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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Summary report on the third session of the Unidroit study group on the international protection of cultural property, held at the seat of the Institute from 22 to 26 January 1990

(prepared by the Unidroit Secretariat)

Rome, May 1990

1. The third 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 10.15 a.m. on 22 January 1990. In greeting the participants (for the list of which see APPENDIX I), he addressed particular words of welcome to Ms Gams, Principal inspector of police with responsibility in connection with the theft of works of art (Interpol), and Colonel Napolitano, Head of the artistic heritage section of the Italian "Carabinieri", who were taking part for the first time in the work of the group as observers.

Item 1 on the agenda - Adoption of the draft agenda

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

Item 2 on the agenda - Feasibility and desirability of drawing up uniform rules relating to the international protection of cultural property

3. In introducing this agenda item the Chairman recalled that the Secretariat had requested the members of the group and the observers to communicate to it in advance their observations on the revised preliminary draft Convention so as to facilitate the work of the third session of the group. He drew attention to the documents which had been prepared for the session:

Study LXX - Doc. 15 - Preliminary draft Convention on the restitution and return of cultural objects (prepared by the Unidroit Secretariat in the light of the discussions of the study group on the international protection of cultural property at its second session held in Rome from 13 to 17 April 1989).

Study LXX - Doc. 16 Adds. 1 and 2 - Observations relating to the preliminary draft Convention on the restitution and return of cultural objects (Study LXX - Doc. 15).

Study LXX - Doc. 17 - Communication from the Commission of the European Communities to the Council on the protection of national treasures possessing artistic, historic or archaeological value: needs arising from the abolition of frontiers in 1992.

4. The Chairman then suggested that the group first hold a general discussion in the course of which its members might wish to raise questions which had not yet been dealt with, after which it would consider, article by article, the preliminary draft Convention on the restitution and return of cultural objects which had been prepared by the Secretariat following the discussions of the group at its second session.

5. As this might be the last session of the study group, the Secretariat had thought that the constitution of a drafting committee could be useful for the purpose of drawing up a text which would best reflect the opinions of the group, all the more so since a number of questions had been left unresolved at the end of its second session. In particular, the group had failed to agree on the principle of the restitution of a cultural object stolen from a dispossessed person, and on the compensation to be awarded in such cases to the possessor (Articles 2 and 3 of the preliminary draft), in respect of which two alternatives appeared in the present text. This drafting committee, composed of Ms Prott, Mr Ajala, Mr Fraoua, Mr Lalive and Mr Merryman would meet according to the progress made by the group and submit to it a text for second reading.

I. GENERAL CONSIDERATIONS

6. Some members of the group expressed a wish to reconsider the difficulty constituted by the distinction to be drawn between legal and illegal commerce, for today it was necessary to face up to serious distortions in international trade. There was a need to encourage legal traffic in cultural objects by defining it and by according a wide measure of protection to the possessor, and it was this that the study group was doing by indirectly modifying the traditional rules on the acquisition in good faith of cultural objects. This regulation of legal commerce was also very important since it was commonly the outlet for illegal traffic: many objects initially of doubtful origin were to be found on the legal market. Moreover a number of States "exporting" cultural objects continued to lay down conditions for their export which were too severe, and as long as such unreasonable rules existed the problem would remain.

7. The group also recalled the ineffectiveness hitherto of purely legal solutions given the low percentage of objects recovered each year. For a text to be genuinely applicable and effective, its aims would have to be restricted and it would also have to represent a compromise between the different interests involved.

8. Some members of the group drew attention to questions which had not been considered by it during its previous sessions. In the first place, it was suggested that a preamble be added to the preliminary draft, which would provide a source of interpretation for judges, an idea which was supported by several members. Such a preamble would set out the reasons which had led to the elaboration of the preliminary draft, stressing in particular the problems caused by illegal export and possibly referring also to the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property so as to indicate that the preliminary draft was intended to be complementary to it. On this last point, one member of the group stated that he was opposed to such a reference as it was a practice never to refer to an existing Convention since this would automatically prevent those States which had not accepted it from accepting the new Convention.

9. Importance was also attached to the need to draw up a sufficiently detailed explanatory report on the various articles so as to indicate the questions which had been discussed, possible differences of opinion within the study group and the compromise solutions adopted.

10. Still other questions were raised which would merit consideration at some time during the course of the session such as laws of mandatory application, the recognition of foreign law concerning inalienability and the absence of limitation, connecting factors and the interpretation of *ordre public* in those legal systems where this concept rendered contracts null and void.

11. The last of the questions which had not been dealt with by the study group during its earlier sessions related to the concept of "market overt" in Common Law systems to which one member had drawn attention. This doctrine operated as an exception to the fundamental principal of English law and of Common Law, *nemo dat quod non habet*, in that it permitted the purchaser in good faith of movable property in open market to acquire a good title to the property even though the acquisition was *a non domino*.

