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

OBSERVATIONS OF INTERNATIONAL ORGANISATIONS  
ON THE PRELIMINARY DRAFT UNIDROIT CONVENTION  
ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(Interpol)

Rome, September 1993

## I. INTRODUCTION

After considering the preliminary draft Convention on stolen or illegally exported cultural objects, as revised by the Unidroit Secretariat in June 1993, the General Secretariat of the I.C.P.O. - Interpol confirms its support for the maintenance of a distinction between the legal regime for the protection of stolen cultural objects (Chapter II) and that for illegally exported objects (Chapter III). This distinction is fully justified both for reasons relating to international criminal law and administrative law and for reasons pertaining to private law.

Having regard to the discussions at the third session of the committee of governmental experts on the international protection of cultural property, the General Secretariat of the I.C.P.O. - Interpol considers that the proposals for the deletion of Chapter II or for the restriction of the common definition of cultural objects for which provision is made in Chapter I of the preliminary draft Convention, could constitute a step backwards in comparison with the text of Article 7 (b)(i) of the 1970 Unesco Convention. The same is true of the proposals to dispense with or to narrow down the obligation to provide compensation for the "good faith purchaser".

The General Secretariat of the I.C.P.O. - Interpol would hope that States will succeed in overcoming the difficulties which arise out of diversities in their legal systems so as to reach the text of a Convention that will pay due regard to the special character of the objects to be protected.

## II. CHAPTER I (SCOPE OF APPLICATION)

### Article 1: Limitation to international situations:

The General Secretariat of the I.C.P.O. - Interpol is of the opinion that the international character of claims for the restitution or return of stolen or illegally exported cultural objects can be found in sub-paragraphs (a) and (b) of Article 1, inasmuch as the objects must have crossed the frontiers of one or more Contracting States. It would therefore be completely superfluous to provide a precise definition of all the elements which could be taken into account for the purpose of determining the international character of a given claim. Furthermore, the international character of the unlawful act, resulting for example from the nationality of its perpetrators or of its victims, would in no way affect the international character of the claim for restitution.

Whatever solution will be adopted by the Unidroit committee (either that of leaving it to the judge of the forum to determine the international character of the claim or to seek to arrive at a non-exhaustive definition of that international character in the provisions of the Convention itself), the distinction between domestic and international situations will lead to different legal regimes in relation to the restitution of cultural objects and the notion of good faith.

III. CHAPTER II (RESTITUTION OF STOLEN OBJECTS)

Article 3, paragraph 1 (the stolen object):

This provision raises the question of the advisability of offering an autonomous definition of theft for the purposes of the Convention or providing a conflicts rule permitting the identification of the applicable law (law of the State where the act was committed, *lex rei sitae*, *lex fori*).

Those proposals that would mention theft, possibly including its more serious forms, fraud, blackmail, or the acquisition of cultural objects from illegal excavations, as acts to be assimilated to theft, would enlarge the concept of theft and, should there be a consensus to that effect, would make it preferable to introduce an autonomous definition of theft which would moreover in no way affect the definition of those acts under each State's criminal law. In no way can the objective of the Convention be that of harmonising the criminal law of States; what is being sought is to ensure a degree of reciprocity in connection with the legal fate of property which has been the object of an unlawful act.

Without prejudice to Article 11 of the preliminary draft, the discussion concerning the concept of theft or those acts equivalent to it should moreover take account of the other international Conventions concerning other unlawful acts in relation to cultural objects or to criminal or civil mutual assistance to the extent that those Conventions may provide a foundation for claims for restitution of cultural objects which have been the subject of other unlawful acts (cf. for example Article 6 of the 1985 European Convention on Offences relating to Cultural Property, which create an obligation for Contracting Parties with a view to the restitution of cultural objects).

Article 3, paragraph 2 :

The drafting committee introduced this paragraph at the request of a number of delegations with a view to assimilating an unlawfully excavated object to one which has been stolen for the purposes of claiming restitution.

Although such an assimilation is possible, it is not sufficient for the regime of protection established in Chapter II to be effective. In fact, so as to obtain the restitution of objects coming from clandestine excavations, it must be possible to identify them and to determine their origin in a precise manner. However, any object remains unknown until it has seen the light of day, and in the case of theft (that is to say an unlawful excavation), the private or public owner can provide no precise information. It is not easy therefore to see how the international cooperation or mechanism for protection established by Article 4 in Chapter II can apply to such objects.

Article 4, paragraph 2 - Diligence of the good faith purchaser:

The General Secretariat of the I.C.P.O. - Interpol supports the general idea reflected in Article 4 of the draft Convention and is in particular of the belief that the restitution of a stolen cultural object against compensation to be paid to the possessor is only justified in cases where the latter can prove that it exercised the necessary diligence when acquiring the object. Interpol would however make two observations on the requirements provided for in Article 4, paragraph 2 which provides :

"In determining whether the possessor exercised the due diligence, regard should 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".

Among the various elements listed in this provision, the General Secretariat of the I.C.P.O. - Interpol attaches great importance to the consultation of a register accessible to the public and urges States to establish national registers in collaboration with police authorities and other bodies entrusted with the implementation of international Conventions (cf. the Unesco Convention which invites all countries to draw up inventories of their most important cultural objects).

In this connection it is useful to recall the international cooperation against the illicit traffic in cultural objects conducted by the I.C.P.O. - Interpol through the General Secretariat and the national central bureaux of the member countries. Those bureaux belong to national administrations and are public authorities. The assistance provided by the I.C.P.O. - Interpol consists in the diffusion of information regarding the theft of cultural objects to all the national bureaux. The information contained in the files of the General Secretariat of the I.C.P.O. - Interpol comprises data of a personal character (for example with a view to the arrest of those who have committed unlawful acts) and data of a non-personal character providing for instance a description, including the image, of identifiable objects which have been stolen or otherwise acquired through a criminal act. These files are not accessible to the public. Only the national bureaux and those bodies authorised by the bureaux which have communicated the information to Interpol have access thereto. It is for the national bureaux themselves to decide whether such information should be communicated to individuals.

The exchange of information between national police services and individuals or professional institutions is governed by national law. Such exchange of information may be the basic element for the establishment of national registers incorporating data which has been communicated at international level. It is nevertheless important to avoid limiting consultation only to registers of an official character. However, with a view to ensuring the reliability of private registers, it would be necessary to require the respect of certain rules and criteria by the organs responsible for them.

**IV. CHAPTER III (RETURN OF ILLEGALLY EXPORTED OBJECTS)**

The provisions of Article 2 bis in Chapter I, of Article 4, paragraph 4 in Chapter II and of Articles 5 bis and 8 in Chapter III call for discussion of the legal difficulties which could arise in the event of refusal to recognise an official export certificate, of the presumption of bad faith or of illegal export in the legal system of the State addressed.

In this context, reference should be made to the international Convention on mutual administrative assistance for the prevention, investigation and repression of Customs offences of 9 June 1977, which gives to the Customs Cooperation Council certain competence with regard to the fight against the smuggling of artistic works, antiquities and other cultural objects. The views of the Customs Cooperation Council on the chapter concerning the return of illegally exported objects would be most useful.