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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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 1993

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

as revised June 1993

Introduction

The three meetings of the governmental experts held in 1991, 1992 and 1993 studied a text which had been proposed by a study group of experts after three sessions. The text has therefore been studied closely six times. The fourth session of the committee of governmental experts still has to make a decision on certain important matters of principle. What is essential at this stage is to settle on a text which can be a basis for negotiation at a diplomatic conference.

All the issues being debated at the expert level can be taken up again at the diplomatic conference - the essential thing is to provide a text for discussion: it is clearly not the final version and does not preclude further discussion but any changes and proposals will not only slow down progress towards a Convention but may prevent its emergence at all.

A compromise

It is important to recall that the draft produced by the study group responded to a serious problem recognized by all, but had to reconcile legal systems with very different principles on the acquisition of property and national interests of opposite tendency. The only possible way to achieve a solution was by compromise.

All States stand to gain from reaching an agreement, but such an agreement will only be reached if each and every one makes an effort and sacrifices some points which are important to it.

Most Continental European States, which are not at present Party to the UNESCO Convention, are being asked to make a fundamental change by returning stolen cultural property and some illicitly exported cultural objects rather than protecting the bona fide purchaser; in return they will also profit by being able to claim cultural property stolen or illegally exported from them.

Although Common Law States will be able to retain their rules on the return of cultural property (which are more generous than those in the draft), they will need to look to their rules on the time restrictions of claims. For the United Kingdom, it means a possibility of claiming important cultural objects which have been exported contrary to its export control as well as stolen objects which have been previously irrecoverable because they are in the hands of a "bona fide" purchaser.

"Exporting" States will make major gains by an easier process for recovery of stolen goods and illegally excavated objects at the price of not covering all illegally exported objects as they would like.

In adjusting these conflicting interests and varying legal approaches, the study group reached a compromise. While it is understandable that the line of compromise can be moved, it is quite clear that a failure to reach some middle point between the different views will result in the collapse of the initiative.

As against this, the benefits of the good, if not perfect, text which can be achieved have to be weighed:

the practice in the art trade whereby little information is given and few questions asked will be reversed;

illicit traffic should become, therefore, less attractive to its perpetrators;

all stolen cultural objects will be able to be recovered between Contracting States;

the limited recognition of export controls now in force between European States would be extended to those States most in need of protection for their cultural heritage.

These are advantages which should not be lightly given up, neither because of preferences for a different form of drafting, nor because the draft does not go as far in substance as a State might wish.

Contents

It is important to bear in mind that this is a convention of private law: proposals to require the establishment of administrative units or to create duties of the administration beyond those which would normally apply in the support of its courts are not appropriate in this content.

Procedure

In order to make productive use of the procedures and to reach a final text for submission to the diplomatic conference, 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 an adequate 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, nor is it 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 major decisions of principle remain to be taken. These would seem to be:

MAJOR DECISIONS OF PRINCIPLE

Whether the scheme should set up a system of export certificates (affects Arts. 2bis, 5 Alt II, 5bis, 8(1bis).

Where to place and how to express the protection of clandestinely excavated objects (Ch. II?; Ch. III?; another Chapter?).

Whether the cultural objects covered by the scheme should be defined by a general definition or an enumerative definition (Art. 2).

Whether to make any reference to third States (Art. 8(4); Art. 5 Alt I (4)).

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.

What courts or other competent authorities should have jurisdiction (Art. 9).

Whether the Convention should deal with enforcement of judgments (Arts. 9 (Alt IV 9bis) - 9quinques).

It is the view of UNESCO that since the question of export certificates will affect the document throughout, it should have first priority to be decided. Similarly, the question of clandestinely excavated objects is a major one which must be settled, as it affects the structure of the whole Convention. UNESCO therefore proposes that these two questions be dealt with first, and that once the group has taken a decision on them, there should be no going back, as the structure must be finally settled at this meeting.

1. Export certificates

It is the view of UNESCO that provisions as to export certificates which are those of public law should not appear in this draft Convention, i.e. the articles proposed as 2bis and 5bis. However, private law provisions relating to the effects of a purchaser not demanding an export certificate where it is necessary are properly part of this draft, but can be dealt with in one Article (8(1bis) (current proposals Alt 5(2) and 8(1bis)). Detailed reasoning on these articles is given at the appropriate spot in the commentary.

2. Objects derived from clandestine excavation

The study group draft had covered these in Chapter III, Art 5(3) (a) (b) and (c). However some clandestinely excavated objects would fall under Chapter II since they could be proved to have been stolen from their owner, a State (where it claims ownership of the archaeological subsoil), or of an individual (excavator or landowner or finder in other systems of law).

A proposal made to include all unlawfully excavated objects under Article 3 has destroyed the symmetry of this system. The difficulty in recovering clandestinely excavated objects is not so much the difficulty of proving ownership, as the difficulty of proving which country the object came from and when. If these facts can be proved, clandestinely excavated objects could be recovered under either Chapter II or Chapter III.