12. Before the group proceeded to an article by article examination of the preliminary draft Convention, the representative of the Commission of the European Communities presented to the members of the group a communication from the Commission to the Council on the protection of national treasures possessing artistic, historic or archaeological value in the perspective of the abolition of the internal frontiers in 1992. He recalled that Article 36 of the Treaty of Rome provided for an exception in respect of "the protection of national treasures possessing artistic, historic or archeological value", which meant that while in principle in the member States all goods, including cultural objects, should be able to

circulate freely, Article 36 left a door open for the application of national laws constituting an exception to that principle. The problem which arose was that of the interpretation of this option which was available to member States. The document interpreting Article 36, which had the authority only of the Commission, dealt with the limits laid down by community law on the right of member States to apply their laws protecting cultural property. It offered an interpretation of the concept of "national treasures" by attempting to combat an abusive use of the concept, without however giving a positive definition, and then established procedural limits (a law is only acceptable if for example the decisions are motivated, that there are appeal procedures, that the time limits for the procedures are reasonable ...). It could be expected that there would in the near future be judgments of the Court of Justice providing a definitive interpretation of Article 36 regarding which the Commission had only made suggestions, whether it be the Commission itself which would institute proceedings against a member State for non respect of community law, or individuals. The completion of the internal market would in no way affect the existence of Article 36.

13. He then outlined the two practical consequences of 1992: the disappearance of physical controls at frontiers and of the supervision by customs or fiscal authorities of exchanges of all goods, including cultural objects. The Commission's communication described first the legal framework within which the problem should be considered. It then sought to indicate the basis for possible answers to the questions raised in the first part, without stating a preference for any of the ideas put forward and which were of two orders: the measures which the member States might take at national level, and those which might have to be taken by the twelve. Finally, in its conclusions, the Commission of the Communities recalled that while all possibilities were open, the 1970 Unesco Convention should be ratified.

14. One member of the group recalled that in recommending ratification of the 1970 Unesco Convention the Commission was expressing a totally different opinion from that it had held in the 1970s when it had considered that the member States could not become Parties to that Convention given the customs aspects which were within the competence of the Community. Some countries had not however followed that opinion (first Italy and Greece, then Spain and Portugal). The representative of the Communities stated that it was true that in principle commercial policy fell within the exclusive competence of the Community but that certain international instruments contained elements of commercial policy. He stressed however that ratification of the 1970 Convention was only one of the possibilities suggested by the Commission in its communication and while, in the conclusions of a political nature, it had come back to that point, the question of competence had not been raised in the course of the discussions.

15. Some members of the group expressed concern at this recommendation of the Commission which they considered to be a step backwards vis-à-vis their own work and they stated moreover that the Convention simply was not working. The representative of Unesco recalled in this connection that the 1970 Convention was essentially a public law instrument and that Unesco had requested Unidroit to complete it by preparing private law provisions. This was in no way a recognition of failure as 68 States had become Parties to the Convention and in many States national measures for its application had been worked out. Unidroit had decided to set up the study group with the full support of Unesco which had believed Unidroit to be a more appropriate forum for such work, and Unesco would continue to cooperate actively with Unidroit.

II. ARTICLE BY ARTICLE CONSIDERATION OF THE PRELIMINARY DRAFT CONVENTION ON THE RESTITUTION AND RETURN OF CULTURAL OBJECTS

Title

16. At previous sessions the study group had, without discussing in detail the question of the title, commented on its wording, although no decisions had been taken on it. Some members of the group had likewise submitted written comments in this connection. Two questions now needed to be settled, that of whether the words "restitution" and "return" should be employed, and that of the choice between the words "cultural objects" and "cultural property".

17. One member expressed satisfaction with the title as adopted at the end of the group's second session, "Preliminary draft Convention on the restitution and return of cultural objects", since this language tracked that of the 1970 Unesco Convention. He pointed out however that the word "return" had in that Convention a more technical meaning (physical return). Another member suggested that the terminology employed in the 1970 Unesco Convention was not very precise as the term "restitution" could refer to financial compensation, which was not the case here, and that it was necessary to avoid making the same mistake a second time. Moreover, using the same words with different meanings would create a certain degree of confusion.

18. Some members also criticized the word "restitution", and proposed employing only the word "return" which did no more than describe the geographical fact of movement from one country to another and did not in any way prejudge the legal question. Others recalled that the preliminary

draft Convention, or at least certain of its articles, could have a purely national application and that the title should not therefore contain language which might suggest that it applied only to international situations, which could be the case if one were to use the term "return" which for some had a very special meaning. A number of members suggested that the English version should employ only the word "recovery" which was more neutral and which would avoid giving rise to a mistaken interpretation.

19. Finally, the group agreed to speak in the title neither of restitution nor of return so as to avoid differing interpretations or a confusion of ideas. It would be the different articles which would indicate the content of the Convention, thereby avoiding a difficulty of international characterisation. It was suggested that certain clarifications could be made in the preamble but in any event it seemed to the group to be necessary to introduce a new article defining the scope of application (cf. new Article 1).

20. The second outstanding question concerned the choice between the words "cultural objects" and "cultural property", in which connection the group drew a distinction between the French and English language versions. As regards the French text, a substantial majority of members of the group expressed a clear preference for the words "biens culturels", a legal term which was well known in France, Italy and Spain. One member however preferred the expression "objets culturels" since an object is capable of movement whereas property may be an immovable. Every object was of necessity "property" whereas the converse was not true. As regards the English version, it was pointed out that the expression "cultural property" had made its appearance only recently in Common Law, in the 1954 Hague Convention for the Protection of Cultural Property in Case of War. Many other texts used the term "cultural heritage". Ultimately it was decided to employ the words "biens culturels" in French and "cultural objects" in English.

