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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

COMMENTARY ON THE UNIDROIT PRELIMINARY DRAFT CONVENTION
ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS
AS REVISED JUNE 1992

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**COMMENTARY ON THE UNIDROIT
Preliminary Draft Convention on Stolen or Illegally
Exported Cultural Objects**

as revised June 1992

Introduction

The two meetings of the governmental experts studied a text which had been proposed by a study group of experts after 3 sessions. The text has, therefore, been studied closely five times. The third meeting of the Study Group has a great many proposals to consider which arose out of the proceedings of the last meeting. In order to make productive use of the procedures and to reach an advanced stage in the preparation of the text; UNESCO would like to propose the following working principles for this meeting:

1. Amendments to the text should avoid complicating it: where a simpler formulation will achieve the same result additional provisions should be avoided.
2. The Convention is not self-executing. Matters that can be left to domestic law to settle (e.g. procedural matters) should not be dealt with in the Convention. It will be difficult to get agreement on such matters in view of the variety of procedural systems current, and it is not necessary if a State undertakes to adopt the substantive provisions by whatever procedural means are available to or necessary for it.
3. The meeting should work towards a workable international compromise instrument which will attract a large number of participant States. The meeting is not intended to produce merely a statement of principle, which can be much more economically done in an academic forum, but a legal instrument which will improve the existing legal situation in respect of the recovery of lost and stolen cultural objects. In drafting such an international instrument, regard must be had to the legal imperatives of other States (their constitutional requirements, legal traditions and legal philosophy) and the political feasibility of the changes which they will be required to make.
4. The instrument should not intend to do too much: after 30 centuries of relocation of cultural objects in peace and war, one instrument cannot turn the tide of history. What this instrument can do is take one or two clear steps to reversing the current tide of theft, illegal excavation and illegal export of cultural objects which will result in their return by practical legal steps. The draft is based on a simple triggering fact: illegal export after the date of entry into force.

Decisions of Substance

It is clear that some of the draft provisions supplied by Delegations contradict each other or fundamentally depart from the substance of the original draft. For this reason, it seems that certain decisions of principle should be taken before consideration of some of the detailed drafting. These decisions would seem to be:

MAJOR DECISIONS OF PRINCIPLE

Whether the scheme should cover all stolen cultural objects or some (see comments at pp. 7-10).

Whether the scheme should cover all illegally exported cultural objects or some (see comments p. 13 ff.).

Whether the cultural objects covered by the scheme should be defined by

- (i) a general definition in the draft Convention,
- (ii) the legislation of the requesting State,
- (iii) the determination of the court or other competent authority in the requested State.

Whether compensation should be offered for holders of stolen cultural objects where they have used the diligence required by the Convention.

Whether compensation should be offered for holders of illicitly exported cultural objects where they have used the diligence required by the Convention.

Whether the scheme should set up a system of export certificates.

Whether the scheme should deal only with the State of export and the State of location, or whether provision should be made for third States to intervene.

If provision is made for third States to intervene, what can reasonably be expected of the requested State by way of notification to that State, and of the third State by way of proof, and at whose expense.

Whether possessors who have to return an illegally exported object should have the option of transferring it to a person or institution in the territory concerned.

Relationship of UNIDROIT Draft to European Directive and Regulation

1. Whether the European instruments apply to stolen goods, depends on whether the goods have been "unlawfully removed" in the sense of the European directive. Stolen goods which were not illegally exported (because they fall into a category not subject to export control) are therefore to be recovered by the existing remedies for stolen goods. Art. 15 of the Directive provides

This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen.

This means that European States may retain their current laws as to stolen property or may change them - the Directive has nothing to say on this matter.

The European Directive therefore will not affect Ch. II of the UNIDROIT draft in respect of stolen goods. Whatever changes may be made to Ch. III on illicit export, there is no reason to change or abandon the rules on stolen cultural objects in Ch. II.

If a cultural object is stolen in one State which is a member of the European community and "unlawfully removed" to another State Member of the European community, then there will be alternative actions available: an action by the person from whom the object was stolen for the return of stolen goods (as at present available, or as provided in accordance with the UNIDROIT scheme) and an application by the State from which it was unlawfully taken under Art. 4 of the Directive.

Comments on the EEC Directive are mentioned where applicable under each article.

Relationship of UNIDROIT draft to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970

UNESCO has been working hard to hinder illicit traffic of all kinds in cultural objects and to have as many parties as possible participate in the 1970 Convention. That Convention has not, however, solved the problem to date.

UNESCO was concerned to improve the working of the 1970 Convention in three ways:

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

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

The present studies within UNIDROIT were initiated at the request of UNESCO which funded the first two studies of Professor Reichelt¹. These studies served as preparatory material for the work of the Committee of Experts. UNESCO was represented in that group.

The new UNIDROIT Draft Preliminary Convention is free of the ambiguities which some have found in the interpretation of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*, while leaving a margin of appreciation to those applying the Convention which should ensure sufficient flexibility in its operation.

It applies to all stolen objects (Art. 3) of artistic, historical, spiritual, ritual or other cultural significance (Art.2) whether in private or in public hands, whether taken from a collection or an individual item. In that sense it is wider than Article 7 of the Unesco Convention.

It applies to illegally exported objects (Art. 5) of the same kind of significance (Art. 2) whose removal significantly impairs an important cultural interest (Art. 5(3)). In that sense it is narrower than Article 3 of the 1970 Unesco Convention but much more specific, and it provides a procedure applying to important illegally exported objects other than ethnographical and archaeological materials mentioned in Article 9 of the 1970 Unesco Convention. Furthermore, the obligations of the requested State are more detailed, and

^{1/} Reichelt, G. "International Protection of Cultural Property" (1985) Uniform Law Review 43; Cf. also by the same author "Second Study Requested from UNIDROIT by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property in the Light also of the Comments Received on the first Study" (UNIDROIT, Rome) 1988.

should be easier and more straight-forward for Requesting States to put in operation, since States Parties to the 1970 Unesco Convention have adopted differing means of implementing Article 9 of that Convention.

