara. (iii) above by applying "its national law" because compensation *shall be paid* under Swedish internal law. On the other hand, Swedish courts would neither be allowed to apply Finnish law although under Swedish conflict of law rules the law applicable to the acquisition is Finnish law under which the purchaser would not be entitled to any compensation.

Even this result seems to be rather odd. Why should the Convention in this case prevent Sweden from applying a law more favourable towards the restitution and applicable under its ordinary conflict of law rules? Why should the Convention give *less* protection to the lawful owner of a stolen *cultural* object than that given by the State of the forum to the owner of a stolen bicycle?

On the basis of the considerations above, we propose that the complicated rules contained in Article 11 (a)(i)-(iii), (b)(i)-(iv) and (c) be replaced by a general provision which would simply provide that a State Party shall be free to apply any rules more favourable towards the return. This provision could read e.g. as follows:

> *Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable towards the restitution or the return of a stolen or unlawfully removed cultural object than this Convention.*

Furthermore, because of the crucial importance of such a clause, we propose that it be included in Chapter I, possibly after Article 1.

3. The application of the Convention would require effective cooperation between the judicial and other competent authorities of the Contracting States. In proceedings relating to the restitution or return of stolen or unlawfully removed cultural objects, the judicial and other competent authorities have to obtain evidence, including expert opinions, and other information from the requesting State concerning the object and the grounds upon which the claim is based as well as on the laws and regulations of that State. In order to secure the restitution or return of the object, it is often necessary that the authorities of the requested State be able to act promptly, in particular by taking protective and other emergency measures already before the proceedings are initiated in order to locate the cultural object and to secure its return.

In order to facilitate and promote the proper and effective operation of the Convention, we feel that it is necessary that the Convention establish a system of Central Authorities, widely adopted in several similar conventions which require international cooperation between the competent internal authorities of the Contracting States. Since the system of Central Authorities would operate both in respect of claims under Chapter II and Chapter III, we also propose that these provisions be included in Chapter I, the title of which would then be *General Provisions*. The proposed new provisions could read e.g. as follows:

Article X

A Contracting State shall designate a Central Authority to discharge the duties imposed upon such Authorities by this Convention.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify their territorial powers.

Article Y

Central Authorities shall cooperate with each other and promote cooperation between the judicial and other competent authorities in their States to secure the restitution of stolen cultural objects and the return of unlawfully removed cultural objects.

Central Authorities shall, in particular, take or cause to be taken appropriate measures:

a) to locate the stolen or unlawfully removed object,

b) to protect the physical preservation of the object and to prevent its removal outside the territory of the State where the object is found by taking any appropriate protective and emergency measures,

c) to initiate or facilitate the initiation of proceedings for the restitution or the return of the cultural object,

d) to inform each other of stolen or unlawfully removed cultural objects found in their territory,

e) to exchange information of a general character on their laws and regulations as well as on any administrative arrangements relating to the protection of cultural property in their States,

f) to keep each other informed of the operation of this Convention and of any obstacles to its application.

Finally, it should be pointed out that the proposed system of Central Authorities is not proposed to be exclusive in the sense that all requests and applications should necessarily be made through Central Authorities. On the contrary, it is to be understood that applications and requests under the Convention may also be made directly to the judicial or other competent authority in the requested State and also that the Convention would not exclude direct cooperation between the competent authorities of the Contracting States.

II. SPECIFIC OBSERVATIONS

1. Title of the Convention

We propose that the title of the Convention would read as follows: *Convention on the international aspects of the restitution of stolen [cultural objects] or the return of unlawfully removed cultural objects.*

2. Title of Chapter I

Proposed new wording: *General Provisions.*

3. Article 1

In case the title of the Convention would read as suggested above, it does not seem necessary to have a reference to *international situations* in the *chapeau* of Article 1.

The wording of subparagraphs (a) and (b) could be simplified if some additional definitions could be added to Article 2 as suggested below. Subject to these amendments subparagraphs (b) might read e.g. as follows:

(b) the return of cultural objects unlawfully removed from the territory of a Contracting State.

