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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
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THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Summary report on the first session of the Unidroit study group  
on the international protection of cultural property, held at the  
seat of the Institute from 12 to 15 December 1988

(prepared by the Unidroit Secretariat)

Rome, January 1989

# CORRIGENDUM

Page 3: Note (2) - for "APPENIDICES" read "APPENDICES".

Page 7: Paragraph 19, lines 7 and 8 - Delete the words "notwithstanding his good faith".

Page 11: Paragraph 33 - Read lines 5 to 8 as follows: "... While therefore he was prepared to contemplate the restitution by a *bona fide* purchaser to a dispossessed owner of property stolen from the latter against payment of compensation to the purchaser ...".

Page 13: In line 4 read "(i)" for "(ii)".

1. The first session of the study group on the international protection of cultural property was opened at the seat of Unidroit by the President of the Institute, Mr Riccardo Monaco, at 9.40 a.m. on 12 December 1988. After welcoming the participants (for the list of which see APPENDIX I), Mr Monaco invited the group to proceed to the election of its Chairman and Vice-Chairman under item 1 of the draft agenda (S.G./C.P. - Ag. 1).

2. The group unanimously elected Mr Monaco as its Chairman and Mr Loewe as its Vice-Chairman.

**Item 2 on the draft agenda - Adoption of the draft agenda**

3. The group approved the draft agenda as proposed by the Secretariat (see APPENDIX II).

**Item 3 on the agenda - Feasibility and desirability of drawing up uniform rules relating to the international protection of cultural property**

4. The Chairman introduced this agenda item by drawing attention to the following documentation which had been prepared for the session:

Study LXX - Doc. 1: Study requested by Unesco from Unidroit concerning the international protection of cultural property in the light in particular of the Unidroit Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables of 1974 and of the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (prepared by Ms Gerte Reichelt).

Study LXX - Doc. 2: Outlines for a private law Convention on the International Protection of Cultural Property (prepared by Mr Riccardo Monaco).

Study LXX - Doc. 3: Preliminary draft Convention on the restitution of cultural property (drawn up by Mr Roland Loewe).<sup>(1)</sup>

Study LXX - Doc. 4: 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 and in the light of the comments received on the first study (prepared by Ms Gerte Reichelt).

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(1) Given the lengthy discussion of this paper by the group, its content has for the sake of convenience been reproduced hereafter as APPENDIX III.

Study LXX - Doc. 5: Extract from the report of the 67<sup>th</sup> session of the Unidroit Governing Council (Rome 14 to 17 June 1988) relating to item 5 (d) on the agenda.

Study LXX - Doc. 6: Good faith redefined: A practical solution (paper prepared by Mr Richard Crewdson).

Text of the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (subsequently reproduced as Study LXX - Doc. 8).

Text of the 1974 Unidroit draft Convention providing a Uniform Law on the Acquisition in Good Faith<sup>(2)</sup> of Corporeal Movables (subsequently reproduced as Study LXX - Doc. 9).

5. The Chairman briefly recalled the background to the work within Unidroit on the subject of the international protection of cultural property, mentioning in particular the two studies prepared by Ms Reichelt at the request of Unesco. He stated that those studies had been supplemented in particular by preliminary investigations conducted by the Secretariat of the Institute and by a set of preliminary draft articles drawn up on his own initiative by the Austrian member of the Governing Council, Mr Loewe. Those materials had been considered by the Council at its 67<sup>th</sup> session in June 1988, on which occasion it had decided to constitute a study group on the international protection of cultural property entrusted with consideration of the various aspects of the subject on the basis in particular of the documents to which he had already referred as well as of any other documentation which might be submitted to the group by the Secretariat. In these circumstances he suggested that the group proceed in the first instance to a general debate, after which certain more specific questions might be addressed.

6. It was so agreed.

(2) The group was also seized during the course of its session of Study LXX - Doc. 7: Observations submitted by Ms Lyndel Prott, and of working papers submitted by Mr Merryman, Ms Prott and Mr Fraoua, reproduced hereafter as APPENDICES IV, V and VI respectively.

# I. GENERAL DISCUSSION<sup>(3)</sup>

## A. *The concept of "international protection of cultural property"*

7. A number of members of the group took issue, for different reasons, with the concept of the "international protection of cultural property". In the first instance, the view was expressed that "protection" was a term with emotive connotations the use of which would not be appropriate in many of the circumstances which would be considered by the group. For example, cultural property which was stolen or exported from one State in violation of an export prohibition might be better protected in the sense of its conservation as a result of the theft or the illegal export. It was therefore necessary for the terminology employed to be precise and if what was contemplated was the restitution of property to a dispossessed owner or its return to the State of origin then it would be preferable to use language to that effect, even though it was clear that in certain cases the element of protection would be present, as where the property in question would be deprived of its power, significance or beauty by its removal from its context or where its removal constituted an impairment of an integral work of art such as the dismembering of a triptych.