The chief difference is the stricter degree of care required under Chapter II than under Chapter III. The study group draft had the merit of allowing recovery of clandestinely excavated objects when they could be proved to be stolen subject to the stricter duty of diligence, and leaving other clandestinely excavated objects to be recovered, where no offence against ownership could be shown, according to the provisions of Chapter III.

While Chapter II applies to <u>all</u> stolen cultural objects, no clandestinely excavated object would be left outside the protections of the Convention if clandestinely excavated objects which could be proved to have been stolen are claimed under Article 5, since it would be evident that the removal of

every clandestinely excavated object had impaired the interest of the physical preservation of the context of the object (Art. 5(3a)), and the interest in the preservation of information of a scientific or historical character (Art. 5(3c)). The nature of the object itself and of its removal would likely also bring into play the interest in the preservation of the object itself (Art. 5(3a)) and the integrity of a complex object (Art. 5(3b)).

It has been suggested that a separate Chapter could be devised to deal only with clandestinely excavated objects. UNESCO does not favour this proposal because it would create confusion. There are many objects which are clandestinely excavated which may not be known to be so: e.g. whether an object was part of a grave-goods, part of a monumental complex or a freestanding object made for commercial purposes is in many cases not clear.

For the same reason it may be difficult to require a higher duty of care of a purchaser in respect of clandestinely excavated objects which have not been stolen. While a purchaser can clearly be required to investigate title, it may be considered unreasonable by some States for a purchaser to be required also to verify how an object entered the market, when this may not even be clear to experts.

After careful consideration of the alternatives, UNESCO proposes that the draft Convention should retain the system of the study group. However, it is absolutely essential, in that case, that the periods of limitation (Arts. 3(3) and 7(2)) should be the same so that a decision whether to proceed for clandestinely excavated objects under Ch. II or Ch. III will be made purely on the basis of whether they can be proven to be stolen or not, and not on the basis of the timeliness of the claim for their return.

NOTE

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 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 as to illegally exported cultural objects, would render the obligations of States Parties clearer and respond to the sensibilities of States who felt that the 1970 Convention was not sufficiently precise;

(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 Reichelt.[1] These studies

(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.

served as preparatory material for the work of the study group. 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 <u>all</u> stolen objects (Art. 3) of 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 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 78 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 cultural 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.

COMMENTARY ARTICLE BY ARTICLE

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

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

ARTICLE 1

This Convention applies to claims of an international character for:

(a) the restitution of stolen cultural objects removed from the territory of a State;

(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].[2]

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(1) At its second session, the committee of governmental experts decided by 25 votes to none that the principle that the future Convention should deal only with international situations should be reflected both in the title and in Article 1 (Study LXX - Doc. 30, para. 23). The proposed title of the draft Convention, which was suggested by the drafting committee at the committee's second session (Study LXX - Doc. 29, p. 48), may need to be revised once the precise international connecting factors for the application of the future Convention have been defined.

(2) The committee has yet to take a final decision on the retention of the square-bracketed language.

ARTICLE 1

The present version of Article 1 is acceptable (with or without the phrase in square brackets) as a draft to be put to a diplomatic conference.

Comment

"claims of an international character"

It is not clear that this would allow a claim in the situation of *Winkworth v. Christie's Ltd.*[(a)] where the cultural objects of an English collector were stolen from him and sold in Italy to an Italian who then offered them for sale in Christies, London. Winkworth's claim for recovery was unsuccessful. However, the present formulation would allow a judge some flexibility to hold such a case covered.

General comment

The study group had not suggested that the draft Convention be limited to international situations. Although the adoption of this limitation was done by a clear vote of the governmental experts, it has several disadvantages;

(a) it does away with the possibility of having uniform law on transactions concerning cultural objects (thus providing purchasers and dealers with two standards of diligence, depending on whether the transaction is international or not) and

(b) it creates the problem of defining what is an international transaction.

While UNESCO would not suggest reopening this question at the committee of experts, this may be a matter to be considered again at the diplomatic conference.

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.

(a) The case can be found in the English law reports [1980] 1Ch. 496.

It therefore seems that a State, a member of the European Community, which does not take ownership automatically of all undiscovered archaeological objects and cannot therefore regard them as "stolen" from it and 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. An action for theft may be available to the owner, e.g. a landowner on whose property 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 Community to another and not to objects which have been illegally removed from countries outside that community.

ARTICLE 2[3]

ALTERNATIVE I

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

(3) The two alternatives for Article 2, proposed by the drafting committee at the third session of the committee of governmental experts, reflect the views of those delegations which preferred a general definition (Alternative I) and those which favoured a more detailed definition which would in part track the language of Article 1 (a) to (k) of the 1970 Unesco Convention (Alternative II). The use of square brackets in each alternative indicates differences of opinion within the committee which have yet to be resolved. For the discussions of the committee on this article at its third session, see Study LXX - Doc. 39, paras. 25 to 38.

ARTICLE 2

The study group used a general definition which would be restricted in Chapter III in its application to illegally exported 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.

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.