4. Article 2

We propose that Article 2 read as follows:

Article 2

For the purposes of this Convention:

(a) "cultural object" means any material object of [outstanding] cultural significance, for example, in an archaeological, artistic, historical, spiritual or ritual area,

(b) "unlawful removal" means the removal of a cultural object from the territory of a Contracting State contrary to its law applicable to the protection of cultural objects,

(c) "unlawful removal" shall also include cases where the cultural object was removed lawfully from the territory of a Contracting State but not returned to that State contrary to its law applicable to the protection of cultural objects,

(d) "the law applicable to the protection of cultural objects" means any rules and regulations of a Contracting State which contain prohibitions or restrictions relating to the removal of an object outside the territory of that State because of its cultural significance.

In addition, we propose that a new article be added after Article 2 of the present text of the Draft as follows:

Article 2 bis

When determining whether the object, alleged to be stolen or unlawfully removed, shall be deemed to be a cultural object in the meaning of Article 2, subparagraph (a), the judicial or other competent authorities shall duly take into account the law applicable to the protection of cultural objects of the State from the territory of which the object was removed.

5. Chapter II

See the comments above, I, 1.

6. Title of Chapter III

We propose that the title read: *Return of unlawfully removed cultural objects.*

7. Article 5, paragraph 1

Following the amendments proposed above to Chapter I, we propose that paragraph 1 of Article 5 be replaced by the following provisions:

Article 5

(1) Where a cultural object has been unlawfully removed from the territory of a Contracting State (the requesting State) to another Contracting State, the court or other competent authority of the Contracting State where the object is located (the State addressed) shall upon request order the object to be returned.

(2) The request may be made by the requesting State through Central Authorities or directly to the court or other competent authority of the State addressed and it shall be accompanied by the particulars necessary to determine whether the removal was unlawful in the meaning of Article 2.

(3) The court or other competent authority of the State addressed may request that the requesting State obtain from the court or other competent authority a decision or other determination that the removal of the object was unlawful.

8. Article 5, paragraphs 2 and 3

Both Chapter I and paragraph 1 of the draft article 5 seem to provide that where a cultural object, within the meaning of the Convention, has been unlawfully removed from a Contracting State to another Contracting State, the object shall be returned, the *status quo ante* shall be restored. It is therefore rather surprising to read that under paragraphs 2 and 3 this is *not* the case. According to these provisions it is not sufficient that the requesting State be able to give full evidence that an unlawful removal in terms of the Convention has taken place. In addition, the requesting State has to prove that the removal, or rather *the non-return*, of the object, would significantly impair one or more of the interests listed under paragraph 3. This means, in other words, that even in cases where an unlawful removal has clearly taken place, the State whose laws have been violated ("the victim State") has to prove that the new home of the cultural object in the State addressed is a bad home where the cultural object would be maltreated or that the requesting State itself is desperate at having lost the object. If the requesting State fails, the object will not be returned; the object has, though illegally, found a new home.

We are unable to understand the whole "philosophy", if any, of the system adopted in paragraphs 2 and 3, unless its purpose is to create a diplomatic crisis between the two States concerned. The criteria enumerated in paragraph 3 are so vague and general that they would only offer the courts of the requested State, perhaps even against the wishes of their Government, to refuse the return, for instance on the ground that the object is indeed of outstanding cultural importance, but not specifically and at least not exclusively *for the requesting* State. We are afraid that the provisions in paragraphs 2 and 3 would in the practical application of the Convention lead to the result that unlawfully removed cultural objects would rarely, if ever, be returned. For these reasons, and subject to the amendments our delegation has proposed to Article 6, we suggest that paragraphs 2 and 3 be deleted.

9. Article 6

We recognise that there may be *exceptional* cases where the requested State cannot reasonably be required to return the cultural object, although the removal has been unlawful. However, we feel that these problems cannot be appropriately solved by rules comparable to paragraphs 2 and 3 of Article 5. Instead, we suggest that Article 6 be rewritten in such a way that it would contain an exhaustive list of fairly narrow exceptions to the obligation to order the return. The suggested provisions would largely

follow the traditional patterns of grounds for refusal used in international instruments on international legal assistance and recognition and enforcement of foreign judgments, yet having regard to the particular problems arising in the context of unlawful removal of cultural objects. The proposed new article 6 would read as follows:

Article 6

The return of the cultural object may be refused where:

(a) the return would significantly impair the physical preservation of the object or of its context, or

(b) the cultural object, prior to the unlawful removal from the requesting State, was unlawfully removed from the State addressed, or

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

(d) the return of the cultural object would be manifestly contrary to the fundamental principles of the law of the State addressed.