21. At the suggestion of one member of the group, it was decided to divide the preliminary draft Convention into five chapters, each with a title, namely: scope of application and definition (Articles 1 and 2); restitution of stolen cultural objects (Articles 3 and 4); return of illegally exported cultural objects (Articles 5 to 8); claims and actions (Article 9) and final provisions (Articles 10 and 11). The text of the preliminary draft Convention on Stolen or Illegally Exported Cultural Objects is contained in APPENDIX III hereto.

Article 1
(new)

22. This article did not exist in the earlier versions of the preliminary draft. It was introduced by the drafting committee following a decision by the study group to delete the words "restitution and return" in the title. It appears as *Article 1* as it seemed logical to the group to set out first the scope of application of the preliminary draft, and then to define the term used.

23. One member of the group laid stress on the distinction drawn in this article between theft and illegal export. In fact, the text spoke of theft irrespective of where it had been committed, whether a State was a Party to the Convention or not being irrelevant, whereas it was pointed out that illegal export was that from the territory of a Contracting State. The group was of the opinion that as theft was punished everywhere, the place where the theft was committed did not need to be in a Contracting State. On the other hand, not all countries had adopted export regulations, and the group's wish was that those countries which called for respect of their own laws in this connection should be Parties to the Convention.

24. In reply to a question put by an observer, it was recalled that the Convention could apply also to purely domestic cases. The matter had been brought up on a number of occasions during earlier sessions of the group without however ever having given rise to a detailed discussion.

Article 1

25. This article contained a definition of the expression "cultural object" and was based on that to be found in Mr Loewe's preliminary draft.

26. The definition given in *paragraph (1)* of Article 1 was slightly altered in the French version in the light of the decision taken by the group to replace the words "objets culturels" by "biens culturels" in the title.

27. In addition, one member of the group suggested a minor amendment to the English version of the text on the ground that the existing wording could give rise to the impression that what was not artistic, historic, spiritual or ritual was not cultural, so that it was necessary to make it quite clear that such objects were only examples of cultural objects. The new formulation suggested would clearly comprehend objects used by a living culture, such as those covered by Article 4 (now Article 5) (3)(d). There was wide support within the group for adoption of this amendment, the

consequence of which would be that the new wording would provide guidance to users of the Convention as to its scope of application. It was pointed out that the new formula was very close to the existing French version and that while it might not be very elegant to have slight differences between the texts, there was no need to modify the French version.

28. A suggestion was also made to introduce into the definition of cultural object a fixed or mobile date, specifying for example that the object must be more than twenty years old. The other members of the group did not however support this proposal as they believed it to be extremely difficult to determine at what moment an object should be considered important. Indeed an object might not be deemed to be important at the time of the theft, but could become so subsequently, or vice-versa. Both moments had to be taken into consideration and it was difficult to make a choice between them. One member further emphasized that it was difficult to date certain objects which had been created recently with a view to the performance of ancient rites, objects which called for protection on account of their scientific or archaeological value, and that the introduction of a date in the definition would result in a lesser degree of protection. With a view to simplicity, and in the interest of correct drafting technique, the group decided not to adopt the proposal and to leave to the judge a degree of discretion in determining whether an object had been or still was important.

29. With a view to avoiding the problem of definition and that of dating, one member proposed adding at the end of the existing text the words "under the law of the State Party where the property was located prior to removal" so as to establish a link with the legal system of that country, which would provide assistance to a judge seized of a claim for restitution or return of a cultural object who would know where the object was considered to be important for the purposes of being covered by the future Convention.

30. Although some members of the group initially found the proposal to be attractive, it was not adopted. Indeed one member pointed out that while, in regard to illegal export, it was the State which had issued the prohibition which must show that the object had a special significance for it, it was far from certain that in cases of theft regard should be had only to the country where the act had been committed or whether there was not a general standard to assess the importance of the object. Another member was of the opinion that such an addition would amount to saying that the country of origin could define what is in effect a cultural object. The importing countries were concerned by what is in the United States called blank check provisions, that is to say that claims could be brought before an American court calling for unconditional acceptance of the determination

by another country that an object should be returned to it without any consideration of whether such a claim amounted to "over-retention". That member believed that the draft would have much less chance of being ratified in countries like the United States and some others if it contained such implications.

31. The group preferred to leave it to judges to decide upon such questions, which they would not necessarily do on the basis of their own national law. It was moreover pointed out that since national laws did not provide a more precise definition of cultural objects than did the preliminary draft, nothing could be achieved by referring to one law or another and that it would be mistaken to suggest that a general definition could resolve the problem of private international law of determining what was the applicable law for the characterisation of a cultural object as that was not the purpose of the definition.

32. The group then considered *paragraph (2)* of Article 1. As regards *sub-paragraph (a)*, some members proposed amendments to the wording of the English version, either by way of linguistic improvement or so as to render the text clearer. More generally however this provision was criticized both as to its substance and as to its form. As regards first its form, one member suggested that although the present wording was such as to indicate that the draft did not govern questions of ownership, in some cases it did. The purpose of the Convention was to regulate in a way different from the traditional schemata cases of acquisition in good faith, which indubitably touched on the question of ownership. What the group had wanted to say was that the Convention did not seek to govern the general regime of ownership of movable goods, but only that aspect of the regime concerning cultural objects, and a new formulation would permit this to be done.