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

The UNIDROIT Preliminary Draft Convention thus deals with some of the most difficult issues remaining doubtful or unresolved after the adoption of the 1970 Unesco Convention. For the 70 parties to that Convention, it represents a step towards greater protection of their movable cultural objects. For important market States which have expressed their support for the principles of the UNESCO Convention but have not become party to it, the UNIDROIT project provides an opportunity to achieve an instrument for the same purpose in a form which should not present difficulties of interpretation.

Preamble

The Preamble has not yet been drafted. UNESCO wishes to propose that the following considerations be kept in mind:

- a statement of the importance of cultural exchanges
- a statement as to the severe damage done by illicit traffic (e.g. clandestine excavation, loss of material culture from its community of origin etc.)
- a statement that States parties are prepared to make significant changes in their national law to ensure the conservation, security and accessibility of cultural objects by ensuring their return in cases of theft or illegal export

THE FOLLOWING PAGES ARE DESIGNED AS A COMMENTARY ARTICLE BY
ARTICLE ON THE CURRENT DRAFT PREPARED BY THE SECRETARIAT.

ARTICLES OF THE DRAFT APPEAR ON THE LEFT-HAND (EVEN-NUMBERED) PAGES
AND THE CORRESPONDING UNESCO COMMENTARY ON THE RIGHT-HAND
(ODD-NUMBERED) PAGES.

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

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

ARTICLE 1

This Convention applies [in international situations as described in Article 9]⁽²⁾ to claims for:

- (a) the restitution of cultural objects stolen or illegally removed by excavation on the territory of a Contracting State⁽³⁾ [and found on the territory of another Contracting State] [which have been moved across an international frontier];⁽⁴⁾
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law [applicable to the protection of cultural objects].⁽⁵⁾

ARTICLE 1

"in international situations as described in Article 9" (US proposals, footnote 2 of Secretariat Report, Study LXX - Doc. 31). The more precise definition in Article 1(a) is preferred and this phrase should be deleted.

Subsection 1(a)

"or illegally removed by excavation"

The European directive covers goods "unlawfully removed from the territory of a Member State in breach of its rules on the protection of national treasures . . ." This would appear to cover objects resulting from illegal excavations.

As noted before, Article 15 of the European Directive provides:

This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen.

It therefore seems that a State a member of the European community which has goods illegally excavated which are found in the jurisdiction of another State member of the European Community, will have to proceed by way of the Directive, rather than by the procedure set up in accordance with the UNIDROIT scheme, since most, if not all, of these States do not take ownership automatically of all undiscovered archaeological objects and cannot therefore regard them as "stolen" from them, though an action for theft may be available to the landowner on which the goods were found.

States of the European Community will therefore need to study carefully the relationship between the two texts where illegally excavated goods are concerned. Differences between the two texts are likely to be the length of prescription (barring of action by lapse of time)(Art.7 Directive; Art. 3(2) UNIDROIT); definition of cultural object covered by the legislation (Art.1 + Annex of Directive; Art.2 UNIDROIT); likelihood of compensation (Art.9 Directive; Art. 4).

For States outside the European Community there is no concern with the application of the EC rules, since the EC rules apply only to cultural objects which have been illegally removed from one country of the European to another and not to objects which have been illegally removed from countries outside that community.

"which have been moved across an international frontier".

This formulation is preferred to that of "found in the territory of another contracting State" to cover the situation of Winkworth v. Christie's Ltd.¹ where the cultural objects of an English collector, stolen from him and sold in Italy to an Italian who then offered them for sale in Christies, London. His claim for recovery was unsuccessful, and if the formula "found on the territory of another Contracting State" is used here, such a claimant would not be covered.

^{1/} The case report can be found in the English law reports [1980] 1 Ch. 496.

ARTICLE 2⁽⁶⁾

ALTERNATIVE I⁽⁷⁾

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⁽⁸⁾

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⁽⁹⁾

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.

ARTICLE 2

UNESCO regards it as essential to decide whether this definition is to apply both to Ch. II (stolen cultural objects) and Ch. III (illegally exported cultural objects).

The view of the experts in the study group was that there is a much wider agreement on the need to return stolen cultural objects than there is on illegally exported cultural objects. This corresponds to UNESCO's experience in the administration of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property* 1970. Many experts in cultural heritage law from different legal systems have emphasized the importance of the return of cultural objects to the original holder after a theft, even at the cost of changing the rule in many European legal systems protecting the *bona fide* purchaser of stolen goods (Chatelain², Rodotà³, O'Keefe and Prott⁴, Reichelt⁵, Fraoua⁶). This degree of agreement is not however evident on illegally exported goods.

This situation was reflected in the original draft prepared by the Study Group by using an extensive definition which was applied without limitation in the case of stolen goods (Ch. II) and with restrictions in the case of illegally exported goods (Ch. III). The same effect could have been achieved by having an extensive definition within Ch. II and a restrictive definition in Ch. III.

On the four alternative definitions now proposed, therefore, the following comments can be made:

ALTERNATIVE I

Implications of the definition for stolen cultural objects.

The addition of the words "outstanding cultural significance" would limit the application of the Ch. II on stolen goods.

The most important defect in this alternative is that it negates the most important principles of the Convention. This is to require ALL purchasers of cultural objects to be diligent in investigating provenance. If only some objects will need to be returned after theft, and only some require diligent inquiries into title, the present practice of wilful ignorance in the art trade will not be reversed.