The two alternative definitions now proposed both cover cultural objects adequately. The first is a general definition, of the type proposed by the study group; the second is based on that in the 1970 UNESCO Convention.

To some extent the difference between these formulations is a difference of traditions of legal drafting. Whereas some systems are content to leave to their judges the application of general clauses such as that in Alternative I, others prefer more detailed regulation as in Alternative II. If the general (Alt I) style definition is adopted, it could be explicitly interpreted in implementing legislation in States which feel that their legal system would have difficulty in adjusting to this style of definition.

ALTERNATIVE I

The addition of the word [outstanding] would limit the application of Ch. II on stolen goods.

This would negate the most important principle of the Convention, which 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.

Apart from not changing the present practice which facilitates illicit traffic, this addition 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.

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 II

For the purposes 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:

(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.

ALTERNATIVE II

The effect of this proposal also comes close 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.

The combination of a wide definition with the provision in Art. 3(1) that all such stolen objects are to be returned is probably the single most important step which could be taken against the illicit traffic in cultural objects.

[ARTICLE 2 bis

Any Contracting State may make provision in its legal system for an export certificate in respect of its own cultural objects, the model of which is annexed to this Convention.](4)

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

ARTICLE 3

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

(2) For the purposes of this Convention, an object which has been unlawfully excavated shall be deemed to have been stolen.

(3) Any claim for restitution shall be brought within a period of [three] [five](5) *years from the time when the claimant knew [or ought reasonably to have known]*(6) *the location [or], [and]*(7) *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.*

(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State [shall not be subject to prescription] [shall be brought within a time limit of [75] years.(8)

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(4) This provision was prepared at the third session of the committee by a working group which was set up with a view to considering a proposal for the establishment of a certificate to accompany cultural objects, in the absence of which the sale, purchase, import and/or export of a cultural object would be prohibited by Contracting States (Study LXX - Doc. 38, Misc. 7 and Study LXX - Doc. 39, para. 39). For lack of time the committee deferred until its next session discussion on the substance of the proposals of the working group.

(5) The committee agreed at its second session that the precise limitation periods should be determined by the diplomatic Conference (Study LXX - Doc. 30, para. 57).

(6) At the third session of the committee, 15 delegations supported the retention of this language, 14 its deletion and eleven abstained (Study LXX - Doc. 39, paras. 53 - 55).

(7) A vote at the third session of the committee indicated that 24 delegations favoured the retention of the word "and" and 13 the word "or", while six delegations abstained (Study LXX - Doc. 39, para. 65).

(8) At the third session of the committee, 27 delegations voted in favour of the principle expressed in the new paragraph 4, 14 against and nine abstained, any decision on the language in square brackets being deferred until the fourth session (Study LXX - Doc. 39, para. 58).

ARTICLE 2 bis

This draft article was linked with a proposal that in the absence of any such certificate the sale, purchase, import and/or export of a cultural object would be prohibited by Contracting States.

It does not seem appropriate that this provision, which is essentially one of public law, should appear in this draft Convention, which is essentially one of private law. In any event, the article has no substantive effect, since it is facilitative only. It is clear that any State may at present institute such a system if it wishes. The importance of such a system for private law depends on the effect the availability of such a system has for the liability of a purchaser.

UNESCO recommends that this draft article be omitted, but that effect be given to such systems of export control in Article 8 (1bis).

CHAPTER II

A proposal was made by one delegation either to delete Chapter II or to allow reservations to it:

UNESCO strongly opposes deletion or the possibility of reservation.

The raison d'être of the whole UNESCO/Unidroit exercise was indeed to make changes to the private law of many States. Indeed, if States were not prepared to change their law, there would be no point in having an Institute for the Unification of Private Law. For many years, experts in cultural heritage law from different legal systems have emphasized that the only way substantially to hinder the illicit trade in cultural property is to ensure 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 (Chatelain[b], Rodotà[c], O'Keefe and Prott[d], Reichelt[e], Fraoua[f].

(b) Chatelain, J. Means of Combatting the Theft of an Illegal Traffic in Works of Art in the Nine Countries of the EEC (Commission of the European Communities, Doc. XII/757/76-E (1976)) 114.

(c) Rodotà, S. "Explanatory Memorandum" in Council of Europe, The Art Trade (1988) 8.

(d) 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 Tráfico Ilícito de bienes culturales pp. 53-57; Law and the Cultural Heritage: Vol. III - Movement (Butterworths, London) 1989, 648.

(e) 1988, 39, article mentioned above No. 1.

(f) Le trafic illicite des biens culturels et leur restitution (Editions universitaires, Fribourg) 1985, 179.

UNESCO therefore proposes the addition of a clause preventing reservations to Chapter II (see Article 14 proposed in this Commentary).

ARTICLE 3(1)

The new version has the clarity which befits a statement of principle. It should be noted in general that the draft Convention is to state principles: these will have to be implemented by detailed legislation in each jurisdiction in accordance with the principles of that legal system.