In the context of Article 6 some delegations have proposed (Study LXX - Doc. 29, Misc. 19 rev.) that the return of an unlawfully removed cultural object might also be refused in cases where the cultural object has a closer connection with a third State than with the requesting State and even that in such cases the State addressed might order the object to be "returned" to that third State although the object *was not unlawfully removed in the meaning of the Convention from the territory of that third State*. This proposal seems to suggest that if the cultural object was unlawfully removed from State A to State B, this unlawful act, violation of the law of *State A*, should give *State C* a claim against State B, a claim which State C did not have under the Convention. Moreover this claim triggered by the violation of the law of State A would have such a force that it would extinguish the claim of that same State A itself.

We are unable to understand and to accept this proposal. We are also afraid that, if the proposal were adopted, it would create a serious obstacle for a large number of countries to ratify the Convention. Therefore we are strongly against the inclusion of the proposal in the Convention.

On the other hand, it should also be noted that under the Draft Convention, there might be cases where several Contracting States may have made requests for the return of the same cultural object unlawfully removed

from their territories. The object may have been first *unlawfully* removed from the territory of State A to State B, then once again *unlawfully*, in violation of the law of State B, removed to State C, after which both States A and B make a request to the court or other competent authority of State C for the return of the cultural object on the ground that the removals violated their respective laws and were unlawful within the meaning of the Convention. These situations of *successive unlawful removals* are, however, entirely different from that contemplated in the proposal mentioned above (Study LXX - Doc. 29, Misc. 19 rev.). As in the case of an unlawful *counter-removal* (see proposed Art. 6(b) above), these cases also should be solved following the principle *prior tempore, potior iure,* i.e. the claim of State A, based upon the first unlawful removal should prevail, irrespective of whether the object might be deemed to have a closer, or even a manifestly closer connection with State B. The object shall be returned to State A, the *status quo ante* will be restored and after that States A and B are free to continue their battle, which fortunately falls outside the scope of this Convention.

10. Article 8

Although we understand the reasons for the inclusion of paragraph 1 in Article 8, we do not think that the provision is necessary and it could be deleted. If the Article provides that a Contracting State may make the return conditional upon paying compensation to the *bona fide* possessor, it goes without saying that a *mala fide* possessor should return the object without compensation.

As to paragraphs 2 and 3, they both seem to be drafted in such a way that does not in our view accurately reflect what in fact the Convention intends to say. The actual wording of both provisions seems to suggest that the Convention imposes an obligation upon Contracting States to provide that a *bona fide* possessor shall be paid compensation and that the expenses of the possessor will be reimbursed. In addition the text goes even further, it even seems to suggest that the possessor shall *have a right,* based directly upon the Convention, to compensation and reimbursement. It is only in Article 11 (b)(iii) that we can find that this in fact is not the case. Instead, the question is ultimately left to the national law of each Contracting State. Each Contracting State - in fact all Contracting States - are completely free, e.g. when ratifying the Convention, to adopt even a mandatory rule that no compensation nor reimbursement of expenses shall be paid to the possessor in any case where the object is ordered to be returned, if they wish to do so. - See also our comments and the proposal, *supra* I.2.

For these reasons we consider that the wording of paragraphs 2 and 3 should be revised in such a way that it would not be misleading, suggesting that there should in all cases be an obligation to pay compensation and reimbursement of expenses.

As to the compensation to be paid to a *bona fide* possessor under paragraph 2, we further consider that a Contracting State should only be allowed to make the return conditional upon compensation to be paid only where the acquisition has taken place *after* the unlawful removal.

On the basis of the above considerations and subject to drafting, paragraphs 2 and 3, as new paragraphs 1 and 2, might read e.g. as follows:

Article 8

(1) The court or other competent authority of the State addressed may, upon ordering that the cultural object shall be returned, order that the requesting State shall pay a fair and reasonable compensation to the possessor, unless the possessor, having acquired the object after the unlawful removal, knew ...