^{2/} Chatelain, J. *Means of Combatting the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC* (Commission of the European Communities, Doc. XII/757/76-E (1976)) 144.

^{3/} Rodotà, S. "Explanatory Memorandum" in Council of Europe, *The Art Trade* (1988) 8).

^{4/} *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, Paris) (UNESCO Doc. CLT/83/WS/16 1983, 141 pp. 126-130; in French as *Mesures législatives et réglementaires nationales visant à lutter contre le trafic illicite de biens culturels* pp.53-58; in Spanish as *Medidas Legislativas y Reglamentarias Nacionales de Lucha Contra el Trafico Ilícito de Bienes Culturales* pp.53-57; *Law and the Cultural Heritage: Vol. III - Movement* (Butterworths, London) 1989, 648.

^{5/} 1988, 39, article mentioned above n.1.

^{6/} *Le trafic illicite des biens culturels et leur restitution* (Editions universitaires, Fribourg) 1985, 179.

Apart from not changing the present practice which facilitates illicit traffic, Alternative I would also not assist in the case of less important stolen goods, such as privately owned collections (like the Netsuke collection of Mr. Winkworth) and locally important items (such as the mediaeval figure stolen from an English church which could only be repatriated from Belgium by compensating the *bona fide* possessor.) It was the intention of the Study Group that all such goods should be returned (subject only to compensation where the possessor can prove diligent inquiry). This is particularly important to deal with the flood of thefts from small churches, local museums and private houses.

ALTERNATIVE II

The use of the words "designated by each Contracting State" has the same limiting effect, since many cultural objects in private hands are not designated by a State which may, indeed, have a philosophical objection to doing so. It would again not assist Mr. Winkworth, or the parishioners of a small church or a village which has suffered loss of objects of local significance.

ALTERNATIVE III

This proposal includes both the above limitations and is therefore even more limiting.

ALTERNATIVE IV (10)

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) (11)

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.

ALTERNATIVE IV

The effect of this proposal comes closer to that of the original draft, since the comprehensive terms of the UNESCO Convention probably include all cultural objects. However the limitation to more than 100 years of age is not appropriate e.g. to ethnological items. It appears in the UNESCO Convention only in relation to furniture and antiquities.

UNESCO therefore proposes that the following definition, which is precise enough to meet the needs of customs and police officers for ready identification of cultural objects, and is based on the definition in the 1970 UNESCO Convention, as follows:

For the purposes of this Convention, "cultural object" means any material object of an archaeological, prehistorical, historical, [spiritual, ritual, ethnological], literary, artistic, or scientific nature and which belongs to one of the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

The combination of a wide definition with the provision in Art.3(i) that all such stolen objects are to be returned is probably the single most important step which could be taken against illicit traffic in cultural objects.

Implication of the definition for illegally exported cultural objects

If a wide general definition is preferred in Art. 2, then it needs to be cut down in some way when applied to illegally excavated cultural objects. All four alternatives suggest types of limitation. These will be discussed in relation to Ch. III.

Proposed new paragraph 2

If a general definition is used, this could be a useful reference. However, in the normal course of events, it would be probable that the court or competent authority in the state of location would take account of that law (this would include unwritten law and tribal practice, for example, in traditional communities).

CHAPTER II - RESTITUTION OF STOLEN⁽¹²⁾ CULTURAL OBJECTS

ARTICLE 3

(1) The [physical] possessor⁽¹³⁾ of a cultural object which has been stolen or illegally removed by excavation⁽¹⁴⁾ shall return it [to its owner]⁽¹⁵⁾ [subject to the terms of this Convention].⁽¹⁶⁾

(2) Any claim for restitution shall be brought within a period of [three] [five]⁽¹⁷⁾ years from the time when the claimant knew [or ought reasonably to have known]⁽¹⁸⁾ the location [or,] [and]⁽¹⁹⁾ 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.

ARTICLE 3 (i)

"or illegally removed by excavation". Proof by a State that a particular object has been illegally excavated on its territory can be difficult, especially of objects from a culture which spreads over several geographical boundaries.

"to its owner" The addition of this phrase is unnecessary and complicating. It is for the court or competent authority ordering the return to determine to whom the object is to be returned. In the case of stolen property this would normally be the owner, but it might be to a museum (object on loan, sent for expertise or restoration), bank etc. In such cases it may be improper for it to be returned to the owner.

"subject to the terms of this Convention". Since all the provisions of the instrument have to be read together, this seems to be an unnecessary complication.

ARTICLE 3(2)

It should be noted that the limitation of claims under the European Directive (possible one year limitation) is not relevant here, since this Chapter deals with stolen objects. In any event, a limitation of one year would work injustice in an instrument of world wide application, rather than a regional one.

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]⁽²⁰⁾ diligence when acquiring the object.⁽²¹⁾

OR

(1) In the event of restitution, the rights of the *bona fide* possessor vis-à-vis his predecessor are reserved.⁽²²⁾

ARTICLE 4

The whole reason for Article 4 was to penalize acquirers of cultural property who do not make proper enquiries into provenance. It is at present standard practice for dealers and auctioneers not to name their vendors and for buyers not to question the credentials of sellers. If buyers were subject to the risk of losing the object if they do not inquire, then this practice would change, as they would refuse to buy unless information were given.

However the reversal of the protection of a *bona fide* purchaser is a major step for many countries who have regarded this principle as a pillar of their legal system. In order to ease their presentation of this change to their legislative bodies, it was felt necessary to provide for compensation, as the instrument would be unlikely to be adopted without it.