33. As to substance, some members emphasized the difficulties created by the words "ownership" and "real right". While it might be the case that the terms "propriété" and "droit reél" had a precise meaning in the Civil Law, the same was not true of the words "ownership" and "real rights" in Common Law. They preferred the deletion of the sub-paragraph so as to avoid the problems of interpretation to which such a provision would not fail to give rise in view of the differences in law and in legal culture. Rather than to attempt to reformulate the provision which, at least in the French version, had a clear meaning, the group preferred to delete it and to provide a suitable explanation in the explanatory report.

34. Subsequent to the preceding session, some members had proposed the deletion of *sub-paragraph (b)* which they considered to be superfluous from a legal point of view. During this session, that suggestion had met with the approval of the group as a whole which believed that while in the

original preliminary draft the provision had been justified because there were a number of circumstances in which expertise had been relevant, this was no longer the case. Furthermore, the words "other sellers" gave rise to difficulty in that in some legal systems an auctioneer for example was not a seller and did not wish to be one, being nothing more than an intermediary. Moreover, there could be other persons with an interest in the object, for instance someone who had advanced a loan on the security of the object. Here again, given the deletion of the sub-paragraph, the group expressed a wish to see a statement in the explanatory report that the Convention did not deal with this matter and that such liability should be governed by the national law applicable to the transaction.

35. The study group proceeded to a second reading of the former Article 1(1) which was now a single paragraph, since the whole of paragraph (2) had been deleted, which contained a minor amendment to the English version. The group approved the text which was renumbered Article 2, although one member regretted the absence of any reference to a given legal system, "renvoi to the internal law of the State addressed", and another stated his opposition to such an intellectual definition of a cultural object which sought to include everything, for in his view this amounted to the creation of a legal category whose content was undetermined, whereas what was called for was a practical definition covering certain categories of cultural objects considered to be of special significance.

Article 2

36. Two alternative texts of this article were submitted to the group as it had previously been unable to reach agreement on the principle of the restitution of stolen objects. The first alternative was based on the assumption that there would be no automatic restitution of stolen cultural objects if the possessor could prove that it had taken "the precautions normally taken when acquiring such an object" and "consulted any accessible register of cultural objects which have been stolen". The second alternative provided on the other hand for the automatic restitution of a stolen object by the possessor. It was now for the group to choose between the two alternatives, and thus to settle the very important and difficult problem of reconciling two equally legitimate interests, namely that of an owner who had been dispossessed by theft and that of a person acquiring a stolen object in good faith.

37. The members of the group as a whole preferred Alternative II, that is to say granting priority to the protection of the dispossessed owner as against the possessor, one of them stating that this was the only realistic solution which could combat commerce in stolen works of art. Only one

member argued in favour of Alternative I, notwithstanding the fact that it contained a rule of evidence which was difficult to apply (need to take the most stringent precautions), based on the notion of protecting the possessor.

38. However, faced with these alternative solutions, one member of the group suggested that it might be possible to adopt a combined formula, namely Alternative I which would be better suited to cultural objects in general, and the stricter Alternative II for certain categories of objects which would be more clearly and rigorously defined. He insisted on the need for the category afforded special status to be restricted so as to ensure a greater degree of protection and to increase the chances of the uniform law being accepted as the wealthy countries would only accept the abandonment of the protection of the acquirer in good faith in certain very limited cases.

39. This dualist approach seemed attractive to some members of the group, but it was pointed out that the distinction which would have to be drawn between a strictly and a more broadly defined category of objects, or between objects which were or were not easily identifiable, would create a risk of restricting the cultural objects covered by the Convention for in many developing countries it was very difficult to find inventories and therefore to identify the objects so that it would be necessary to devise a means of protecting those objects also. Moreover the complexity of such a system as compared with a unitary one was emphasized.

40. Since there was little support for Alternative I, the group decided to embark on its discussion of this article on the basis of Alternative II, without however losing sight of the possibility of according a different treatment to cultural objects deemed to be of lesser importance and therefore requiring a lesser degree of protection (with a regime more similar to that to be found in Alternative I).

41. The group therefore concentrated its attention on Alternative II of Article 2 which laid down the principle of the restitution by the possessor of a stolen object in all cases. One of the first problems which it encountered was that of whether only cases of theft should be regulated or whether on the other hand there should be an extension to "any other similar act sanctioned by the criminal law". Some members were of the view that only theft should be dealt with, as this was a criminal act in all legal systems, and that it would be most imprudent to extend the application of the uniform law to less clearly defined cases which were treated differently from one country to another. They also recalled that the more restricted the scope of application of a Convention the more effective it would be. Others however stated that they would prefer to

retain the reference to "any other act" so that the future Convention would extend to acts falling within the concept of "vol" in Civil Law systems but which would not be comprehended by that of theft in the Common Law systems. The Convention would be incomplete if regard were to be had only to theft in the technical sense, which would of necessity be determined by the competent authority.

42. It was therefore proposed either to retain in the text of Article 2 the broader concept and to provide for a reservation clause which would permit States to limit the application of the uniform law to theft, or alternatively to speak only of theft and to allow States the possibility of extending its application to other criminal acts.

