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COMMITTEE OF GOVERNMENTAL EXPERTS  
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

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

(Canada, France)

Rome, September 1993

## CANADA

The Comments of the Government of Canada refer to Misc. 21, Misc. 21 Add and Misc. 21 Add 2, prepared by the Drafting Committee during the third session of the Committee of governmental experts on the International Protection of Cultural Property.

### Article 2

Given that the Drafting Committee did not have the opportunity to take this formulation into account Canada reiterates, with minor variations, the comments and definitions proposed prior to the 3<sup>rd</sup> session:

"Having regard to the different points of view concerning the definition of cultural property, and the need for a definition which will apply to stolen cultural property as well as to that which is illegally exported, Canada would propose that Article 2 provide as follows:

#### Article 2

For the purposes of this Convention, "cultural property" means

- a) with respect to stolen property, any material object of significance by reason of its cultural value, including its archaeological, artistic, historic, ritual, scientific or spiritual value; and
- b) with respect to illegally exported property, any material object designated through the legislation of a Contracting State as being of significance to that State by reason of its cultural value, including its archaeological, artistic, historic, ritual, scientific or spiritual value."

### Article 2 bis

Canada questions the need for the addition to the Convention of Article 2 bis, as it would in any event be open to any State to institute a system of export permits.

### Article 4(4)

Canada questions the need for the addition to the Convention of Article 4(4), as it would in any event be open to a third party to enter into such an arrangement.

Article 4(5)

Given that Chapter II deals only with stolen property, some of which might not be subject to export control, Canada would not be in favour of adding this paragraph.

Article 5(4)

This paragraph appears to address a situation in which, for example, an object is legally exported from State A - perhaps under a temporary export permit for the purpose of exhibiting the object in State B. The object is then exported from State B to State C in defiance of the original export permit. The export from State B is not illegal, as the object is not State B's cultural property; thus B cannot bring a claim against State C for the return of the object. Nor can State A bring a claim against State C as the object was not illegally exported from State A; the illegality is in not returning the object to State A, in defiance of the temporary export permit.

Canada agrees with the principle behind the proposed Article 5(4). However, a simpler way of resolving this problem might be to alter the wording of Article 5(1) to provide as follows:

"(1) When a cultural object has been removed from or is otherwise outside the territory of a Contracting State (the requesting State) contrary to its Law ..".

It would be open to States to provide in their domestic legislation that it is illegal to breach the provisions of an export permit. Thus the object would be outside the territory of the requesting State contrary to its Law and the requesting State could request its return.

Article 6

The purpose of this Convention is to provide for the return of cultural objects to their State of origin; Article 6 gives an opening to a State to refuse the return of cultural objects.

It has been asserted that the purpose of Article 6 is to limit the "public policy" reasons for which a State may refuse to return an object, and for this reason it is important that the word only be a part of whichever formulation is chosen. However, Canada questions whether Article 6 would indeed have the effect of limiting "public policy" refusals to return objects to those given in Article 6, and would prefer that the Article be deleted.

Article 7(2)

Canada would be in favour of having identical limitation periods for stolen and illegally exported objects, and would propose that the limitation period be addressed in Chapter IV - Claims and Actions.

Article 8

Given that the Drafting Committee did not have the opportunity to take this formulation into account, Canada reiterates with minor variations the comment and proposal made prior to the 3<sup>rd</sup> session with respect to Article 8:

"Canada would propose that Article 8 be reformulated to make it more consistent with Article 4. Canada therefore proposes that Articles 8(1) and (2) provide as follows:

Article 8

1) The possessor of cultural property that has been illegally exported who is required to return it shall be entitled at the time of return to payment of fair and reasonable compensation, provided that the possessor prove that it exercised due diligence when acquiring the object.

2) In determining whether the possessor exercised due diligence regard shall be had to the circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted the relevant legislation of the requesting State and other relevant information and documentation which it could reasonably have consulted."