(2) The court or other competent authority of the State addressed may also order that the requesting State shall reimburse to the possessor expenses incurred in the protection ...

Paragraph 5 has also been drafted in such a way that it seems to impose upon the requesting State an obligation, based upon the Convention, to bear the costs of returning the cultural object. Even this might be slightly misleading, since the intention obviously seems to be that the State addressed has no obligation to bear these expenses, but if that State, some other State or an organisation or a private person is generous enough to bear such costs, the Convention certainly has nothing against it.

As to paragraphs 4 and 6, we consider that these provisions unnecessarily deal with details which should be left to national law. We also consider that the exact legal meaning of these provisions does not seem to be entirely clear. We therefore suggest that these provisions be deleted.

11. Chapter IV - Claims and actions

As to the proceedings relating to the return of unlawfully removed cultural objects (Chapter III), there is no need to have any specific rules relating to jurisdiction in these cases, provided that our proposal for a new Article 5 or a similar rule be adopted. In that case Article 5 would already in itself indicate that the request shall be made - as is self-evident - to the court or competent authority of the Contracting State where the object is located. It is also self-evident that the question of "recognition" or "enforcement" of a foreign judgment does not arise in these cases. The requested State enforces its own order, the object is returned and the case is closed.

For these reasons we suggest that the provisions in Chapter IV of the present Draft be transferred to Chapter II if that Chapter be maintained. This would also make the structure of the Convention clearer, in particular if States were to be given the possibility to reserve the right to exclude the application of Chapter II as suggested above in I, 1.

THE NETHERLANDS (*)

In the Preliminary Draft, as it is presented by the Secretariat, (Study LXX - Doc. 31, p. 18 *et seq.*), Article 9 on claims and actions has four variants.

The Netherlands and the Hague Conference offered variant II jointly. It should be recalled that variant I appeared in the project presented by the study group, but that the discussions within this group on international jurisdiction had not gone into depth.

1. International jurisdiction at the stage of litigation

Critique of variant I

According to variant I,the plaintiff may introduce an action either before the courts of the State of the habitual residence of the possessor of the cultural object, or before those of the State where the object is located. The use of the alternative ".. or ..." shows that the intent is to make an exhaustive enumeration of the bases for assuming jurisdiction, and this is further shown by the fact that paragraph 2, allowing for jurisdiction on the part of the forum chosen by the parties and for arbitration, begins with the word "however".

The provision for jurisdiction in the courts of the State where the cultural object is located is an important new step. Indeed, in domestic law, as in treaty law, such as basis for jurisdiction is today practically unknown. Neither in the domestic law on assumption of jurisdiction, nor, for example, in the Brussels and Lugano Conventions is the court of the place where an object is located granted jurisdiction over claims relating to movable property. Now, in the particular case of a treaty text aimed at the restitution or the return of stolen or illegally exported cultural property, it is essential to be able to act immediately where the object is located, since otherwise there is a risk that it will once again be exported.

(*) Presented in conjunction with the observer of the Hague Conference on Private International Law.

But what is disturbing in variant I is that the plaintiff is prevented from utilising grounds for jurisdiction which are perfectly reasonable and recognised in both domestic and treaty law on the assumption of jurisdiction: for example, the court of the place of the domicile (and not simply of the habitual residence) of the defendant, the court of the place where the crime was committed (for example, in the case of theft), or again that of the domicile or of the habitual residence of a co-defendant, accomplice in the commission of the illegal act. The exhaustive solution, which is debatable on the merits, may also be met by opposing political arguments; in the framework of the States which have established among themselves a system for international jurisdiction (Brussels and Lugano Conventions, Inter-American Conventions), why put the brakes on the treaty mechanism to which the parties and the courts are accustomed?

Presentation of variant II

For this reason, the first paragraph of variant II, as proposed by the Netherlands and the Hague Conference, retains the new and constructive element proposed by the working group, which is provision for jurisdiction on the part of the court of the State where the cultural object is located, while rejecting the exhaustive nature of the proposal. In brief, this would leave intact the ordinary or treaty rules in force in Contracting States and variant II would, in addition, always allow the plaintiff to have recourse, if he so wishes, to the jurisdiction of the court of the place where the object is located.