While owners and States which have major thefts from their territory may regard this as unfair, the difference between ALTERNATIVE I and ALTERNATIVE II is in fact small. In practice, there should be very few possessors who can prove that they met all the tests for due diligence in the acquisition and nevertheless acquired a stolen object. If this continues to cause concern, more details could be included in the clause concerning diligence (see next para.)

4 ALTERNATIVE I (1) version 1 - agreed

To make clearer the high degree of diligence required para. 2 (words in bold type represent proposed additions):

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, the provisions of the contract, the circumstance in which it was concluded, the price paid, **the provenance of the object, any special circumstances in respect of the transferor's acquisition of the object which are known to the possessor,** and whether the possessor consulted any accessible register or data base of stolen cultural objects which it could reasonably have consulted.

4 ALTERNATIVE I (1) version 2.

The actual words *bona fide* have been avoided throughout the draft. This concept is differently applied and to different groups in the various legal systems. It is also, in many legal systems, subject to many presuppositions in favour of "bona fides". It was thought best, therefore, to avoid the phrase altogether so that national authorities would not be tempted to use their traditional concept of bona fides in connection with this instrument, but would be bound to apply the concept of "due diligence" as described in the Convention itself.

This version is also unnecessary, since it is a matter for the applicable law to allow for recourse against a predecessor. In practice, however, it should be noted that very often the predecessor is not available to sue or is not worth suing.

ARTICLE 4

ALTERNATIVE I

(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,⁽²³⁾ and whether the possessor consulted any accessible register⁽²⁴⁾ [or data base] of stolen cultural objects [or cultural property legislation]⁽²⁵⁾ 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].⁽²⁶⁾

[(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.]⁽²⁷⁾

[(5) The provisions of this article do not apply when a possessor, under the law applicable, shall return the cultural object without compensation.]⁽²⁸⁾

ARTICLE 4 ALTERNATIVE I (2)

The addition of the words "official and authoritative" is not necessary. In practice, there are lists of Stolen Objects kept by INTERPOL, by national police forces and by the Art Loss Register/IFAR (London-New York). CHIN (Canadian Heritage Information Network) also runs a service. An American court has already held that failure to consult IFAR by an American dealer purchasing mosaics from Cyprus, disentitled her to hold them as against the true owner (the Autocephalous Orthodox Church of Cyprus).

It should be left to the court or competent authority ordering the return to decide what were the appropriate registers to consult.

"or cultural property legislation" it is not clear why these words are being suggested and what effect is being sought.

Article 4 ALTERNATIVE I (4)

This proposed article seems unnecessary. If a claimant wants to make some arrangement with another body to pay the compensation, in return for certain undertakings in respect of the future possession, access, insurance and conservation, this is to be regulated by private agreement between them, and does not need to be dealt with in this instrument: nothing in the text of the instrument prevents such an arrangement.

In any event, the words "requesting State" assume that the claimant is a State. In many cases it will be an individual, museum, local community, church etc and not the State.

Article 4 ALTERNATIVE I (5)

The aim of the whole UNIDROIT project was to improve the protection of cultural property by ensuring its return to its owner. Compensation was considered only because depriving a possessor of an object in some legal systems would be a major change, and the reference to compensation would make the presentation of this change politically and philosophically more acceptable. **AT NO STAGE WAS IT EVER INTENDED TO SUGGEST THAT NATIONAL SYSTEMS WHICH ALREADY PROVIDED FOR RETURN OF STOLEN CULTURAL OBJECTS SHOULD CHANGE THIS RULE BY PROVIDING COMPENSATION.** This is reflected in Art. 11 (iii) which enabled such countries (e.g. a number of Common Law jurisdictions) to maintain their existing rules.

The suggested new sub-clause makes this clear and is mandatory, rather than facilitative, which is an improvement to ensure that achievement of the objective mentioned. The question remains whether it is better placed here than in Article 11.

ARTICLE 4

ALTERNATIVE II (29)

(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.

ARTICLE 4 ALTERNATIVE II

(1) The reversal of the protection of a *bona fide* purchaser is a major step for many countries who have regarded this principle as a pillar of their legal system. In order to ease their presentation of this change to their legislative bodies, it was felt necessary to provide for compensation, as the instrument would be unlikely to be adopted without it.

However, as pointed out above, there will be very few cases where compensation will be payable because of the requirements of strict diligence.

(2) and (3) If the original form (ALT 1) is accepted, then it is unnecessary and unwise to spell out these provisions, which can be left to negotiation.

(2) It is unwise to mention reimbursement of "expenses in the protection and restoring of the object". In a Canadian case, while the government authorities were considering an export ban on an Indian mask, the dealer who wished to export it arranged for its "restoration" so that the Canadian museum authorities felt that it had lost its authenticity and was no longer worth retaining. To indicate that such expenses would be reimbursed would encourage possessors to undertake work, either to prevent an object being reclaimed (as no longer worth the trouble of the claim) or to magnify a claim for compensation. This is unlikely to ensure that "restoration" is the kind which would be of the best professional standards.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

ARTICLE 5⁽³⁰⁾

ALTERNATIVE I⁽³¹⁾

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its law [applicable to the protection of cultural objects],⁽³²⁾ that State may request the court or other competent authority⁽³³⁾ of a State acting under Article 9 (the State addressed) to order the return of the object [to the requesting State].⁽³⁴⁾

(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.⁽³⁵⁾

CHAPTER III

This chapter, concerning illegally exported cultural objects, is the most controversial and politically difficult of the draft.

There is no doubt, for many States, that the fact an object was illegally exported from another country does not make it an illegal import or place any legal hindrance to its acquisition in that State. This is the present practice of all European States, except those party to the 1970 UNESCO Convention (Italy, Spain, Portugal, Greece; Switzerland has announced its intention to become party).