The addition of qualifying phrases in order to make the provision more precise, created, in this as in many other provisions of the Convention, complications which are removed if the more general principle is left unadorned. The intention can be clarified in a commentary; the mechanics of its operation will be legislated by each State.

ARTICLE 3(2)

See discussion of the problem of clandestinely excavated objects in the introduction to this commentary. 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.

The proposal to add the words "if it is proven to have been illegally excavated and to have been owned by a person or a State" (proposal of U.S. delegation, Study LXX - Doc. 38) does not improve matters. Any tribunal would have to be satisfied, if this provision is to be applied, that the object has, in fact, been clandestinely excavated.

Unless there is a State declaration that the archaeological substratum is "*res nullius*" (not known among any of the legislations on the subject) or is not determined (contrary to the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations 1956 which provides (Art. 5(e)) that the legal status of the archaeological sub-soil should be defined), then clearly the object must have been owned by some juridical entity (person or State).

It is not clear, therefore, what proof of ownership would add to the claim, nor why it should be necessary.

ARTICLE 3(3)

[or ought reasonably to have known]

These words make the application of the provision somewhat easier, since it is very difficult to prove at what point and whether a claimant had knowledge. This phrase would leave it to the tribunal in the requested country to make a reasonable finding as to the publicity or notoriety of

the acquisition and would need, of course, to take account of the presence of the original owner in another country.

If this limitation is not included, it is likely that judges in many countries will in any event apply their general rules concerning delay on the part of the claimant. There may, therefore, be no great change in substance if it is deleted.

[or] [and]

It seems reasonable for the claimant to take action where he has either item of information, provided, of course, there is an appropriate jurisdiction in which to sue. The possessor could be sued if he or she is in a country which is a Contracting State; so could the person in physical possession of the object (even if that person is not the bona fide acquirer but is, e.g. a bailee (bank, insurance company, exhibiting museum etc.)). However, whether both these avenues are open depends on decisions to be taken in respect of Article 9.

The two views on these articles might be described as follows:

One group of national experts would like to delete "ought reasonably to have known" and let time run from the date at which the claimant knew both the location of the object and the identity of the possessor (in favour of claimants).

The other group would prefer inclusion of that phrase and time to run from the date on which the claimant knew either the location of the object or the identity of the possessor (in favour of acquirers).

A suitable compromise might therefore seem to be to accept the phrase "ought reasonably to have known" but to require knowledge of both elements.

ARTICLE 3(4)

If this article is adopted, it will be very important for States to define what they regard as "public collections" for the purposes of the Convention (this may of course be different to what they regard as public collections for their own purposes).

ARTICLE 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled at the time of restitution to payment by the claimant of fair and reasonable compensation provided that the possessor [did not know] [neither knew nor ought reasonably to have known](9) *that the object was stolen and can prove that it exercised due diligence when acquiring the object.*

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

(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].(10)

[(4) In the absence of the export certificate referred to in Article 2bis duly issued by the requesting State, the bad faith of the possessor of the cultural object is conclusively presumed.](11)

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(9) A final decision has yet to be taken by the committee on the retention of the language in square brackets.

(10) The language in square brackets is based on a proposal submitted by the United States Delegation at the second session of the committee (Study LXX - Doc. 29, p. 19).

(11) See note (4) above.

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. 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 enables such countries (e.g. a number of Common Law jurisdictions) to maintain their existing rules.

While owners and States which have major thefts from their territory may regard this as unfair, the number of cases where compensation should be necessary should be very 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.).

ARTICLE 4(2)

In order to meet the difficulties of legal systems which would have difficulty in providing compensation to the acquirer of a stolen object, it would be helpful to make even clearer the degree of diligence necessary. In this formulation, the use of the word "including" is important, as it would allow the tribunal to take account of other relevant circumstances:

> 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 circumstances 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.

ARTICLE 4(3)

Questions concerning the application of the rule in point of time have in practice traditionally been decided in private international law by judges[g]. The words in [ ] would seem to be unnecessary and the rule suggested an appropriate one for judicial decision.

[ARTICLE 4(4)]

A "conclusive presumption" is a contradiction in terms.

This provision does not seem appropriate in Chapter II which deals with theft and not with illicit export. Some countries allow the export of certain cultural objects without a licence, even though others are subject to export certification. An object may indeed have been lawfully exported by its owner. Lack of an export certificate has therefore no evidentiary quality in respect of the theft of an object.

(g) See Lalive, P. "Note on Koerfer v. Goldschmidt" (1969-1970) Schweizerisches Jahrbuch für internationales Recht 315).

CHAPTER III - RETURN OF ILLEGALLY [EXPORTED][12] CULTURAL OBJECTS

ARTICLE 5[13]

ALTERNATIVE I

(1) Where 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],[14] that State may request the court or other competent authority of a State acting under Article 9 (the State addressed) to order the return of the object.