8. Other members of the group believed the notion of "protection" to be appropriate insofar as it referred to the interests of the dispossessed owner or of the State seeking the return of illicitly exported property while yet others found the term, which was widely used in a number of international instruments and in the literature, to be quite acceptable when combined with the notion of cultural heritage. Indeed, in the view of some members of the group what was misleading was not the reference to "protection" but rather that to "property" which in certain societies had very little meaning and which certainly was of no relevance to artefacts with a ritual or spiritual significance in the communal life of those societies. Moreover, it was suggested that even the adjective "cultural" might not be appropriate in those circumstances if it bore the connotation of something aesthetically pleasing since that element was of little importance to those who attached a completely different significance to artefacts used in their communal life.

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(3) In accordance with the traditional practice within Unidroit the Secretariat has prepared a summary report on the session of the study group which follows an analytical approach rather than a chronological record of the discussions. In consequence, the report does not refer to the individual interventions of participants except when this is necessary to identify the authors of specific written proposals discussed by the group.

9. The group did not reach any firm conclusions on the question of terminology, being of the belief that it could revert to the matter once it had discussed in depth the content of the possible uniform rules. There was however considerable support for the suggestion that the word "objects" would be a more neutral and therefore a more acceptable term than "property".

*B. Form of any rules which might be drawn up by the group*

10. Although one member of the group expressed the conviction that only an international convention would be an effective vehicle for the adoption of uniform rules in this connection, others considered that it was premature at this stage to contemplate the form of any future instrument or indeed instruments which might emerge from the group's deliberations.

*C. Content of the future rules*

11. Here again the group was of the opinion that this matter could not be discussed in the abstract. This was particularly the case with regard to the extent to which recourse might be had to rules of private international law and of administrative or public law. In this connection one member of the group believed that if heavy reliance were to be placed on rules of private international law then the Hague Conference on Private International Law would be a more appropriate forum for discussion while others, laying stress on the complexity of the issues involved, insisted on the necessity of avoiding the exclusion *a priori* of any solutions which might fall outside the traditional bounds of private law *stricto sensu*.

12. Attention was also drawn to the possible need for a definition of cultural objects for the purposes of the uniform rules, in which regard criticism was levelled at the techniques of enumeration and registration with a view to providing criteria for the application of the rules although it was recognized that the latter might be of special interest in connection with the treatment of stolen cultural objects.

13. Some support was expressed for a general definition of cultural objects along the lines of that contained in Article 1 (1) of the preliminary draft Convention on the restitution of cultural property submitted by Mr Loewe (hereafter referred to as the "Loewe draft") which spoke of "any material object created by man of artistic, historical or cultural importance", a definition which was for practical purposes narrowed down by the criterion of pecuniary value in Articles 2 and 4 of that draft. Independently of the appropriateness of determining the

application of the rules in function of economic considerations, some members of the group stated that if it were felt necessary to introduce a general definition of cultural objects, then such a definition should also embrace objects of spiritual, religious or ritual importance.

14. A number of members of the group expressed the wish that any future instrument should as far as possible be framed in such a way as to be compatible with the provisions of the 1970 Unesco Convention, for while it was true that of the sixty-five States which had accepted that Convention most were what are often described as "exporting nations", and were indeed developing countries, there were notable exceptions such as Canada and the United States of America and it would be politically undesirable to draw up a new instrument which could block further acceptance of the 1970 Convention. It was moreover recalled in this connection that that Convention contained few provisions of a private law character and that it was precisely for this reason that Unesco and Unidroit had contemplated the elaboration of additional rules.

15. As to the substantive content of any future instrument there was broad agreement that every effort should be made to meet the varying concerns of different groups of States, all of which were however preoccupied in one way or another by the growing illicit trade in cultural objects. It was decided for reasons of convenience that it would be preferable to deal separately with two issues, on the one hand the problems associated with the dispossession of a person formerly in possession of a cultural object by theft or some other unlawful act such as fraud or conversion, and on the other with the consequences of the removal of cultural objects from the territory of a State in breach of a national law prohibiting or imposing conditions on such export. In this connection however some members of the group feared that the considerations relevant to theft might differ substantially from those pertinent to the illegal export of cultural objects and that any provisional approach adopted in regard to the first issue might affect that to be taken in connection with the second. It was therefore on the understanding that the consideration of theft should in no way prejudice that of illegal export and that any preliminary conclusions reached as to the former should be reviewed in the light of the discussions as a whole that the group embarked upon its examination of the substantive content of the provisions of any future uniform rules.

## II. DISPOSSESSION BY THEFT AND OTHER UNLAWFUL ACTS

16. The group recognized from the outset that the essential problem facing it in this connection was that of the conflict of interests between

a person (usually the owner) who had been dispossessed of an object and a *bona fide* purchaser of such an object. Ms Reichelt's second study had indicated the widely differing approaches in the various legal systems to this problem while the experience of Unidroit in relation to the draft LUAB of 1974 had amply demonstrated the difficulty of bringing about any rapprochement between the Common Law jurisdictions which almost unanimously followed the *nemo dat* rule and the bulk of the Civil Law systems which, to varying degrees, accorded much wider protection to the good faith purchaser of stolen property.