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970 was the first instrument to challenge that position. However that instrument has been adopted by only one major art importing State, the United States (and by one or two others with interests both in importing and exporting, such as Argentina, Australia, Canada).

The European directive and Regulation on the Return of cultural Objects Unlawfully Removed from the Territory of a Member State will change that position. All European States will be bound to return to other Member States cultural objects illegally exported from a Member State which is

designated by national legislation or regulation as a "national treasure" and falls within one of the categories listed in the Annex, some of which do include minimum financial criteria of financial value.

If this obligation to return illegally exported cultural objects to the countries from which they were illegally exported were undertaken in respect of countries outside the community, it would also improve the present legal situation for those States. However, the European categories of cultural objects do not include objects of an ethnological, ritual or spiritual nature which are of considerable importance to States with traditional communities.

The Commonwealth Secretariat (London), acting on a proposal of the New Zealand government in 1983, has prepared a draft for reciprocal recognition of export controls within the Commonwealth, but this has not yet been adopted and is still subject to negotiation.

The adoption of principles committing countries of import to return ANY categories of illegally exported cultural property would therefore be an advance on the present legal situation. (The United States implementation of the 1970 agreement provides procedures only for illegally exported archaeological or ethnological objects, whose pillage puts the cultural heritage of the State in jeopardy).

Any version of the draft would therefore improve the present legal situation.

ARTICLE 5

ALTERNATIVE I

(1) The phrase "contrary to its law" or "contrary to its law applicable to the protection of cultural objects" is preferred to the proposal of the U.S. delegation (in footnote 32) "contrary to a legislative provision prohibiting the export of cultural property because of its cultural significance". Both the suggested phrases in the text are clear, and the U.S. proposed formulation adds nothing in substance and unduly complicates the drafting.

(2) no comment

ARTICLE 5⁽³⁰⁾

Paragraph (3)

Alternative A⁽³⁶⁾

(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⁽³⁷⁾ 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].

ARTICLE 5 (3) ALTERNATIVE A

(3) The Study group considered very seriously the areas where there was the most convincing case for international co-operation. There was substantial agreement that these cases would be

- physical damage to monuments and archaeological sites (including that done by illicit excavation or pillage) (a)
- physical damage to delicate objects by unprofessional handling by pillagers, possessors, runners, dealers etc. involved in the illicit export (a)
- dismemberment of complex objects (e.g. beheading of sculptures, dispersion of frescoes, division of triptyches, or stripping interiors from historic buildings) (b)
- loss of information by removal of objects from their context and irreversible damage to the context (e.g. disturbance of stratigraphy); by break-up of a collection or loss of documentation (c)
- removal of objects still in use by the traditional community e.g. the Afo-a-Kom, a ritual figure of supreme importance, said to have embodied the spirit of the Kom (Cameroon); traditional carvings representing spirits, ritual objects such as masks in traditional communities(d).

Independent experts such as anthropologists, archaeologists, ethnologists from all countries, including the major art importing States, are agreed on the severe damage that illicit traffic creates in all these respects.

This would therefore appear to be the minimum content of an agreement to recognize and enforce the export controls of a foreign State.

Subsection (e) was included to cover the rare case of outstanding significance which would not be included in (a) to (d). Such a case was that of *Attorney-General of New Zealand v. Ortiz*⁷, where the New Zealand government failed to obtain the return to it of important Maori carvings which had been illegally exported from New Zealand and were on sale at Sotheby's. The carvings had been buried up until the time when they were extracted by the seller to the dealer who illegally exported them. Of a style no longer being practised (the Taranaki style) and of extremely fine technique and beauty, the New Zealand government wanted to use them as an inspiration to young Maori carvers. There is little doubt that the New Zealand government could have proved that these panels were of outstanding cultural importance to the New Zealand people. The case is unique, but such is the nature of cultural works that it seems wise to make allowance for such rare cases in the draft convention.

As a matter of drafting, (e) does not sit comfortably with (a) to (d) since they are subject to "significantly impairs", which is not applicable to (e). In that respect the Canadian formulation is better.

⁷/ The case report can be found in the English law reports 1982 I Q.B. 349; [1982] 3 W.L.R. 571 (C.A.) [United Kingdom].

The proposed Canadian amendment "certifies that the object is of outstanding cultural importance or if that State" would widen the amount of material potentially subject to return, since it appears that the judgment as to "outstanding significance" would rest in the hands of the requesting State, and not in the hands of the court or competent authority of the requested State. In any event, the Canadian proposal must be seen as an alternative to (e).

UNESCO therefore supports the better drafting proposed by Canada. However the meeting could consider replacing the word "certifies" by "proves". This would mean that the requesting State would still have to prove (not merely certify) that the object was of outstanding cultural significance. This draft then retains the substance of the original draft, which is a minimum proposal on which there is likely to be agreement.

The addition of the words "violated its applicable export legislation" (Hungarian proposal Sec. Rep. FN 37) is not necessary, since the substance of Art. 5(3) is governed by the provisions of Art. 5(1) which expresses the same idea.

ARTICLE 5⁽³⁰⁾

Alternative B⁽³⁸⁾

(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⁽³⁹⁾

(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].⁽⁴⁰⁾

ARTICLE 5(3) ALTERNATIVE B

The text proposed would enable States to claim return of an object even if its export was not illegal, which is inconsistent with the largely accepted text of Article 5(1). Illegal excavation is already covered by (a)(b) and (c) (and may be covered in Ch. II, depending on the decision taken there). This proposal therefore should not be adopted.