(2) Any request made under the preceding paragraph shall contain [the particulars necessary to] [or be accompanied by such information of a factual or legal nature as may] assist the court or other competent authority of the State addressed [to determine whether the requirements of paragraphs 1 to 3 have been met].[15]

(3) The court or other competent authority of the State addressed shall order the return of the cultural object if the requesting State [establishes] [proves] that the removal of the object from its territory [significantly][16] impairs one or more of the following interests:

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(12) At the third session of the committee, the drafting committee placed the word "exported" in the title of Chapter III between square brackets in view of the decision taken at the second session of the committee of experts to replace the word "exported" by "removed" in the English version throughout the whole of Chapter III (Study LXX - Doc. 39, para. 84).

(13) The principal difference between Alternatives I and II is to be found in the inclusion in the latter of paragraph 2 which does not appear in Alternative I. On an indicative vote at the third session of the committee, 18 delegations supported the idea reflected in paragraph 2 of Alternative II while 16 voted against and seven abstained (Study LXX - Doc. 39, para. 125).

(14) See note (2) above and Study LXX - Doc. 39, paras. 86-88 and 118-120.

(15) The committee decided at its third session to maintain this paragraph for the time being but to defer further discussion on it until its fourth session without this being understood as a formal approval of the text proposed by the working group which had drawn up a first version of the provision that had then been amended by the drafting committee (Study LXX - Doc. 38, Misc. 8 Corr. and Study LXX - Doc. 39, para. 121).

(16) Although the committee at its third session rejected on an indicative vote the principle of the automatic return of illegally exported cultural objects by 20 votes to 14 with eight abstentions, decisions on the square-bracketed language were deferred until its fourth session (Study LXX - Doc. 39, paras. 111, 122 and 123).

(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.

[(4) The request may also be made, in conformity with paragraphs (2) and (3) of this article, by a Contracting State from whose territory a cultural object was initially legally exported (but was subject to temporal limitations and/or to limitations as to the territory of destination) when, following one or more successive exports not contemplated by the law of the State of origin, or by the export authorisation issued by that State or by an international agreement, whether multilateral or bilateral, to which both States concerned are Parties, the same effect is produced as would have been by the illegal export of the object to another Contracting State or by an infringement of cultural interests protected by the conditions which would have attached to the initial permission to export the object.](17)

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(17) The committee agreed at its third session to maintain in square brackets this provision which had been submitted by the Italian delegation (Study LXX - Doc. 38, Misc. 16), and to resume consideration of it at its fourth session (Study LXX - Doc. 39, para. 124 and paras. 113 to 116).

CHAPTER III

This chapter, on illicitly exported cultural objects, complements Ch. II on stolen cultural objects.

There is no doubt, for many States, that the fact that 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. Prior to the adoption of the European Directive and Regulation on the matter, this was the 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 changed that position. All European States are bound to return to other Member States a cultural object 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).

The adoption of this chapter would therefore greatly 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 other proposals, such as that of the U.S. delegation proposed at the 3rd session "contrary to a legislative provision prohibiting the export of cultural property because of its cultural significance", that proposed as a compromise (para. 87 of Unidroit report on 3rd session) "contrary to its law applicable to the protection of cultural objects and to the disposal of property rights therein", or "contrary to the mandatory rules of law of the State in question".

All these proposals complicate the text: if a compromise is necessary, the phrase "contrary to its law applicable to cultural objects" could be considered. The specific reference to "disposal of property rights" or "mandatory rules" seems too narrow - e.g. rules on exchanges and loans by museums would seem to be excluded, and these are surely relevant.

(2) no comment

(3) The study group considered very seriously the areas where there was the most convincing case for international cooperation. 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 historical 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*[(h)], 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).

UNESCO therefore proposes, in order to ensure grammatical correctness, a redraft of Article 5(3) as follows:

> (3) The court or other competent authority of the State addressed shall order the return of the cultural object if the requesting State prove that the object is of outstanding cultural importance for the requesting State or that its removal significantly impairs one or more of the following interests:
> (a) - (d) *unchanged*

The addition of the words "if that State proves that the object was removed from its territory contrary to its law" is not necessary, since the substance of Art. 5(3) is governed by the provisions of Art. 5(1) which expresses the same idea.

(h) 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].

[ARTICLE 5(4)]

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 no 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.

ALTERNATIVE II

(1) Where 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], that State may request the court or other competent authority of a State acting under Article 9 (the State addressed) to order the return of the object.

(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 request made 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) The court or other competent authority of the State addressed shall order the return of the cultural object if the requesting State [establishes] [proves] that the removal of the object from its territory [significantly] impairs one or more of the following interests:

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

(b) the integrity of a complex object,

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

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

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

ARTICLE 5 - ALTERNATIVE II

The articles are in substance the same as ALTERNATIVE I, except for 5(2).

Art. 5(2) is a provision of public law. It would require the imposition of import controls. It would not seem necessary here and is out of place in a private law instrument.

[ARTICLE 5 bis

In the absence of the export certificate referred to in Article 2 bis duly issued by the requesting State, the cultural object is conclusively presumed to have been illegally exported and must automatically be returned.](18)

ARTICLE 6

The return of the cultural object may be refused [only] where [:

(a) the return would significantly impair the physical preservation of the object; or

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

(c)] the cultural object is of outstanding cultural importance for the State addressed and the return would be manifestly contrary to the fundamental principles on the protection of the cultural heritage of that State.(19)

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(18) See note (4) above.