17. Generally speaking, a consensus emerged to the effect that legal traditions were so deep-rooted that there was little prospect of achieving a solution which had escaped the authors of the draft LUAB in the sense of devising a uniform rule acceptable to all Parties to any future instrument without qualification, even if the application of that rule were to be limited to cultural objects.

18. On the other hand it was apparent that those States which already accorded a wide measure of protection to the dispossessed owner could scarcely be expected to reduce that protection for the sake of uniformity and the idea of establishing certain conditions under which the object must be returned to the person formerly in possession while leaving it open to the Parties to the future instrument to go further in the direction of protecting such persons, a feature of Article 9 of the Loewe draft, enjoyed considerable support.

19. With respect to the question of what might constitute an acceptable "minimum" uniform rule, the group considered the solution set out in Articles 2 and 3 of the Loewe draft which to a certain extent reflected the concept of the "right to payment" that had already been examined in detail in the second of Ms Reichelt's studies. In effect, the solution proposed was that in certain circumstances and under certain conditions a purchaser of a cultural object would, notwithstanding his good faith, be required to return the object to the dispossessed person against payment of compensation.

20. While finding the system outlined by Mr Loewe to be an extremely useful basis for discussion, some participants expressed hesitations regarding various aspects of the draft and in particular the notion that the future instrument would only apply if the object in question were of a certain value, the stringency of the precautions to be taken by the purchaser in satisfying himself that the object had not been stolen or otherwise illegally misappropriated depending on a sliding scale which was once again related to its value.



21. While recognizing the intention underlying the approach as explained by Mr Loewe, namely of providing a measure of certainty for the application of the rules and of excluding objects of no real significance, some members of the group drew attention to the fact that many objects of the greatest historical, religious or scientific importance might not attain the minimum value contemplated by the draft and that indeed the placing of a monetary value on such objects could in some circumstances be considered offensive.

22. It was suggested that as an alternative to the monetary test proposed in the Loewe draft regard might be had to the cultural importance of the object or to the Scandinavian concept of property of more than just pecuniary value with a view to determining which objects should be subject to the "right to payment". These criteria were likewise the subject of criticism on the ground that they were open to wide divergencies of interpretation and would therefore be less certain in their application than one based on the value of the cultural object, a test which however some found to be less objective than might at first sight appear since the opinions of experts as to the value of any given object might differ widely.

23. With a view to finding a satisfactory formula attention was drawn to Article 7 of the 1974 draft LUAB which provides as follows:

"1. Good faith consists in the reasonable belief that the transferor has the right to dispose of the movables in conformity with the contract.

2. The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case.

3. In determining whether the transferee acted in good faith, account shall, *inter alia*, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor's acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded."

24. It was suggested that certain elements of this text, suitably modified so as to take account of the special characteristics of cultural objects, might be combined with some of those contained in the Loewe draft, which latter had the great merit of avoiding any definition of "good faith" or indeed of referring to it at all, while at the same time concentrating attention on the concept of possession rather than on that of ownership. On the other hand, the notion of monetary value could be encompassed within a list of a number of factors such as those mentioned in Article 7 (3) of the

draft LUAB which would spell out the precautions to be taken by a purchaser in accordance with the circumstances of the case. Such an approach, it was pointed out, might also place a heavier burden on the purchaser than was the case with the Loewe draft, all the more so if it were to be stated expressly rather than implicitly that the burden of proving that he had taken all necessary precautions should lie on the purchaser, failure to do which would entail restitution of the object to the dispossessed owner without his being required to pay any compensation.

25. In connection with the precautions referred to in Article 7 (3) of the draft LUAB, reference was made to the preparation of a computerised international register of stolen cultural property and to the imposition of an obligation on purchasers, especially professionals such as antique dealers or auctioneers, to consult that register. As to the doubts which were expressed regarding the possibilities of the practical maintenance of such a register and of the abuse to which it might lend itself by virtue of owners overvaluing cultural property, it was replied that the latter problem was one more related to insurance and that studies were already at an advanced stage regarding the feasibility of compiling a register of stolen cultural objects although the computerisation of information concerning illegally exported objects was still some way off.

26. On a more general level, doubts were expressed as to the extent to which the concept of theft was common to all jurisdictions and to the equation in the Loewe draft to theft of "conversion, fraud, intentional misappropriation of lost property or any other culpable act assimilated thereto".

27. As to the first issue, and to a certain extent the second, Mr Loewe recalled that in accordance with Article 2 (1) of his preliminary draft, when read in conjunction with Article 8, the characterisation of the culpable act fell to be determined by the courts either of the State where the person in possession of the cultural property had his habitual residence or those of the State where the cultural property was located at the option of the claimant, with the consequence that the problem of differing definitions would be avoided. An opposing view was however expressed to the effect that such questions of definition should be regulated by the law of the State in which the culpable act had been committed.