ARTICLE 5(3) ALTERNATIVE C

This proposal would eliminate the possibility of requesting return in a case such as the Taranaki panels (carvings claimed by New Zealand discussed above) since "outstanding significance" is only to be judged in relation to the four interests mentioned.

Greek proposal (first 2 1/2 lines of ALTERNATIVE C, footnote 40)

This is the proposal with the widest possible coverage. It would involve a complete, rather than a modified, reversal of practice and law in all the art-importing countries which are not party to the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property* 1970 and also the United States.

ARTICLE 5⁽³⁰⁾

ALTERNATIVE II⁽⁴¹⁾

(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)⁽⁴²⁾

(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 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.

Proposed new paragraph (5)⁽⁴³⁾

(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 5 ALTERNATIVE II

This alternative would require a system of export certificates in order to make claims for return.

Article 6 of the 1970 UNESCO Convention provides for such a system. However, UNESCO has little information about the adoption of such systems, and a number of parties to the Convention have preferred to use a negative system i.e. cultural objects may be freely exported without a certificate unless they fall within certain categories (set out in legislation). The United States made an express reservation to this provision.

While some States are prepared to adopt a system of export certificates for every legally exportable item, a number are not. For countries with a very significant art trade, this may not be practical, since it would involve a large bureaucratic increase to deal with applications for export licences. For countries with less well resourced bureaucracies, it may not be possible to properly and promptly issue such certificate. Many States also fear that such a system would give rise to forgery and corruption.

On the other hand, the European Directive and Regulation provides for export licences for objects being taken outside the European Community, and but not for those travelling within that area. The view has been expressed that this will involve, in practice, export certificates for all cultural objects falling within the scheme, as a purchaser within the area will want to be provided with an export certificate so that it can be sure to be able to sell it to whomever it wishes. The Scheme of the Commonwealth Secretariat involved a validation certificate which could be requested where a purchaser was not certain whether export permission was granted or whether the object was a prohibited export.

A decision of principle has to be taken as to whether export certificates will be required. A compromise solution might be to allow for validation certificates.

Proposed new para. 4

This subsection is not necessary. The State of original export can in any event approach the court or competent authority in the State of location, with proof that there was not valid export certificate for its present location. If an export certificate is produced which was valid for some other country or for a limited period of time or subject to conditions which have not been met, then it will have the proof necessary to have return ordered.

Proposed new para. 5

This proposed para. is not necessary as it concerns a matter of internal law. It is up to each State to determine how the issues are settled within that jurisdiction and what level of legal protection is to be given to each party.

ARTICLE 6⁽⁴⁴⁾

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]⁽⁴⁵⁾ [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 a State other than the requesting State].

Proposal for a new paragraph (2)⁽⁴⁵⁾

[(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

[(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.]

Proposal for new paragraphs (2) to (4)⁽⁴⁷⁾

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

- (a) the object is a national treasure for another Contracting State, and
- (b) the object was removed or exported from the State of origin in violation of legislation designed to protect national treasures before leaving the sovereign territory of the State of origin.

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

ARTICLE 6

This article, which has caused much discussion, was put in for a technical legal purposes and has been much misunderstood.

In the private international law applied in most national systems (i.e. the rules concerning international transactions), courts have traditionally reserved wide powers to refuse claims on the ground of "public policy". Such a reason might be used to prevent return of cultural objects in cases clearly covered by the Convention (e.g. because "public policy" would prevent depriving a purchaser, presumed bona fide under the domestic rules of that system, of a cultural object, even though the purchaser had not met the strict rules of diligence under the UNIDROIT draft). This would clearly negate the effect of the draft.

Article 6 was designed to prevent this by stating the "only" possible reason for refusing return would be the close connection with the culture of the requested State, which must be as strong or stronger as the connection with the cultural of the requesting State.

The addition of any other exceptions clearly will weaken this effort to limit refusal to return.

ALTERNATIVE I

Art. 6 "or a State other than the requesting State".
and

both versions of new para. 2. as well as ALTERNATIVE II

These proposed amendments have several inconveniences

- (i) they weaken the obligation to return in Article 6 which was straightforward, clear and subject only to one limited exception.
- (ii) they would involve courts and competent authorities in requested States to take decisions on delicate issues, often of emotive and political import, relating to foreign States which would involve cultural evidence. This could be considered an unreasonable burden, compared to the comparatively simple decision as to illegal export from one (requesting) State party to the UNIDROIT convention. The addition of such a provision will almost certainly deter States which are likely to have many such requests from becoming party to the Convention.

Proposal for new paragraphs (2) to (4) (German delegation)

The exact purpose of this proposed amendment is not clear.

It imports into the Convention a number of factors of uncertainty such as "reasonable consideration of all circumstances" and "pointers" "manifestly irreconcilable". These would very considerably weaken the convention. The original required only 3 elements presence in the requested state, proof of factors in 5(3) and proof of illegal export.

(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 (48)

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).

The principle so far governing the draft is that illegally exported cultural objects covered by the Convention should in all cases be returned. The question of knowledge goes only to the matter of compensation. Furthermore, the provisions of para 2 would replace the carefully drafted provisions on diligence intended to replace the present protection of *bona fide* purchasers.

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]⁽⁴⁹⁾ 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]⁽⁵⁰⁾ the location [or] [and]⁽⁵¹⁾ the identity of the possessor, of the object⁽⁵²⁾ and in any case within a period of [six] [ten] [twenty] [thirty] years from the date of the export⁽⁵³⁾ of the object,⁽⁵⁴⁾ or
- (c) the export of the object in question is no longer illegal at the time at which the return is requested.

ARTICLE 7

The basic provisions of this article are settled, except for some points which will need to be dealt with at the diplomatic conference, such as the lengths of the periods concerned.