(19) At its third session the committee decided to retain Article 6 by 22 votes to 15, with five abstentions (Study LXX - Doc. 39, para. 142). In the absence however of any real discussion on sub-paragraphs (a) and (b), these were retained in the text in square brackets (Study LXX - Doc. 39, para. 143).

ARTICLE 5 bis

This is a provision of private law which is properly found in the Convention. However, if the public law provisions (Arts. 2bis, 4(4) and Alt 5(2) are omitted, the article would need to be rephrased. Such a rephrasing could run as follows:

> Where a State Party to this Convention has instituted a system of export certificates, the absence of an export certificate for an object for which it is required shall put the purchaser on notice that the object has been unlawfully exported.

It should be noted that this provision would only have effect where

- the requesting State has a system of export controls
- it can prove that the object
  - came from the requesting State
  - after the entry into force of the Convention
  - that the exportation of the object required a certificate under its legislation, and
  - no export certificate can be produced by the acquirer.

This provision would more logically appear in Article 8 1bis, since it is relevant to illicit export and not to theft.

ARTICLE 6

This article, which has caused much discussion, was put in for a technical legal purpose 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. All sorts of other grounds of "public policy" might be adduced by judges - such as "closeness to the culture of the requested State", "better care" in the requested State, some historical link though remote of the object with the requested State, disapproval of the cultural policy of the requesting State and so on.

Article 6 was designed to prevent this by stating (in its original form) that 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 culture of the requesting State.

The addition of other exceptions clearly weakens this effort to limit refusal to return.

The wisdom of Article 6(a) is doubtful. It would seem invidious for a judge to suggest that a country which had gone to the trouble of making a claim for repatriation would not adequately preserve the object.

Subsections (b) and (c) seem acceptable.

ARTICLE 7

(1) 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 when the object is less than 50 years old; or

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

(2) Any request for the return of the object shall be made within a period of [three] [five] years from the time when the requesting State knew [or ought reasonably to have known] the location [, or] [and] the identity of the possessor, of the object and in any case within a period of [six] [ten] [twenty] [thirty] years from the date of the export of the object.(20)

(20) For the square-bracketed language, see notes (5), (6) and (7) above in relation to Article 3, paragraph 3. It should also be recalled that, at the third session of the committee of governmental experts, the drafting committee suggested that paragraph 2 of Article 7 might be better placed elsewhere, one possibility being the introduction of a new Article 7bis so as to track the structure of Chapter II, that is to say to place it before the provision concerning compensation (Study LXX - Doc. 39, para. 157).

ARTICLE 7

1(a)

The phrase "or when the object is less than 50 years old" was devised to cover the case of ethnographic objects. However it does not seem sufficient for this purpose. Where objects of ritual or worship are concerned which are removed from a tribal community, which, usually being of organic materials, are often less than 50 years old, contrary to the wishes of that community, why should it be unable to recover? It is not always easy to prove that the removal from such a community was "theft" but this is a kind of illicit trade which may have very severe repercussions on not only the cultural life, but even the cohesion, of the society concerned. Such objects are often in high demand for the illicit trade because "tribal art" raises high prices on the international market. An example is provided by the case of the Afo-a-Kom, a ritual figure of supreme importance, said to have embodied the spirit of the Kom (Cameroon). Elsewhere in Asia and the Pacific area there are important carvings in traditional style representing spirits. Ritual objects such as masks which in traditional communities (as among Native Americans) are often replaced, and the carver may even be known, but these objects are made for the community and seen as belonging to it.

UNESCO therefore proposes the following amendment:

(1) 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 when the object is less than 50 years old except where the object was made for the use of a traditional community by a member of that community; or

1(b) no comment

ARTICLE 7(2)

This raises exactly the same issues as the parallel provision in Chapter II.

[or ought reasonably to have known]

These words make the application of the provision somewhat easier, since it is very difficult to prove at what point and whether a claimant had knowledge. This phrase would leave it to the tribunal in the requested country to make a reasonable finding as to the publicity or notoriety of the acquisition and would need, of course, to take account of the presence of the original owner in another country.

If this limitation is not included, it is likely that judges in many countries will in any event apply their general rules concerning delay on the part of the claimant. There may, therefore, be no great change in substance if it is deleted.

[or] [and]

It seems reasonable for the claimant to take action where he has either item of information, provided, of course, there is an appropriate jurisdiction in which to sue. The possessor could be sued if he or she is in a country which is a Contracting State; so could the person in physical possession of the object (even if that person is not the bona fide acquirer but is, e.g. a bailee (bank, insurance company, exhibiting museum etc.)). However, whether both these avenues are open depends on decisions to be taken in respect of Article 9.

The two views on these articles might be described as follows:

One group of national experts would like to delete "ought reasonably to have known" and let time run from the date at which the claimant knew both the location of the object and the identity of the possessor (in favour of claimants).