The authors of this proposal would see no major obstacle to the express retention of paragraph II of variant I, which allows the parties to submit their dispute to arbitration, although in practice this would correspond to the ordinary or treaty rules in force in the Contracting States.

Because of the fact that the ordinary or treaty rules on international jurisdiction may lead the plaintiff to file suit in the court of a State other than that where the property is located, it seemed useful to provide in paragraph 2 of variant II that the State where the object is located may take provisional or conservatory measures, pending the results of the lawsuit on the merits brought in another State. This rule, which is directly inspired by Article 24 of the Brussels Convention, appears to be most useful in order to avoid the cultural object being immediately re-exported to a third State.

Critique of variant III

As concerns variant III proposed by the delegation of the United States, it seems to result from a misunderstanding.

Paragraphs 1 and 2 appear to be rules of international jurisdiction, but they are very debatable rules. Indeed, these provisions take into consideration the habitual residence of the plaintiff in a Contracting State, while in the practice under domestic and treaty rules for international jurisdiction, the residence, the nationality or the domicile of the plaintiff is never taken into consideration to justify the jurisdiction of the court of *another* State, that of the defendant's domicile or residence, or that of the location of an object, or the place of the crime, etc. It is known that the domicile or the nationality of the plaintiff is taken into consideration as an exorbitant basis of jurisdiction to justify the jurisdiction of the plaintiff's court, *but not that of the defendant*!

In truth, these rules have been proposed only to support those which appear in paragraphs 3 and 4, which do not deal, it appears, with international jurisdiction, but rather with the scope of application in space of the international Convention itself. The intent is to avoid that the international Convention might be invoked in litigation between persons habitually residing in the same State, or where the stolen property has not crossed a frontier.

That is an entirely different aspect of the problem, which ought to be resolved by *ad hoc* rules, and not by utilising rules of international jurisdiction in an artificial manner.

Critique of variant IV

Variant IV, proposed by the Greek delegation, meets certain concerns of the Netherlands and the Hague Conference, but arises from a systematically different approach.

Certainly the exhaustive listing of jurisdictions in variant I is augmented by the reference to the *forum delicti commissi*. Nonetheless, it is hard to see why some bases for jurisdiction are ruled out which are perfectly reasonable and normal and are accepted in domestic or treaty law, particularly in the Brussels and Lugano Conventions.

But the Greek proposal goes even further, since it would regulate in detail the enforcement of foreign judgments.

2. Enforcement of judgments

The Greek proposal offers a relatively detailed set of rules for the enforcement of judgments rendered in application of the Convention. The danger is that the proposal might raise a problem which would soon go beyond the provisions proposed by the Greek delegation.

Indeed, between the introduction of the complaint, which falls in the area of international jurisdiction, and the enforcement of the decision, are situated a certain number of legal operations concerned with the coming into play of the rules of jurisdiction, which are not dealt with in variant IV. No specifics are given in respect of the rights of the defence (in case of default, the judge of the court of origin generally ought to verify that the defendant has been notified of the summons in time to be able to defend himself); neither has the problem of concurrently pending lawsuits been dealt with (what is to be done if, for example, the plaintiff brings the action before the court of the habitual residence of the defendant and then introduces a new action before the court of the place where the object is located?), nor has *ex officio* verification of the basis for international jurisdiction.

Finally, the Netherlands and the Hague Conference would prefer to adopt the same tactic as for jurisdiction and refer to the ordinary or treaty rules of Contracting States on the enforcement of judgments.

Rather than be silent, it would appear, however, preferable to adopt a very simple express rule according to which: "the decisions rendered in application of the present Convention by a court having jurisdiction under Article 9 are recognised and enforced in the other Contracting States under the conditions provided by the ordinary or treaty law of the requested State".

The adoption of an express provision along these lines inserted in the Convention would have the advantage of providing a basis for the enforcement of decisions in the States which only allow for the enforcement of a foreign decision within the framework of an international treaty (Netherlands, Nordic States, etc.) without having to undertake the difficult and complex construction of an *ad hoc* set of rules for enforcement of judgments.