As far as the Israeli proposal is concerned, if it is accepted, it needs some redrafting to make clear that the words "cannot" do not include failure to act for some reason within the requesting State's control. e.g.,

"the time limits mentioned in this paragraph shall not apply where a State has been excluded from the right to make claims by the State in which it wishes to make a claim according to rules applicable in the latter State..."

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 law [applicable to the protection of cultural objects] of the requesting State] shall not be entitled to claim compensation.⁽⁵⁵⁾

[(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 law [applicable to the protection of cultural objects] of the requesting State [or that that fact ought to have been obvious to any reasonable acquirer].]⁽⁵⁶⁾

[(3) In cases where the possessor of a cultural object exported in breach of the law [applicable to the protection of cultural objects] 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.]⁽⁵⁷⁾

ARTICLE 8

(1) The deletion of the words in square brackets would mean that no compensation could be given, even for a purchaser which had used diligence, where an object had to be returned.

The provision for compensation here, as in respect of stolen objects, is to facilitate a major change in domestic law for many States. Where there are significant collecting and art dealing communities it will be depriving their own citizens of objects which, until acceptance of these obligations, they had every right to retain.

Two points should be borne in mind:

- (i) "knew or ought to have known" would now cover a vast number of cases, especially since the export control laws of countries have been published by UNESCO. The number of cases where compensation would be necessary should therefore be few.
- (ii) some States have constitutional prohibitions on the taking of private property which can only be met where there is provision for compensation in cases where fault cannot be proved.

The proposal of Canada and the Netherlands (footnote 55) to include a clause parallel to that in Article concerning the relevant factors to be taken into account would usefully spell out the appropriate level of care for dealers and acquirers of goods of foreign origin. This formulation would be preferable to the German proposal "or that fact ought to have been obvious to any reasonable inquirer", since that may encourage courts or competent authorities in the requested State to look at present standards of inquiry in the art trade which are manifestly inadequate to prevent illicit trade.

ARTICLE 8(2) is clearly an alternative to Article 8 (1).

Para. (3)

It is unwise to mention reimbursement of "expenses in the protection and restoring of the object". In a Canadian case, while the government authorities were considering an export ban on an Indian mask, the dealer who wished to export it arranged for its "restoration" so that the Canadian museum authorities felt that it had lost its authenticity and was not longer worth retaining. To indicate that such expenses would be reimbursed would encourage possessors to undertake work, either to prevent an object being reclaimed (as no longer worth the trouble of the claim) or to magnify a claim for compensation. This is unlikely to ensure that "restoration" is the kind which would be of the best professional standards.

ARTICLE 8.

[(4) When returning the cultural object the possessor may, [where appropriate], 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.] [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.]]⁽⁵⁸⁾

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 ownership 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.]

(5) The cost of returning the cultural object, in accordance with this article shall be borne by the requesting State.⁽⁵⁹⁾

[(6) 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.]⁽⁶⁰⁾

(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].⁽⁶¹⁾

Para. 4 (first version)

This article was designed to allow a holder to retain ownership after its return, or to transfer it to a person in the territory of the requesting State, who the State is satisfied will be a trustworthy custodian, and who will not connive at further illicit export of the object. The provision on nonexpropriation was to enable that situation to continue without interference from the State. The words "and who provides the necessary guarantees based on the approval of that State" are necessary to prevent the return of the object to the original vendor; otherwise dealers in the requesting State could offer goods subject to export ban on the understanding that they would repurchase the object from a client who had to return it. The dealer would then sell it elsewhere (probably to a country not party to the convention). It is clear that such a scheme would be no real deterrent to the speculative breach of export regulations.

Para. 4 (second version)

This proposal reverses the onus of proof which has throughout the text consistently required the holder to prove that he has used diligence, not on the claimant to prove that he knew of its illegal character (an extremely difficult thing to prove). For this reason the Canada/Netherlands proposal (FN 55 see above) is to be preferred.

para. 5 no comment

para. 6

This proposed article seems unnecessary. If a claimant wants to make some arrangement with another body to pay the compensation, in return for certain undertakings in respect of the future possession, access, insurance and conservation, this is to be regulated by private agreement between them, and does not need to be dealt with in this instrument: nothing in the text of the instrument prevents such an arrangement.

para. 7

The words between square brackets are unnecessary. It should be left to the court or competent authority of the requesting State taking decisions on particular cases, or to the national legislature implementing the Convention generally, to decide on the time scale applicable to objects being claimed in that jurisdiction.

[ARTICLE 8 bis (new)⁽⁶²⁾

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.]

ARTICLE 8 bis (new)

It is not clear what purpose this proposed article is intended to fulfil. It seems unnecessary in that it should be possible for the requesting State to bring whatever evidence it wishes before the court or competent authority in the requested State (e.g. its legislation requiring an export licence, and the lack of export licence).

ALTERNATIVE I⁽⁶⁴⁾

(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.

ALTERNATIVE II⁽⁶⁵⁾

(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.

ALTERNATIVE III⁽⁶⁶⁾

(1) A claim may be brought under this Convention by a claimant [who is a habitual resident of 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 nor 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.

ARTICLE 9

ALTERNATIVE II is an improvement on ALTERNATIVE I (the original version.

The addition of the provision of provisional measures which would allow e.g. an application for an injunction to prevent sale or export of an object for which a claim was being made, is particularly useful.

However para. 2 of ALTERNATIVE I, allowing parties to agree on another forum, could be retained.

ALTERNATIVE III

This proposal speaks of a "claimant who is a habitual resident of a Contracting State". However, the claimant under Ch. III may be the State itself.

The effect of paras. 1 and 2 of this proposal are covered by ALTERNATIVE II.