The other group would prefer inclusion of that phrase and time to run from the date on which the claimant knew either the location of the object or the identity of the possessor (in favour of acquirers).

A suitable compromise might therefore seem to be to accept the phrase "ought reasonably to have known" but to require knowledge of both elements.

ARTICLE 8

(1) The possessor of a cultural object exported from the territory of a Contracting State (the requesting State) contrary to the law [applicable to the protection of cultural objects] of the requesting State shall be entitled at the time of the return of the object, to payment by the requesting State of fair and reasonable compensation, provided that the possessor [did not know] [neither knew nor ought to have known] at the time of acquisition that the object [would be, or] had been [,] unlawfully exported.(21)

[(1bis) In the absence of the export certificate referred to in Article 2bis duly issued by the requesting State, the bad faith of the possessor of the cultural object is conclusively presumed.](22)

(21) For the first square-bracketed language, see note (2) while as regards the words "[would be, or] had been [,]" it was agreed by the committee that further consideration needed to be given to the temporal factor.

(22) See note (4).

ARTICLE 8(1)

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.

ARTICLE 8 (1bis)

This would appear the appropriate place for a mention of export certificates. UNESCO proposes the following article to be substituted for that suggested (since "bad faith" has not been mentioned elsewhere in the draft Convention)

> Where a State Party to this Convention has instituted a system of export certificates, the absence of an export certificate for an object for which it is required shall put the purchaser on notice that the object has been unlawfully exported.

(2) Instead of requiring compensation, and in agreement with the requesting State, the possessor may, when returning the cultural object to that State, decide:

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees.

(3) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.

[(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.] (23)

(5) 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]. (24)

[ARTICLE 8 bis

The court or other competent authority of the State addressed, in ascertaining whether there has been an illicit removal of a cultural object in the meaning of Article 5, may request that the requesting State obtain from the court or other competent authority of the requesting State a decision or other determination that the removal of the object was illicit under Article 5.] (25)

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(23) This proposal of the Italian delegation, submitted in Study LXX - Doc. 29, p. 81, was submitted in square brackets pending further discussion, although an analogous proposal made in connection with Article 4 was rejected (Study LXX - Doc. 39, paras. 82 and 178).

(24) For the analogous wording in Article 3, paragraph 3, see note (10) above.

(25) This text was submitted to the committee at its second session by the Finnish delegation (Study LXX - Doc. 29, p. 72). Lack of time did not permit its consideration by the committee at its third session.

ARTICLE 8(2) provides an alternative to compensation under Article 8 (1).

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 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.

ARTICLE 8(3)

no comment

ARTICLE 8(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 understandings 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.

ARTICLE 8(5)

The addition of the words in brackets seems 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

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).

CHAPTER IV - CLAIMS AND ACTIONS

ARTICLE 9[26]

ALTERNATIVE I[27]

(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[28]

(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.

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(26) Although the committee proceeded at its second session to discussion of Article 9, no votes were taken on the various proposals made which indicate widely differing approaches (cf. Study LXX - Doc. 30, paras. 178-191). For these reasons the Secretariat has reproduced the text of Article 9 as proposed by the study group as well as three other alternatives submitted in writing to the committee.

(27) Alternative I is the text proposed by the study group.

(28) Alternative II was submitted by the Secretary-General of the Hague Conference on Private International Law and the delegation of the Netherlands (Study LXX - Doc. 29, p. 68). Paragraph 2 of the proposal also seeks to meet a concern expressed by the Chinese delegation in Study LXX - Doc. 24, p. 5 and the Egyptian delegation in Study LXX - Doc. 29, p. 71.

CHAPTER IV

ARTICLE 9

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

The addition of the provision on 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[29]

(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.

ALTERNATIVE IV[30]

(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).

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(29) Alternative III reflects a proposal by the delegation of the United States already submitted to the committee at its first session and reproduced in Study LXX - Doc. 29, p. 79.

(30) Alternative IV contains a proposal by the Greek delegation which deals not only with the question of jurisdiction but also with enforcement of judgments (cf. Study LXX - Doc. 29, pp. 64-65).

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 effects 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) in so far as it concerns a non-international transaction. If it should relate to an international transaction, why should this exception exist? - why should, for example, an English auction house acting on behalf of an Italian vendor, be able to reject the claim of the original owner, whose property had been stolen and transferred in Italy whereas a person of any other nationality could succeed in such a claim?

Para. 4 does not seem necessary, nor, indeed, to have any effect, since it could surely not be held, if the object has not been moved, that the claimant was suing in respect of "an international transaction." The change from formulae such as "found on the territory of another Contracting State" or by "which have been moved across an international frontier" in Art. 1 (a) to "claims of an international character" may be responsible for this concern. If so, one should consider reformulating Art. 1 rather than accepting an additional para. here.

ALTERNATIVE IV

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

Para. 1(c) 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 all 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 judgments if Alt IV(c) were adopted. Some of these would be very controversial, e.g. a requirement that the foreign holder of an object be required by the claimant to litigate in the requesting State (Art. 9(1) (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. 9ter departs substantially from the rules limiting refusal of return (Art. 6). It should not be open to the returning State to take account of the effect of return, but only that of removal.