28. With regard to the second point, attention was drawn to the fact that while in the Common Law jurisdictions wide protection was afforded to the dispossessed owner of stolen property, different rules applied in many of them when a *bona fide* purchaser acquired property which had been the subject of, for example, fraud or conversion and that it might be difficult

for those States to accept the notion of restitution to the original owner in such cases as were contemplated by the Loewe draft.

29. Notwithstanding the belief of a number of members of the group that a minimum uniform rule corresponding to the notion of the "right to payment" would constitute a step forward for some legal systems, all the more so as provision could moreover be made for those States which wished to do so to accord a greater degree of protection to dispossessed owners of cultural objects, others were concerned at the position of developing countries which would scarcely be able to find the necessary resources to repurchase cultural objects from a *bona fide* purchaser, a problem which was already inherent in Article 7 (b) (ii) of the 1970 Unesco Convention. It was therefore particularly important, if this approach were to be followed, to insist on the need for a reversal of the presumption of good faith, for the precautions required of a purchaser entitled to compensation to be onerous and for careful consideration to be given to the basis on which any compensation should be calculated. Furthermore, and although this was perhaps a matter of greater importance in connection with the illicit export of cultural objects, the question should also be addressed of the constitution of a fund permitting States with limited resources to obtain the restitution of such objects.

30. Finally, attention was drawn to the fact that Articles 2 and 3 of the Loewe draft contemplated not only international but also purely domestic situations, a matter which would call for subsequent consideration.

### III. ILLICIT EXPORT

31. The group noted that if the principal problem in dealing with the theft of cultural objects was that of the *bona fide* purchaser, the main issue at stake in connection with the illicit export of such objects was the extent to which States would be prepared to give some form of recognition to foreign public law. It was agreed that little would be gained from pursuing the doctrinal dispute of whether foreign law is in effect applied or recognized or whether it is simply taken into consideration or regard is had to it and that it would be preferable, for political as well as practical reasons, to treat the violation of an export prohibition or licence requirement regarding cultural objects as a fact from which certain legal consequences would flow in given circumstances. In this connection some participants drew attention to the evolution in legal thinking which found expression in such texts as Article 7 of the 1980 Convention of the European Communities on the Law Applicable to Contractual Obligations and Article 19 of the Swiss law on private international law, as well as in the case law of some countries which indicated a willingness in appropriate circumstances to be more generous in taking cognizance of the mandatory rules of law of another State.

32. For his part, Mr Loewe stated that the provisions of Articles 4 and 5 of his preliminary draft had been inspired by the belief that the giving of any effect to foreign public law by the courts of another State represented a departure from the law and practice of most States and that any exceptions thereto should be extremely limited if the future uniform rules were to have any prospect of success. He further recalled that the authors of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods had abstained from following what he saw as the highly regrettable precedent established by Article 7 of the EEC Convention on the Law Applicable to Contractual Obligations.

33. It was his firm conviction that a considerable difference existed on the moral plane between the theft and the illicit export of cultural objects and the fact should moreover be borne in mind that it would be extremely difficult for the average purchaser of illicitly exported property to be aware of the circumstances of that export. While therefore he was prepared to contemplate the restitution to a dispossessed owner of property stolen from him by a *bona fide* purchaser against payment of compensation to the latter, he saw no reason for imposing a similar obligation of restitution on a person who had acquired a cultural object without knowledge of, or any reasonable grounds for suspecting, the violation of the export prohibitions of another State.

34. If, however, the State from whose territory the object had been illegally exported and in which it had been created could prove that the actual possessor or his predecessor under Article 2 (2) of his preliminary draft had knowledge, when exporting or acquiring an object, of the export prohibition or that a reasonable person should at such time at least have had doubts in that regard then, provided that the cultural object had, at the place where it was currently located, a value in excess of a certain sum, for example 50,000 Swiss francs, the State whose prohibition had been violated might claim the return of the object (Article 4 (1)). In his view, moreover, it was necessary to recognize the rights acquired by a person who might be called upon to return cultural property under Article 4 (1) of his preliminary draft. He had therefore proposed in the first sentence of his Article 5 that such a person should, at his option, be entitled to require that the requesting State pay him a sum corresponding to the price paid by him or by his predecessor or to the actual value of the object at the place where it was located, or to transfer the object, for reward or gratuitously, to a person of his choice in the requesting State. In the latter case the requesting State should in addition be obliged to undertake neither to confiscate the property nor to interfere in any other way with the possession of the person to whom the property had been transferred or of his successors under a universal or individual inheritance.

35. In conclusion, he noted that once again the provisions of Articles 4 and 5 constituted a minimum set of uniform rules and that, in accordance with Article 9 of his draft, States which wished to do so could go further in the direction of recognizing the interests of the State whose law on the export of cultural objects had been violated.

36. As had been the case with the proposals made by Mr Loewe in Articles 2 and 3 of his preliminary draft in relation to theft and other acts assimilated thereto, the group recognized the value of having a concrete text, consideration of which would enable it to focus on a series of important questions of principle which may be summarised under the following headings.