43. Finally, the group decided to follow the second path, Article 2 being included in the chapter entitled "restitution of stolen cultural objects", and to include in Article 11 (a) the possibility for a Contracting State "to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object".

44. The group then considered the reference to Article 9 to which attention had been drawn by one of the members who had interpreted paragraph (1), when read in conjunction with Article 9, as allowing the dispossessed person to bring a claim before a court of the country where it was resident, which would be unacceptable in particular in the United States where such a judgment would not be enforced in the State where the object was located. It was however pointed out that this was not the intention underlying Article 9, which conferred jurisdiction on the courts of the State where the possessor had its habitual residence or on those of the State where the cultural object was located. Since the group as a whole wished to draw a distinction between the content of Article 9 and the reference to it in Article 2, and was moreover anxious to avoid cross-references of this type in the Convention, it preferred to delete the reference to Article 9 in Article 2(1).

45. One member stated that, at least in the English version, it was not clear according to which law the court would determine the character of the act sanctioned by the criminal law. It was replied that during the second session of the study group there had been a consensus to choose the law of the State of the court seized of the case on account of a reluctance to rely on foreign criminal law and because no State would be prepared to find a person guilty when he would not be guilty under its own law. As to which law the court would apply, that of the forum or the law applicable in accordance with its rules of private international law, that decision would be for the court itself. It had therefore seemed to the group that this intention had been met by remaining silent on the question.

46. Another problem concerning the meaning of the text was raised in connection with the words "dispossessed person" at the beginning and end of paragraph (1), as one member of the group enquired whether they referred to the owner, an intermediary, a bailor or a holder of a security. Indeed, what might be contemplated was not only the owner, but any person in possession of the object, which had a precise meaning in Civil Law systems. One member expressed concern as to the person to whom the cultural object should be returned and suggested that it be stated that restitution should be to the owner who had the greatest interest in the recovery of the object. Another member of the group stated that in his country restitution would of necessity be made to the original owner (that is to say the person who had title in the object before its theft). In conclusion it was recalled that, with a view to obtaining restitution of a stolen object, there would in the majority of cases be civil proceedings and that if the court decided that the claimant had established the relevant facts, it was to that person that the object would be returned, whether it be a bank holding a security over the object, a museum to which a painting had been lent or any other person.

47. The group then proceeded to discussion of *paragraph (2)* of Article 3 which was concerned with the limitation period applicable to claims in respect of stolen cultural objects. One member pointed out that apart from dealing with the limitation period, the paragraph also contained a conflicts rule which was a duplication of Article 9 and for this reason he suggested deleting the first part of the paragraph which would then begin with the words "The claim must be brought ...". The group reacted favourably to this proposal.

48. One member of the group considered that such a provision would be difficult to accept in the United States since it was for the judge of the forum to determine whether a claim has been brought in time. Other members did not share this view, believing that this was a question of substance and that the court could very well apply a foreign law. Moreover, it was recalled that there was no uniformity with regard to questions of limitation of actions in Common Law jurisdictions: in the United Kingdom, substantive law would be applied as this was considered to be a matter of substance, while in the United States the period began to run at different times in different states and elsewhere there was no clear decision as to whether it was intended to follow the English or the American precedent.

49. The group then considered the length of the limitation period which, in the preliminary draft, was thirty years as from the dispossession. Opinions were divided, some members preferring a short period so as to respect the requirements of the art market, while others preferred a relatively long period which would take account of the speculative aspect

(purchase of the cultural object as an investment), and yet others went so far as to suggest that there should be no limitation period for cultural objects of very great importance or for claims brought by a State. Others again believed that no fixed number of years should be mentioned since that would always be an unfair solution, for the owner in the event of a short period being chosen and for the good faith purchaser if the opposite solution were to be adopted.

50. With a view to meeting the different concerns and to choosing the most satisfactory solution for the conservation of the cultural heritage, one member suggested that there should be no single limitation period, but two: an absolute limit of thirty years running from the theft and a short period of three years as from the discovery of the place where the object was located or from the occurrence indicating that the owner ought to have discovered the object. This solution would moreover provide a certain parallelism with illegal export in respect of which the group had at its previous session already opted in favour of two limitation periods.

51. Notwithstanding the hesitations of some members as to a double limitation period, the group decided to introduce a limit of thirty years as from the theft and one of three years which would begin to run when the claimant knew or ought reasonably to have known of the location of the object. However, on second reading it was pointed out that in the text prepared by the drafting committee a reference was made to "the identity of the possessor" a factor which had not been discussed during the first reading. To this it was replied that the intention had been to establish a reasonable period within which the dispossessed person could bring a claim and that it was possible that it would know the location of the object without knowing the identity of the possessor, or that it knew who the possessor was but did not know where the object was located. Another member however drew attention to the fact that the word "or" would deprive the claimant of the choice of forum as it would be aware of only one factor and would therefore be obliged to bring its claim in a place which might be less favourable to it. The other members of the group did not follow this reasoning and accepted the new wording of paragraph (2) (now Article 3(2)) for if the claimant was aware of only one element, there could be no question of choice of forum so that there was no choice of which it could be deprived.