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.

Art. 9quinques would, in combination with 1(c) of this Alternative, mean that a possessor may have a judgment against him in a foreign court, affecting property rights in his own country, which would not be subject to appeal although enforced by his own courts. 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 judgments in this Convention, but to leave this to the rules currently applicable under normal rules or rules already established by Conventions.

In any event, if consideration is to be given to Articles 9bis-9quinques, Articles 1 (c) and 9quinques of Alt IV should be omitted.

As a drafting point it should be noted that "State of origin" has been avoided because of its ambiguity, which is reflected in its use in Articles 9bis 1(b) and 9bis 1(c) and 9quinques.

CHAPTER V - FINAL PROVISIONS

ARTICLE 10[31]

(1) This Convention shall apply only when a cultural object has been stolen or removed from the territory of a Contracting State contrary to its law [applicable to the protection of cultural objects], after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim is brought for the restitution or return of such an object.[32]

[(2) The provisions contained in the preceding paragraph are without prejudice to the right of a State to address a claim to another State outside the framework of this Convention, in respect of an object stolen or illegally exported before the entry into force of this Convention.][33]

[(3) This does not in any way preclude any future extension of the Convention so as to apply to objects stolen or illegally removed from the territory of a Contracting State by excavation or contrary to its legislation, before the entry of the Convention into force.][34]

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(31) As had been the case with Article 9, no text of Article 10 was submitted by the drafting committee to the committee's second session (for discussion on Article 10, cf. Study LXX - Doc. 30, paras. 192-199). The Secretariat has in consequence retained paragraph 1 of the study group text, amended to take account of the replacement of the words "export legislation" throughout the draft.

(32) In accordance with a United States proposal (cf. Study LXX - Doc. 22, p. 19) the Convention would only apply to claims in respect of a cultural object stolen or illegally exported after both Contracting States concerned had become Parties to the Convention.

(33) Nigerian proposal contained in Study LXX - Doc. 29, p. 70.

(34) Greek proposal contained in Study LXX - Doc. 29, p. 69.

CHAPTER V - FINAL PROVISIONS

ARTICLE 10

Paras. 2 and 3 as proposed are not necessary, as they would in any event apply according to the normal rules of international law. However, if delegations feel that they are desirable for presentational reasons, they could be included.

ARTICLE 11[35]

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) [;

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(35) The language of Article 11 reflects the text approved by the study group together with a number of additional clauses proposed by various delegations which have been included in square brackets as they were not the subject of detailed discussion by the committee at its second session (cf. Study LXX - Doc. 30, paras. 200-207). There was however general agreement within the committee that provision should be made in the final clauses for a system of notification at the time of ratification, or subsequent thereto, so as to indicate the options chosen by a State in application of Article 11 (Study LXX - Doc. 30, para. 200).
A complete redraft of Article 11 was proposed by the Hungarian delegation (Study LXX - Doc. 29, p. 39) whereby paragraph 1 would be retained, subject to the deletion of sub-paragraphs (a)(ii) and (b)(ii), which would be included in a new paragraph 2 worded as follows:

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

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

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

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 which 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.

A proposal in respect of Article 4 made by the delegation of Finland at the second session would have made it clear that retention of the more favourable system is mandatory. In the view of UNESCO that provision should be retained, but a decision should be taken whether to deal with this issue in Art. 4 or Art. 11.

(iv) to apply its national law when this would require just compensation in the case where the possessor has title to the cultural object].(36)

(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);(37)

(v) to require that the costs referred to in Article 8(3) be borne by other than the requesting State].(38)

(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 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 State concerned.

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(36) Proposal by the United States delegation contained in Study LXX - Doc. 29, p. 62.

(37) Clauses (iii) and (iv) were proposed by the Australian delegation in Study LXX - Doc. 29, p. 26.

(38) Proposal by the delegations of Australia, Canada and the Netherlands in Study LXX - Doc. 29, p. 25, Article 11 (b)(iii).

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 reflects this position. Such a proposal would lead to a text which could be applied to all the clauses in Article 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(1);

(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)

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 no reason why they should not.

[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.](39)

ARTICLE 14

No reservations shall be permitted to Chapter II [nor to Chapter III] of this Convention.

(39) These articles were proposed by the Israeli delegation at the second session of the committee (Study LXX - Doc. 29, p. 76). For want of time the committee deferred consideration of them until its third session (Study LXX - Doc. 30, paras. 208-209).

ARTICLE 13(new)

(a) it is not clear how "claims" could be subject to customs duty

(b) agreed.

ARTICLE 14 proposed

This is a new proposal by UNESCO to ensure that the most important provisions of the Convention are not ignored by States which apparently accept the Convention. It is the view of UNESCO that the provisions of Chapter II are essential to make progress against illicit traffic in cultural objects and that the provisions of Chapter III are part of the compromise document which would assist its success.