A. *The nature of cultural objects which should be returned to the State of origin*

37. A number of members of the group experienced the same difficulties with the notion of monetary value determining whether a given object should fall within the scope of application of Articles 4 and 5 of the Loewe draft as they had in connection with Articles 2 and 3 and reference was made to the practical problems which had been encountered by some States in the application of their own export control legislation insofar as attempts had been made to attach an economic value to certain categories of cultural objects.

38. It was then as a basis for an alternative solution that Mr Merryman submitted a paper reproduced in APPENDIX IV hereto. This paper, he stressed, was not to be seen as offering a finished text but rather as casting in procedural terms an approach containing the following elements:

(i) the need for the State of origin to prove *prima facie* that the object had been removed from its territory without the permission required by that State's law and that such removal significantly impaired 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;

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

(ii) that it would then be for the defendant to prove:

(a) that the removal did not violate the law of the requesting State;

(b) that such removal did not significantly impair one of the interests under (ii) and

(c) that the defendant was a good faith purchaser.

(iii) if the defendant could not prove its case under (ii) (a), (b) and (c) then the remedy in favour of the requesting State should be granted.

(iv) the nature of the remedy, the conditions (if any) attached to the remedy, and the consequence of finding that the defendant was in good faith remained open for discussion.

39. While the view was expressed that Mr Merryman's approach was too elastic and that his list of interests might give rise to serious problems of interpretation, a number of participants were in sympathy with the general lines of the Merryman paper which, in the opinion of some, could be combined with the solution proposed by Mr Loewe in the sense that the requesting State might base its claim either on the criteria suggested by Mr Merryman or, if it so wished, on the value of the cultural object's exceeding a certain amount, which would dispense with the need for the requesting State to establish any other facts apart from the violation of its export control law.

40. Independently however of the possibility of such a combination, it was suggested that the Merryman paper might not cover certain cases where the State of origin could have a paramount interest in obtaining the return to its territory of a cultural object on account of the importance which it represented for the cultural heritage of that State, on account perhaps of its rarity value, or, an alternative formulation, if it was particularly representative of the culture of that State, a factor of vital importance for a number of former colonial States whose populations were seeking to establish their national and cultural identity. To the argument that such a criterion would go still further than the Merryman solution in opening up the possibility for a multitude of claims, it was recalled that a State would think very seriously before investing the financial and intellectual resources necessary for pursuing claims for the return of a cultural object before the courts of other States.

41. Attention was also drawn to arrangements in certain countries whereby a private owner agrees to permit public access to cultural objects in his possession against tax concessions or State subsidies offered on condition that the object should not be exported from that State, a

situation whose specific treatment was however criticized as introducing a distinction between privately and publicly owned cultural objects which could create an element of confusion.

B. *Burden of proof*

42. There was general agreement within the group that it would be for the requesting State to prove both that the removal from its territory of a cultural object had violated its export regulations and that any one of the interests mentioned in the Merryman paper, or those which might be added thereto, had been significantly impaired. Differing views were however expressed as to whether it should be for the requesting State to prove that the purchaser had no knowledge of or any reasonable doubts as to the violation of the export rules of the State of origin or whether the burden of proof should be placed on the purchaser.

C. *The relevance of the good faith of the purchaser*

43. Although a number of participants agreed with the approach outlined in the Loewe draft of drawing a distinction between those cases where the purchaser of a cultural object was in good faith, in the sense that he neither knew nor had grounds for suspecting that it had been illegally exported, and those where he had actual or constructive notice of the illegal export, they believed that the draft was too generous to the purchaser. In the first place, the view was expressed that since it was necessary to weigh the collective interest against that of the individual even an innocent purchaser should, under certain conditions, be obliged to return an object to the State from whose territory it had been illegally removed, always provided that he received adequate compensation, including perhaps the benefit of the bargain to be determined by reference to the current market value of the object. If, on the other hand, the purchaser had knowledge, whether actual or constructive, of the illicit export, then he should be in no position to dictate terms as he was permitted to do under Article 5 (1) of the Loewe draft (see paragraph 34 above) and, in the opinion of some members of the group, be obliged to return the property without any compensation being paid to him at all, especially if he had himself instigated or actually carried out the illegal removal of the object from the State requesting its return.

D. *Non-pecuniary conditions which might be attached to the return of cultural objects*

44. The group considered the question of whether, once the requesting State had proved that an object had been illegally exported and that it was one meeting the criteria set out in the Loewe draft or the Merryman paper, in whatever manner those approaches might be amended and combined, there were circumstances in which the requested State might refuse to comply with the claim for the return of the object or attach conditions to such return.