Article 3

52. The group passed on to Alternative II of *Article 3* which contemplated compensation for a possessor obliged to return a cultural object in accordance with the preceding article, on condition that it proved that it had taken certain precautions when acquiring it.

53. The first point raised in the consideration of *paragraph (1)* related to note 13 which indicated that the question of burden of proof had still to be decided. The Secretariat noted that at the previous session of the study group discussion had been centred on Alternative I and that the only purpose of note 13 was to draw the attention of the group to the question in the event of its wishing to reopen it. The group however reaffirmed its view that it was for the person acquiring the object in good faith to prove that it had taken all the necessary precautions.

54. A number of members of the group made proposals for the amendment of the text so as to avoid the double negative at the end of the paragraph ("unless the possessor fails to prove that"), and to alter the terminology employed. In the French version, it was suggested replacing "remboursement équitable" by "indemnité équitable". As regards the English version, one member proposed using the words "fair and reasonable compensation" instead of "equitable compensation" since a misunderstanding might be created in those legal systems to which the concept of equity was familiar. All these proposals were accepted by the study group.

55. Having established the principle of the right to compensation of a possessor in good faith, the group turned to *sub-paragraph (a)* of Article 3(1) which was based on paragraphs (2) and (3) of Article 7 of LUAB. The first issue raised concerned the words "precautions normally taken" which was criticized by certain members of the group who preferred to speak of the "necessary diligence".

56. For reasons of simplicity, some members proposed that there should be no enunciation of the factors to be taken into consideration when determining whether the possessor had exercised the necessary diligence when acquiring a cultural object so as to avoid complicating the understanding and interpretation of the text. They suggested that the type of precautions to be taken should be mentioned in the explanatory report. Others however expressed a preference for a more developed version, fearing that oversimplification might reduce the protection accorded to the victim of a theft.

57. The group expressed a wish to see different formulations of this provision in writing before taking a decision and entrusted that task to the drafting committee.

58. The group then considered *sub-paragraph (b)* and in the first place observed that it needed to be simplified since it had been decided only to speak in the text of theft (with the possibility of extension by a reservation clause). Moreover, and notwithstanding the hesitations of one member to include such a provision given his scepticism as regards the

present efficacy of registers of stolen objects, the group preferred to maintain the content of the sub-paragraph with a view to the practical functioning of the future Convention.

59. It was however proposed to merge sub-paragraphs (a) and (b) into a single provision so that the consultation of a register would be one factor just like any other without according it too much importance. One member considered that a separate sub-paragraph (b) would only have meaning if what was intended was to create a legal obligation to consult the register and that such an obligation was out of proportion to its content.

60. On second reading the group considered two proposals by the drafting committee for amalgamating sub-paragraphs (a) and (b). It preferred a relatively succinct version which would explain what was meant by diligence rather than a longer formula which might create problems of interpretation. The group agreed to speak only of "the relevant circumstances of the acquisition, including the character of the parties and the price paid", together with consultation of a register, leaving to the judge a discretion to decide which other factors he or she deemed to be relevant. The group however insisted that mention should be made in the explanatory report on the text of the factors mentioned in paragraphs (2) and (3) of Article 7 of LUAB (namely the nature and provenance of the object, etc.).

61. The amount of the compensation, which had following the last session of the group become a maximum so as to take account of the financial possibilities of the dispossessed person, was considered in the course of the discussion on *paragraph 2* of Article 3. Before however the discussion of the language contained in the text in square brackets, one member called for the deletion of the whole of the paragraph on the ground that it was a duplication of the notion of "fair and reasonable compensation" to be found in the preceding paragraph. In effect this expression already reflected the idea that the compensation should not be greater than, for example, the commercial value of the object, and it was preferable to leave it to the discretion of the judge to arrive at the same result. Another member further indicated that a specific reference to the price paid or to the commercial value of the object would encourage the judge to add extra weight to those factors when deciding what was fair and reasonable.

62. While the majority of the group accepted this reasoning and in consequence supported the proposal to delete the paragraph, one member was of the opinion that it was necessary to retain a ceiling on compensation so as to avoid speculation, and not to leave the judge such a wide degree of discretion. It was replied that the notion of "fair and reasonable

compensation", which had the advantage of being a universal concept, laid down a very strict limit. One member also recalled that in public international law, in the context of compensation for nationalisation, judges had for a long time already applied the concept in the sense that the sum was less and sometimes very much less than the actual commercial value. In conclusion the group decided to delete Article 3(2).

63. The group then turned to *paragraph (3)* of Article 3 which had been approved at its last session although a request had been made that it be made clear that it did not cover intermediaries so as to avoid a mistaken interpretation. One member suggested replacing the words "dont il a obtenu" by the expression "dont il a acquis" as the present wording of the French version did not indicate sufficiently clearly that what was intended was to assimilate the position of a purchaser who had acquired the object gratuitously to one who had acquired it for value.

64. One member pointed out that a new problem had been created by the introduction in the preceding article of a short limitation period of three years within which to bring a claim when the place where the object was located had been discovered. In effect, if the conduct of the predecessor were to be imputed to that of the possessor, it should in that case necessarily be the same for the successor of the dispossessed person (clearly state that the period begins to run from the time when the deceased dispossessed person discovered where the object was located, and not from the time when a successor entered into the inheritance). It was therefore suggested that the wording of this paragraph be completed in that sense.