If the onus of proving *bona fides* is stated clearly to be on the possessor of illegally exported cultural property, this should have the effect of ensuring that prospective purchasers enquire very closely as to provenance, given that they stand to lose both the object and its purchase price if it has to be returned.

Article 8(2)

While Canada finds the concept embodied in Article 8(2) of Misc. 21 Add most interesting, it would appear to raise a host of questions. For example,

- What would happen to the object upon the death of the possessor? Or upon the death of the person to whom the object was transferred?
- What are the "necessary guarantees"?

#### Article 8(4)

Canada questions the need for the addition to the Convention of Article 8(4), as it would in any event be open to a third party to enter into such an arrangement.

#### Article 8 bis

As the illegality of an export would be just one of the determinations to be made by the court of the State addressed, Canada questions the desirability of adding this Article.

#### Article 9

Given that the Drafting Committee did not have the opportunity to take this proposal into account, Canada reiterates the comment and proposal made prior to the 3<sup>rd</sup> session with respect to Article 9:

"Canada would propose that the following be added to Article 9:

3) Where a claim has been brought under this Convention, the State where the cultural property is located shall take appropriate steps to safeguard the cultural property until a final determination has been made by the court or competent authority of the State before which a claim has been brought.

This requirement would help to safeguard the cultural property; for example, a State could prohibit the export of cultural property until such time as a final determination had been made."

#### Article 12

Given that the Drafting Committee did not have the opportunity to take this proposal into account, Canada reiterates the comment and proposal made prior to the 3<sup>rd</sup> session with respect to a new Article 12:

"Canada would propose that a Federal State Clause be added to the Convention, to facilitate ratification or accession by Federal States:

#### Article 12

1) If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends."

General Comments

Canada would urge that States be conscious of the necessity to establish comprehensive data bases of stolen property, and make these available to other State Parties for use by the General public, in order to implement the provisions of the Convention that deal with stolen property.

**FRANCE**

**Article 1**

Add the word "Contracting" before "State" in sub-paragraph (a).

**Article 5 (paragraph 4)**

It should be noted that the Italian proposal seeks to solve a genuine problem.

It is in effect important that States which can accept only the temporary export of a cultural object or its export to a given country, or even to a specific institution or place, should be able to ensure the respect of those conditions or requirements.

In the event of their being unable to do so, they might well systematically refuse the export of objects which could be less conducive to the conservation or circulation of those objects.

However, the present wording of the proposal would seem capable of improvement and in particular a priority rule should be introduced in the event of competing claims by two different States.

**Article 8 bis**

Article 8 bis should be deleted as the possibility of requiring the requesting State to produce a decision or determination of a court or other competent authority as a condition for instituting proceedings could render the return of the object more problematic, which would run counter to the very purpose of the Convention.

**Article 9**

Add the word "Contracting" before the word "State" each time the latter appears in Alternative I as it is necessary that the court or authority of the State where the possessor has its residence or of the State where the object is located be one of a Contracting State.

Alternatives I and II should be amalgamated by adding to paragraphs 1 and 2 of Alternative I the second paragraph of Alternative II.

**Article 9 bis**

Add a sub-paragraph relating to public policy and another to the rights of defence.

Paragraph 1 of the article would then read:

"(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 not contrary to public policy in the State in which recognition is sought;
- (c) if it is no longer subject to ordinary forms of review in the State of origin;
- (d) where it was given in default of appearance, if the defendant was duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable the defendant to arrange for its defence, and
- (e) if it is enforceable in the State of origin."

**Articles 9 ter and 9 quater**

These two articles should be deleted.

**Article 9 quingues**

This article should become paragraph 3 of Article 9 bis.

**Article 11**

It should be indicated in this article that the options offered by it should be subject to notification to the depository State at the time of signature or of ratification of the Convention or at any time thereafter.

The possibility should also be allowed for a group of States to agree among themselves, within the spirit of Article 11, on joint derogations which would be applicable in their internal relations.