45. Considerable support was expressed for the view that the nature of the cultural objects which each State might wish to retain within its territory and whose export it therefore prohibited or subjected to certain requirements varied so greatly that it would be unrealistic to suggest that States should, in applying any future Convention, consider the question of how far the export legislation of other Contracting States coincided with or was similar to its own (*res extra commercium* or categories of objects peculiar to the requesting State) and indeed one participant suggested that a Contracting State should, if all the necessary conditions were satisfied, also return cultural objects to a non-Contracting State whose export legislation had been violated. This did not however signify that the courts of a State to which a request was addressed for the return of an illegally exported cultural object would automatically accede to that claim for it would always be for such a court to determine whether or not there had been a significant impairment of the interests the uniform rules sought to protect, an allegation which it might well be difficult to prove in the case for example of blanket prohibitions on the export of certain categories of objects.

46. It was moreover recalled that in the field of private international law it was not uncommon to have recourse to the notion of *ordre public* and that exceptional situations could be imagined, for instance where an export prohibition related to the creations of a particular ethnic group within the requesting State, in which the court of the requested State would find it offensive on grounds of public policy to give any form of recognition to the prohibition.

47. The view was also expressed that while the prime purpose of this section of the uniform rules would be the return of the cultural object to the State from which it had been illegally removed, sight should not be lost entirely of the need to ensure the protection, or more precisely perhaps the conservation, of the object in question and in the opinion of some members of the group this was a legitimate concern for the courts of the requested State. It was however suggested that it would from a political standpoint be difficult to provide in the text itself for certain



conditions to be met by the requesting State, however desirable those might be, for example the existence of adequate legal guarantees regarding the security of the object and the taking of measures intended to ensure its conservation including the provision of trained staff. In these circumstances the idea was mooted that the future rules might provide that the requesting State should, when filing its claim for the return of the cultural object, clearly specify its intentions regarding the future location of the object as well as its provenance.

*E. The confiscation of illegally exported cultural objects*

48. There was a wide measure of agreement within the group that its terms of reference did not include the consideration of criminal or administrative sanctions which the law of the State of origin might impose upon those directly responsible for the illegal removal of cultural objects from its territory. It had however to be borne in mind that under the legislation of some States cultural objects which were illegally exported became the property of the State and a view was expressed that the imposition of an obligation on the requested State to return them to the requesting State would go beyond the generally acceptable principle of restoring the *status quo ante* in that it would in effect permit the "nationalisation" of the object in question. Other members of the group admitted that this was indeed a genuine problem falling within the more general one of the extent to which a purchaser should, in certain circumstances, be entitled to determine the location of the cultural object on its return to the State of origin and one which required more detailed consideration. It was however possible that the uniform rules under consideration could be phrased in such a manner as to avoid giving indirect effect to the criminal or administrative sanctions for which provision was made under the law of the requesting State although any future uniform rules of an essentially private law character could not, in the opinion of some of the participants, interfere with the working of the criminal or administrative law of other States.

*F. Circumstances in which any future uniform rules should not apply*

49. The group noted that Article 4 (2) of the Loewe draft had excluded the application of Article 4 (1) in three cases, the first of which (Article 4 (2)(a)) was that where the cultural object manifestly had a closer link with the art, history or culture of a State other than that on whose territory it was created, a rule which had to be read in conjunction with the requirement in Article 4 (1) that the object whose return was sought must have been created on the territory of the State whose prohibition had been violated.

50. While recognizing the pressures which might be put on a State on whose territory a cultural object had been created not to return the object in question to another State from whose territory it had been illegally exported, some participants believed that it was possible with the passage of time for an object created in one country to become part of the cultural heritage of another and that it was essential that this fact should be given due recognition in the future rules. There were admittedly cases where different States might have competing claims over cultural objects arising from such historical facts as the movement of peoples or the changing of national frontiers but if one of the aims of the rules under preparation was to ensure respect for the law then under no circumstances should they give the impression of encouraging or condoning the acts of persons responsible for the illicit export of a cultural object to its country of origin.

51. As to Article 4 (2)(b) of the Loewe draft, there was little enthusiasm for the idea of excluding from the obligation to return to the requesting State objects exported by a person who himself or whose predecessor had created it or possessed it for a period of at least five years prior to its export, a provision included by its author in accordance with the approach he had attempted to follow throughout his preliminary draft, namely that there were limits to which the attributes of private ownership should be sacrificed to a more collectivist philosophy.

52. There was, on the other hand, strong support for special treatment being accorded to the work of living artists, possibly extended for a certain period after their death which, following the precedent of some of the copyright conventions, might be fixed at fifty years or a shorter period if that were felt to be more appropriate. In the opinion of some members of the group the creations of living artists should be excluded totally from the application of any future uniform rules although others, while agreeing to such an exclusion in respect of export prohibitions, felt that it would be illogical and indeed unwarrantable to introduce a distinction between living and dead artists in connection with stolen or otherwise illegally misappropriated objects.

53. The proposal in Article 4 (2)(c) of the Loewe draft that an absolute time-bar should be established for the bringing of actions for the return of illegally exported cultural objects met with general agreement although some participants believed that the ten year period proposed was too short and that it should be extended, the maximum period suggested being thirty years as from the time of the violation of the export prohibition. States should however be diligent in the pursuit of claims and it was therefore suggested that a shorter period, ranging between three and six years, should be laid down which would run as from the time when the State became aware of the location of the cultural object whose return was sought.