65. As regards the protection of an acquirer in good faith who had transferred the object to a person who knew that it had been stolen or who had had doubts in that connection, which was the converse case to that most often encountered in practice, it was suggested that the principle *mala fides superveniens non nocet* should apply even in the case of succession. Two different situations concerning this paragraph were distinguished: the first was that of "innocent" successors of a possessor in bad faith, and in such cases by virtue of paragraph (3) of the article they were deemed to be in bad faith; the second situation was the much rarer one where the successors of a possessor in good faith knew that the object had been stolen and in those circumstances the successors would be in the same position as the deceased according to the principles of the law of inheritance, and would be deemed to be in good faith. It was suggested that in these admittedly very rare cases there might be results which some could find doubtful or even unacceptable. One member insisted on the fact that if the intention was to protect a person who acquired a stolen object in good faith by according that person the rights established by the Convention,

then all persons acquiring the object, apart from the thief, should receive the same treatment, for otherwise a simple advertisement in a widely circulated newspaper of the place where the object was located would prevent any person from ever being able to buy the object from one who had acquired it in good faith and thus destroy the protection offered by the Convention to the latter. That member of the group pointed out that the present wording of the provision did not give an answer to the question and it was therefore up to the group to decide whether it wished to leave the paragraph as it stood or to deal expressly with the matter.

66. Mr Loewe observed that this extremely practical problem was not at present dealt with in the preliminary draft because he, unlike some other members, had been of the opinion that the conduct of each possessor should be considered separately with a view to determining whether that person should be entitled to compensation. Thus, it was possible that at the time when a possessor in good faith sold the object, the future acquirer would be in bad faith. In his initial draft he had not contemplated that a "laundered" object should always remain so as this would permit the most fantastical manoeuvres. He was not convinced by the exceptional case in which the last acquirer was the thief since this was a theoretical possibility which had no effect on the text under consideration. The matter had not been dealt with directly but indirectly (it was nowhere said that the fact of purchasing an object from someone who had exercised the necessary diligence was sufficient for the person subsequently acquiring the object).

67. On second reading, the group adopted the text of the article subject to some minor restructuring and to its being renumbered as Article 4, composed of three paragraphs. The principle set out in the first paragraph remained unchanged (compensation for a possessor who had exercised the necessary diligence when acquiring the object). Paragraph (2) was a restructuring of sub-paragraphs (a) and (b) of the former paragraph (1), while paragraph (3) was not amended. The former paragraph (2) was deleted.

Article 4

68. This article was concerned more specifically with the return of a cultural object which had been exported in infringement of a prohibition, unlike the preceding articles which had dealt with the case of theft. Already at the preceding session, the group had agreed that neither good faith nor the precautions which might have been taken by the possessor could be set up to prevent the return of the object, on condition that the time limits which were laid down had been respected.

69. As to the article as a whole, one member expressed satisfaction at its extremely solid structure for Article 4 answered the fundamental question of who would determine whether the object was a "cultural object". In fact, an action for recovery of the object was to be brought by a State which had to prove that the cultural object was one caught by its control of the export of works of art and, subject to sub-paragraph (b) of paragraph (1), establish the cultural importance of the object. What was being contemplated was therefore existing legislation. The article had the advantage of setting limits to its own application (whereas Article 3 referred the issue to the judge of the State seized of the case) and also of establishing precise critera.

70. As regards the introductory language of *paragraph (1)*, one member recalled the observations made by the committee on cultural property of the International Bar Association at its congress held in Strasbourg in October 1989 which had been unclear as to what type of prohibition was contemplated. A majority of the members of the group were of the view that the intention had been to envisage only existing legislation and that if the present text was not sufficiently clear it should be clarified that what was to be understood was a prohibition of a general character which already existed and that there was no reason to broaden the scope of the notion of prohibition. One member however stated that he would have difficulties if the provision were not to cover prohibitions ordered by a court since, for example, under the Nigerian Constitution, everybody was expected to respect decisions of the courts and non-observance of such a decision would be considered as a contempt of court. He therefore wished to see the provision extend not only to legal prohibitions but also to those based on decisions of courts.

71. Always in connection with the introductory language, the group came back to a question which was dealt with in square brackets in the text, namely whether it should speak only of a court or also of "any other competent authority". One member insisted on the retention of those words since in some countries it was not only a court which might be seized of a dispute relating to ownership of a cultural object, as a government might create a special instance to deal with the case and there should therefore be no limitations on the authority which might determine whether or not a cultural object should be returned. Another member proposed a slight modification to the text so that it would simply read "may request the competent authority of a State". This suggestion did not however meet with the approval of the group as a whole, it being pointed out that one of the innovations of the text was to confer jurisdiction on a national court to order the return of a cultural object which had not been stolen.

72. The group then proceeded to consideration of sub-paragraphs (a) and (b) of paragraph 1 which laid down conditions to which the return of cultural objects might be subject. *Sub-paragraph (a)*, whose origins were to be found in Mr Loewe's preliminary draft, appeared in the text between square brackets and a choice was offered between the words "or" and "and" linking sub-paragraphs (a) and (b) since the group had been unable to reach agreement on the matter at its previous session. The members of the group had in effect been divided, some wishing to retain the criterion of monetary value as it made it easier for the requesting State to discharge its burden of proof and since the use of the word "or" permitted a choice to be made between this criterion and others, while others preferred the deletion of sub-paragraph (a) or, if it were to be maintained, cumulation of the monetary criterion and the others.