SWEDEN

At the second session of the committee of governmental experts there were sharp differences of opinion on important matters and a great number of amendments were proposed. Against this background, the Government will limit its observations to a few important matters. If these issues can be solved, it should be possible to reach a consensus on other matters.

The most crucial question is, as has been stated before, that of the scope of the Convention. To avoid misuse the Convention should be applicable only to a limited number of items. This could be achieved by defining cultural object as an object of outstanding cultural significance (cf. Study LXX - Doc. 31, Article 2, Alternative I).

Further it is of great importance that the Convention make it possible to grant a *bona fide* possessor reasonable compensation if the object is returned. The absence of such rules would make it difficult to accept the Convention.

Thirdly, it is of importance that there are statutes of limitation and that the periods of limitation are relatively short.

TURKEY

1. One of the conclusive facts emerging from the previous meetings of the Unidroit committee of governmental experts is the unanimity expressed implicitly or explicitly by the participating countries on the necessity of effectively protecting cultural objects from being unlawfully removed from the territories of States through theft, illegal export or illegal excavations.

2. This fact, together with the lack of an effective and workable system at present, make it - in a sense - imperative to set up a system in conformity with universal moral principles for settlement of the pressing uestions regarding the return of stolen, illegally exported or unlawfully excavated cultural objects.

It is needless to say that the relevant questions with regard to absolute time-limits for claims for restitution of cultural objects, the conditions for the admissibility of claims and the retroactivity of the system should be taken up within the framework of the same principles, bearing in mind the very fact that cultural objects are not normal merchandise.

3. In this regard, the Turkish delegation wishes to refer to preparatory work already undertaken by the European Community in order to draw up a regulation on the return of cultural objects unlawfully removed from the territory of a member State. The main aim of adopting a regulation is, as it is understood, to establish an effective and workable system of protection again the illegal circulation of cultural objects within the Community as of January 1, 1993 when all internal frontier controls will be abolished.

The Community's approach in this regard, as indicated briefly in the report (Com(91)447 final c3-0080/92), is based on and consists in the following:

- Detailed definition of cultural objects,

- An export licencing system (certificates of origin)

- Abolition of absolute time-limits for claims for return of certain illegally removed cultural objects (cultural objects in public ownership, ecclesiastical objects such as icons).

It may be interesting to know that in this connection it is also stated in the said report that the absolute period of limitation can be abolished, if the scope of definition is not extensive. The argument to this effect is that cultural objects are not normal merchandise and that their value increases with the passage of time. Therefore, insistence on the absolute time limitation serves only the interest of illegal possessors and opens the door for legal ownership for them and furthermore encourages illegal practices in this field.

- Completion of the court's ruling as soon as possible after submission of the claims for return of illegally removed cultural objects.

- Certain limitations on court competence.

- Limitation of the financial and juridical rights of possessors of cultural objects.

4. The way the draft of the Regulation and amendments are formulated indicates that preparatory work is going in the direction of maintaining the guiding approaches and principles summarised above when the Regulation is finalised.

5. The Turkish delegation considers it worthwhile to propose to the committee that a representative of the European Commission be invited to the third meeting of the committee of governmental experts so that participants may have an opportunity to have first hand information concerning the system under consideration by the relevant committees of the Community and may evaluate during its deliberations the possible benefits to be derived from this participation.

6. If such participation cannot be assured at the third meeting of the Unidroit committee of governmental experts, it may be recommendable to defer that meeting until a time when such participation can be guaranteed. The reason for this proposal is that such participation may contribute to the early completion of the draft Convention which will, hopefully, be effectively applicable.

VENEZUELA

1. Title of the Convention

We can accept the proposal with the following addition in parenthesis: "Convention on the International Return of Stolen or Illegally (Obtained and) Exported Cultural Objects" since we believe that objects from illegal excavations should be included.

2. Title of Chapter I and Article 1

We agree to the title of Chapter I; as regards paragraph (a) of Article 1, we would delete the last part "which have been moved across an international frontier" as we believe that the crossing of frontiers, be it legal or illegal, is the only way in which an object can be transferred from one country to another.

As to paragraph (b), we would delete the last part "applicable to the protection of cultural objects", since such deletion would permit the application of rules which, while making no express reference to the protection of cultural objects, might be applicable, as is the case with offences under the ordinary or special criminal law.