#### IV. OTHER QUESTIONS

54. The group recognized that the time available for discussion had not permitted it to examine in detail all the issues calling for consideration, in particular a number of points raised by Ms Prott in Study LXX - Doc. 7 and the implications of the statement made by the observer representative of the Commission of the European Communities. These, as well as other matters, should be addressed at the group's second session, with a view to which the group accepted the Secretariat's offer to prepare a set of draft articles seeking to reflect the views expressed at the first session on those questions which had been the subject of preliminary consideration.

#### Item 4 on the agenda - Other business

55. The group decided that its second session should be held at the seat of the Institute on 13, 14, 15 and 17 April 1989.

56. The Chairman closed the meeting at 6.00 p.m. on 15 December 1988.

## APPENDIX II

### AGENDA

1. Election of the Chairman and of the Vice Chairman
2. Adoption of the draft agenda (S.G./C.P. - Ag. 1)
3. Feasibility and desirability of drawing up uniform rules relating to the international protection of cultural property (Study LXX - Docs. 1 to 5)
4. Other business

Preliminary draft Convention on the restitution of  
cultural property drawn up by Mr. Roland Loewe

Article 1

(1) For the purposes of this Convention, "cultural property" means any material object created by man of artistic, historical or cultural importance.

(2) This Convention governs neither:

(a) the question of ownership of cultural property or that of other rights which may exist over it; however, a possessor who has been obliged to make restitution of cultural property to a person who has been deprived of possession or who, in conformity with Article 4 (1), has returned it against payment of compensation to the State of origin may no longer assert ownership or any other real right thereover; nor

(b) the liability of experts, auctioneers or other sellers of cultural property.

Article 2

(1) When a person has been dispossessed of cultural property by theft, conversion, fraud, intentional misappropriation of lost property or any other culpable act assimilated thereto by a court acting under Article 8, the possessor of such property shall make restitution of it to the dispossessed person when:

(a) that property has, at the place where it is located, a value in excess of [100,000 Special Drawing Rights] [200,000 Swiss francs] and when the possessor fails to prove that he has consulted an expert who, before the acquisition of the property, had advised him in writing that there were no grounds to suspect that the property had been the subject of any of the culpable acts mentioned above: that expert shall be empowered to act by the authorities of a State Party to this Convention and his services shall be employed neither by the purchaser of the property nor by the person from whom the property may be acquired, nor yet again on the basis of any lasting professional or private relationship with the one or the other;

- (b) that property has, at the place where it is located, a value in excess of [10,000 Special Drawing Rights] [20,000 Swiss francs] and when the possessor fails to prove that he acquired it at a public auction in respect of which at least 500 catalogues or lists describing the items on sale were circulated to named persons or that he acquired it from a dealer in property of the same kind who had advised him in writing that there were no grounds to suspect that the property had been the subject of any of the culpable acts mentioned above;
  - (c) that property has, at the place where it is located, a value not in excess of [10,000 Special Drawing Rights] [20,000 Swiss francs] and when the possessor fails to prove that, at the time of its acquisition, he acted with the caution to be expected of an honest purchaser aware of the fact that many items of cultural property are removed from those formerly in possession of them by culpable acts.
- (2) The conduct of a predecessor in possession from whom the possessor has acquired the property by inheritance or otherwise gratuitously shall be imputed to the possessor.
- (3) When the cultural property in question has, at the time of the culpable act mentioned in paragraph (1), been located in a place open to the public such as a museum, an exhibition, a library, a place of religious worship or an archaeological site, the amounts of [100,000 and 10,000 Special Drawing Rights] [200,000 and 20,000 Swiss francs] shall be replaced respectively by those of [50,000 and 5,000 Special Drawing Rights] [100,000 and 10,000 Swiss francs].
- (4) The preceding provisions of this article shall only apply if the action for restitution is brought before a court:

(a) in respect of property mentioned under paragraph 1(a) within thirty years of the dispossession;

(b) in respect of property mentioned under paragraphs 1 (b) and (c) within ten years of the dispossession.

### Article 3

(1) Any dispossessed person who is entitled to the return of cultural property shall at the same time, but at his own option, compensate the possessor either for the price paid by the latter or by his predecessor under Article 2 (2) or for a sum corresponding to the actual value of the property at the place where it is located.

(2) Paragraph (1) of this article shall not apply and no compensation shall be due when the dispossessed person proves that the possessor or his predecessor under Article 2 (2) acquired the property with knowledge that it had been the subject of a culpable act or in circumstances in which a reasonable purchaser should at least have had doubts in this regard.

#### Article 4

(1) When cultural property which, at the place where it is currently located, has a value in excess of [25,000 Special Drawing Rights] [50,000 Swiss francs] has, in spite of a prohibition, been exported from the Contracting State in which it was created, the State whose prohibition has been violated may request the court acting under Article 8 to order the return of the property to that State, on condition that the latter proves that the actual possessor or his predecessor under Article 2(2) had knowledge, when exporting or acquiring the property, of the export prohibition or that a reasonable person should at such time at least have had doubts in that regard.

