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INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

LA PROTECTION INTERNATIONALE DES BIENS CULTURELS

OBSERVATIONS

relatives à l'avant-projet de Convention
sur la restitution et le retour d'objets culturels
(Etude LXX - Doc. 15)

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TITLE

The actual wording is not exactly consistent with the field of application of the text both in the English and French versions provided that no real "return" hypothesis is taken into consideration. In the French text of art.4,5,6 (illicit export) there is a rather improper use of the term "retour" which could possibly give rise to some misunderstandings as to the real contents of the text. Irrespective of whether the choice in the English text is between restitution or recovery (which actually seems more correct), I would therefore suggest inserting a preliminary definition stating that the expression return (retour) indicates the specific obligation of the possessor to render an illicitly exported property to the requesting State party, as provided for by articles 4, 5, 6 of the Convention.

Art.1

As I had already mentioned in the past meetings I would prefer the expression cultural property (bien culturel) which emphasizes the adherence to both international and domestic trends of the past forty years, as expressed by the multilateral conventions since the Hague Convention of 1954, as well as by national legislations. For the sake of clarity I would add, at the end of art.1, par.1), the phrase "under the law of the State party where the property was located prior to removal".

Articles 2 - 3

Restitution of cultural property under this convention should be based on objective principles irrespective of whether the purchaser is in good faith or not. In my opinion restitution should be provided for in any case of stolen property, while good or bad faith should be taken into consideration only for compensation purposes. Alternative II of articles 2 and 3 would therefore be preferable. In art.2 I would add a specification of the quality, either private or public, of the dispossessed subject.

In art. 3.1 I would substitute the (French) sentence "a moins que le possesseur n'apporte pas la preuve" with the following "Si le possesseur apporte la preuve" which expresses in a less twisted way the exception to the presumption of good faith that should be stated by this rule.

Art.4

The problems rising from art.4.a) with reference to art.4.b) are the expression of the difficult relationship between monetary value and other criteria of evaluating the importance of cultural property for the State concerned. The conjunction "and" at the end of par.a) should be deleted considering that the monetary value of an item is not itself a valid condition to which restitution, return or recovery has to be subordinated.

On the other hand it is true that leaving "or" at the end of par. a), could possibly give to a requesting State the right of obtaining the "return" of an item just because its price is particularly high, irrespective of the conditions of par. b).

The study group could consider the actual par. a) as an additional possibility for the requesting State by adding a particular qualification to the monetary value in the State of situation such as (French text):

"a) l'object ait, au lieu ou il se trouve actuellement, une valeur de plus de 25.000 droits de tirage speciaux pour son importance artistique, archeologique, historique etc., "ou....".

Art.5

The purchaser in bad faith should not be entitled to any compensation which could even represent an indirect spur to the illicit traffic of works of art.

Also the possessor in bad faith of the relevant item should not have the right to determine its destination in the requesting State.

The provision of art.5 should be limited to a good-faith possessor.

Art.6

Since the draft-text is not bound to create a private international law instrument, it is hardly conceivable that uniform law rules give rise to problems of consistency with the "ordre public" of the member States. Moreover it is difficult to imagine that a restitution under this convention can be carried out contrary to "ordre public" principles of the requested State, while the same principle could be used as a barrier to avoid the fulfilment of the obligations provided for in articles 2 and 4.