3. Article 2

The content of Alternative II seems to us to be the most appropriate as the scope of the notion of a cultural object is quite broad. We are moveover in favour of the proposed new paragraph because it pays due regard to domestic law in the context of the Convention.

4. Title of Chapter II and Article 3

We would suggest adding to the title of Chapter II the words in parenthesis: "Chapter II - Restitution of stolen (or illegally obtained) cultural objects", so as to ensure consistency with the approach set out under print 1 of these observations.

We would suggest the following text of Article 3:

> "1. The possessor of a cultural object which has been stolen or illegally removed by excavation shall return it to its owner.

> 2. Any claim for restitution 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, and in any case within a period of ten years from the time of the theft."

We prefer the term "possessor" to "owner" as the former expresses a simple factual relationship, the possession of the object. The latter, touches on a much more complex legal problem, that of ownership, which opens up discussion of the legality or illegality of the ownership and thereby makes matters more complicated.

5. Article 4

We accept the second variant of Alternative I as it stands with the exception of paragraph 2 where we would prefer the words "whether the possessor exercised due diligence" instead of "such diligence" which is less binding.

We would retain the text of paragraph 3 as far as the word "gratuitously", deleting the words between square brackets which constitute a limitation.

6. Article 5

We would suggest the adoption of Alternative I with the following amendments:

> "1. When a cultural object has been removed from the territory of a Contracting State contrary to its law, that State may request the court or other competent authority of a State acting under Article 9 to order the return of the object to the requesting State."

We would retain the whole of paragraph 2 of Alternative II (at the bottom of page 9) and paragraph 2 of Alternative I would become paragraph 3 of that alternative, subject to the deletion of the words "or be accompanied by" in the second line.

The amendments proposed by our legal service are intended to facilitate procedures and to ensure effective results.

As regards paragraph 3, which would become paragraph 4, we would accept Alternative B as it stands since, in our opinion, it includes more

of the relevant factors to be taken into consideration in connection with the legal interest in the recovery of cultural objects.

7. Article 6

We would recommend the adoption of Alternative II on the ground that it is much simpler and therefore less specific than Alternative I. We can accept the text as it stands.

8. Article 7

We would adopt the text as presently drafted with the following clarifications:

(a) the period after the death of the person who created the object should in paragraph (a) be fifty years;

(b) the limitation period in paragraph (b) should be five years;

(c) the requesting State should be aware of one of two elements, either the location of the object or the identity of the possessor;

(d) the exception for which provision is made of thirty years as from the date of the export of the object should apply in all cases.

9. Article 8

We would prefer in paragraph 1 to speak of the object having been exported contrary to law rather than to refer specifically to the law applicable to the protection of cultural objects so as to broaden the legal criteria. As regards paragraph 2, we would again support such a general reference in respect of the good faith possessor. Paragraph 3 should likewise be applied on the basis of the same principle.

With respect to paragraph 4, we prefer the second version which we find to be better structured and clearer.

Paragraphs 5, 6 and 7 reflect to the principle of good faith.

10. Article 8 bis (new)

The adoption of the Finnish proposal would seem to be justified as it

would permit, as it were, a preliminary legal decision to be taken on the question of whether or not an act was illicit.

11. Article 9

Of the various alternatives prepared for Article 9, we would favour Alternative II which would disregard all other international conventions and give preference to the application of this new Convention.

12. Article 9 bis

We likewise support the introduction of Article 9 bis as it tends to reinforce the effects of *res judicata* beyond the frontiers of the State addressed and would in all cases require measures to be taken for the preservation of the object.

Similarly, with a view to ensuring the respect of the decision of courts, we would favour the adoption of Articles 9 ter, quater and quinques.

13. Article 10

As to Chapter V, Final provisions, we would see Article 10 as being useful although we would in paragraph 1 delete the words "applicable to the protection of cultural objects" as elsewhere in the text, principally on the ground that sometimes no such rules of law exist. The deletion of this reference would permit the application of the whole of national law, including the ordinary law, by way of the Convention.

We could accept paragraphs 2 and 3 without amendment.

14. Articles 11, 12 and 13

The acceptance as they stand of the proposed Articles 11, 12 and 13 would seem to us to be in order.