(2) Paragraph (1) of this article shall not apply:

- (a) when the property manifestly has a closer link with the art, history or culture of a State other than that on whose territory it was created;
- (b) when the property has been exported by a person who himself, or whose predecessor under Article 2 (2), created it or possessed it for a period of at least five years prior to its export;
- (c) when ten years have elapsed as from the time of the violation of the export prohibition.

#### Article 5

Any possessor required to return cultural property under Article 4 (1) may, at his option, require that the requesting State pay him a sum corresponding to the amount which would be due by a dispossessed person in conformity with Article 3 (1), or transfer the property, for reward or gratuitously, to a person of his choice in the requesting State. In the latter case, the requesting State shall undertake neither to confiscate the property nor to interfere in any other way with the possession of the person to whom the property has been transferred or of his successors under a universal or individual inheritance.

[Article 6

(1) The Special Drawing Rights referred to in the preceding articles are those defined by the International Monetary Fund. Such rights shall be converted into the national currency of the State of the court with jurisdiction under Article 8 in accordance with the value of that currency on the date on which the court is seized of the case and in accordance with the method of valuation applied by the Fund for its operations and transactions.

(2) The value of the national currency, in terms of Special Drawing Rights, of a State which is not a member of the Fund shall be calculated in a manner determined by that State.]

Article 7

(1) In determining the value of cultural property, regard shall be had to the price applied in respect of comparable property at the place where the property is located, and in particular to the price fetched at auction sales.

(2) For the application of Articles 2 (1) and 4 (1), cultural property forming part of a collection, set or series or which comes from the same collection, set or series shall be considered to be a single item of property when the same person has been deprived of possession of it or when its export has violated a prohibition, and when it is in the possession of a single person.

Article 8

The courts either of the State where the person in possession of the cultural property has his habitual residence or those of the State where the cultural property is located shall, at the option of the claimant, have jurisdiction over claims governed by this Convention. The parties to the dispute may however agree upon another jurisdiction or submit the dispute to arbitration.

Article 9

Any State Party to this Convention may extend the protection of cultural property beyond that contemplated therein, either by broadening the notion of cultural property, or by making provision for its restitution in circumstances in which such restitution is not required by the Convention by disallowing or restricting the right to compensation of the person in possession or in any other manner.



Article 10

This Convention shall apply only in respect of cultural property of which a person has been dispossessed by a culpable act or in violation of an export prohibition after the entry into force of the Convention.

PROPOSAL BY MR J.H. MERRYMAN

Schema

State A brings an action in State B, complaining that a cultural object now in State B was removed from State A without the permission required by State A's law. To establish a prima facie case State A must allege and prove:

1. that removal of the object from State A violated State A's law.
2. that removal significantly impaired one or more of the following kinds of interests:
  - (a) physical preservation of the object or of its context;
  - (b) integrity of a complex object;
  - (c) preservation of information;
  - (d) use by a living culture.
3. Defenses - burden of proof on defendant.
  - (a) Removal did not violate the law of State A.
  - (b) Removal did not significantly impair one of values under 2;
  - (c) Defendant is a good faith purchaser.
4. If after hearing evidence and argument court finds for State A on 1 and 2 (and against defendant on 3a, 3b and 3c) then remedy in favour of State A should be granted.
5. The nature of the remedy, the conditions (if any) attached to the remedy, and the effect of a finding that defendant is a good faith purchaser remain for discussion.

PROPOSAL BY MS L. PROTT

1. In determining the right to possession of an object which is part of the cultural heritage of another State, the court shall have regard to the laws of that State including its rules as to inalienability, imprescriptibility and export prohibition.
2. (a) In determining the right to ownership of a cultural object, the court shall have regard to the mandatory rules of the State with which there is a substantial connecting factor.  
  
(b) Such substantial connecting factors include
  - (i) that the object is part of the cultural heritage of that State
  - (ii) that the object was stolen in that State.
3. In determining whether a transaction is void because it is contrary to public policy, public policy shall be deemed to include international public policy concerning the protection of cultural objects.

PROPOSAL BY MR R. FRAOUA

Article 4

1. When a cultural object which, at the place where it is currently located, has a value in excess of ....., or which is invested with a great cultural importance for the Contracting State, is exported from the said State despite a prohibition, the State whose prohibition has been violated may request the competent jurisdiction to return the illegally exported object.
2. That State must demonstrate that the exportation has brought about a significant detriment to one or more of the following values:
  - (a) the physical preservation of the object or its context;
  - (b) the integrity of a complex object;
  - (c) the preservation of information relative to the object;
  - (d) the use of the object by a living culture.
3. The burden lies on the defendant to prove that:
  - (a) the exportation was legal according to the law of the requesting State; or
  - (b) the removal did not significantly impair one of the values listed in clause 2; or
  - (c) s/he was in good faith.