The effect of para. 3 is covered by the provisions of Article 1(a).

The effect of para. 4 is covered by either "found on the territory of another Contracting State" or by "which have been moved across an international frontier" in Art. 1 (a).

ARTICLE 9⁽⁶³⁾

ALTERNATIVE IV⁽⁶⁷⁾

(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).

ALTERNATIVE IV

Paras. 1(a) and (b) are covered by ALTERNATIVE II.

Para. 3 raises major problems in the context of the draft. All the provisions to date make the decision for the return of the objects subject to courts or competent authorities in the state of residence of the holder or of the location of the object. In this way holders of objects and their governments are assured of the intervention of a jurisdiction other than that of the claimant, or claimant's State, in deciding a matter which will deprive them of property. This is particularly important where the claimant is the government itself (as in cases of illicit export). In UNESCO's experience, it is extremely difficult for States to accept such a surrender of jurisdiction. This is especially true where they are bound by constitutional rules protecting private property.

[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 unenforceable 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.]

ARTICLES 9bis to 9quinques

These proposals would produce far-reaching changes into the law concerning the enforcement of foreign judgements. Some of these would be very controversial, e.g. a requirement that the foreign holder of an object be required to litigate in the requesting State (Art.9 (i) (c) through all stages of appeal (Art.9 bis (b)) - a rule which could work substantial hardship on a holder who may have been diligent. It is unlikely that States where holders are likely to be resident would agree to such a formulation. Art.9 quater would also require Contracting States to agree that the rights of their citizens may be governed by a law other than that which would be applied by their own courts to the resolution of property interests. As many States have a constitutional duty to observe rights of property of their citizens, it is difficult to see how such a provision could be accepted.

In sum, UNESCO takes the view that it would be preferable not to deal with enforcement of judgements in this Convention, but to leave this to the rules currently applicable under normal rules or rules already established by Conventions.

ARTICLE 11⁽⁷²⁾

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) [;

(iv) to apply its national law when this would require just compensation in the case where the possessor has title to the cultural object].⁽⁷³⁾

(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 [;

(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 Article 8(2);⁽⁷⁴⁾

(v) to require that the costs referred to in Article 8(3) be borne by other than the requesting State].⁽⁷⁵⁾

(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.

ARTICLE 11

para. (a)(i)

This was intended to allow States to apply the rule of the convention to acts of fraud or fraudulent conversion where these were not otherwise included in the concept of theft.

para. (a)(ii)

This would allow States to allow a larger time period for claims i.e. not to change their national legislation in this respect where it was more generous in allowing claims for stolen goods.

para. (a)(iii)

This para. would allow States who do not require compensation for the holder of stolen goods who has to return them to the true owner not to require compensation. The aim of the whole UNIDROIT project was to improve the protection of cultural property by ensuring its return to its owner. Compensation was considered only because depriving a possessor of an object in some legal systems would be a major change, and the reference to compensation would make the presentation of this change politically and philosophically more acceptable. **AT NO STAGE WAS IT EVER INTENDED TO SUGGEST THAT NATIONAL SYSTEMS WHICH ALREADY PROVIDED FOR RETURN OF STOLEN CULTURAL OBJECTS WITHOUT COMPENSATION TO THE POSSESSOR SHOULD CHANGE THIS RULE BY PROVIDING COMPENSATION.**

Article 4 ALTERNATIVE I para.5 (proposed by Finland) made it clear that retention of the more favourable system is mandatory. In the view of UNESCO that provision should be retained, but decision should be taken as to whether to deal with this issue in Art. 4 or Art. 11.

para. (a)(iv)

This proposal would completely negate the philosophy behind the whole project, which is to deny compensation in cases where, under present law in many legal systems, the holder is presumed to be *bona fide* and thus regarded as owner, even where he has not used diligence. The threat of return of the object, without compensation where diligence has not been used, would have the salutary effect of requiring traders and collectors to make proper enquiry. This would have an important effect generally in deterring illicit trade in cultural objects and is one of the fundamental principles of the draft which should not be put aside.

para. b(i)-(v)

All these provisions would allow States which already have provisions more generous to claimants than the minimum standards provided for in the Convention to retain those standards.

UNESCO is therefore in favour of these provisions. However, in keeping with the proposal that such provisions should be mandatory, rather than optional (it being contrary to intention to allow any State to diminish its existing more favourable regime), the Committee may wish to consider a provision which reflected this position. Such a proposal would lead to a text, similar to that proposed by Hungary (footnote 72) but

applying to all the clauses in para. 11. Such a text would be as follows:

(1) 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 the Convention notwithstanding the fact that the theft of the cultural object occurred before the entry into force of the Convention for that State;

(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 of the requesting State other than those material under Article 5(3)
- (ii) to apply the Convention notwithstanding the fact that the illegal export of the cultural object occurred before the entry into force of the Convention for that State.

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

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

- (i) where this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3 (2);
- (ii) where this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by Article 4 (i);

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

- (i) where this would permit the application of Article 5 in cases otherwise excluded by Article 7;
- (ii) where this would disallow the possessor's right to compensation contemplated by Article 8;
- (iii) where this would deny the possessor the options provided for in Article 8 (2);

- (iv) where this would require that the costs referred to in Article 8(3) be borne by other than the requesting State.

[ARTICLE 12 (new)]

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 (new)

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.]⁽⁷⁶⁾

ARTICLE 12 (new)

This article does not seem to be necessary, as it would be the result of the normal rules of international law. If delegations wish to include it, however, there is not reason why they should not.

ARTICLE 13 (new)

- (a) it is not clear how "claims" could be subject to customs duty,
- (b) agreed.