73. Once again there was a division of opinion within the group on this question. Among those who believed it necessary to retain the provision, some argued in favour of the alternative solution ("or"), and others the cumulative solution ("and"). One member suggested that the choice between "or" and "and" would depend upon the figure: if the alternative solution were to be chosen then the figure should be increased whereas under the cumulative solution it would serve only to relieve the courts of an additional burden. One member went so far as to suggest the establishment of two limits, a maximum with "or" and a minimum with "and".

74. Initially, a consensus emerged within the group to reverse the order of sub-paragraphs (a) and (b), as the present order attached too much importance to the monetary criterion. Subsequently however, since it proved impossible to find common ground on the existing text, and because in any event the provision was of much less importance than it had been in Mr Loewe's preliminary draft where it had been the only condition, the group decided to delete sub-paragraph (a). One member alone continued to argue in favour of its retention with a high amount as this would simplify proceedings for the return of objects under the future Convention.

75. The alternative to the criterion of pecuniary value was contained in *sub-paragraph (b)* of paragraph (1) in the form of a list of interests that would be impaired by the illegal export of the object and which would justify its return. The group as a whole considered the purpose of this sub-paragraph to be extremely important in that it contemplated a change in the universal practice of States by obliging them to recognize and to enforce the export control laws of a foreign State. To obtain acceptance of an exception to the general rule with regard to cultural property, it would however be necessary to offer a reasonable description of the situations in which it would be appropriate to ask States to apply provisions of foreign law which they would otherwise not apply and it was precisely sub-paragraph (b) which listed those situations.

76. In the course of the examination of the content of the sub-paragraph, one member of the group proposed a restructuring of sub-paragraph (b) as a single sentence and not in the form of a list, and this for two reasons. The first was the desirability of consistency with the drafting technique used in Article 3 whereas the second was a question of presentation as the existing wording attached the same importance to five points ((i), (ii), (iii), (iv) and (v)), which was not true. This suggestion met with the approval of only some of the members of the group who feared that its adoption would result in all export prohibitions having to be taken into account. Other members preferred the retention of the existing wording which at least had the merit of clarity.

77. As regards *point (iii)* of sub-paragraph (b), it was recalled that at the preceding session of the group attention had been drawn to the problem of clandestine excavations followed by the export of the stolen object. To take account of this problem one member proposed adding a new paragraph to Article 4 which would read as follows: "the export of an object which has been clandestinely excavated shall *ipso facto* be treated as being within the category described in (b)(iii) above". The group supported the idea underlying this proposal and decided to refer the question to the drafting committee.

78. With respect to *point (v)*, some of the language of which had been placed in square brackets and in respect of which alternative drafting had been proposed at the last session of the group, one member favoured the adoption of the first form of wording to be found in note 15 in Study LXX - Doc. 15, which contained a number of elements permitting the determination of the importance of the object. To this it was however replied that, for reasons of consistency, the text of Article 3 had been simplified so as to leave a degree of discretion to the judge and that there was no reason here to explain how he or she should assess the importance of a cultural object. While recognizing that the present wording of point (v) was not satisfactory because it did not speak of the rare or unique character of the object, the group was persuaded by the arguments based on consistency of drafting and decided that the factors to be taken into consideration when determining the importance of the object should be mentioned in the explanatory report on the text.

79. The last question to be considered in relation to this provision was the choice between the words in square brackets characterising the importance of the object ("great" or "outstanding"). As regards the French version the group agreed on the word "particulière" which conveyed the idea that even if the object in question was not in itself exceptional, it was important in the circumstances of the case and that the request for return was justified so that a broader interpretation could be given to it. As to

the English version, there was a difference of opinion as to whether the word "great" or "outstanding" should be adopted. Finally, a choice was made in favour of "outstanding", although one member who was dissatisfied with that word formally requested that an explanation of its meaning be given in the explanatory report.

80. The group then proceeded to consideration of *paragraph (2)* of Article 4 which contained three exceptions to the principle of return to the requesting State of objects which had been illicitly exported from it.

81. At the end of the last session of the group, all members had been in favour of the inclusion in *sub-paragraph (a)* of paragraph (2) of the idea that prohibitions concerning objects exported during the lifetime of the person who created them or within a certain period following that person's death should not be effective abroad, although two figures had been indicated in square brackets as there had been no consensus regarding the length of the period.

82. One member however objected to the exclusion from the future Convention of objects exported within a certain period following the death of the artist and proposed that the sub-paragraph should finish after the words "who created it". She observed that in some countries no provision was made for such a period as was for example the case in her country with the Australian Export Act which applied to any object as from the death of the artist. If however the group insisted on a period of that kind, she considered that fifty years was absurd and that twenty years would constitute a compromise.

83. The other members of the group however took the view that such a choice would constitute a serious infringement of the rights of artists, as it would paralyse the international circulation of cultural objects and seriously compromise acceptance of the future Convention; they excluded the possibility of taking as the time limit the death of the artist. As to the length of the period following his or her death, it was recalled that the fifty year period was based on an analogy with copyright (Bern Convention of 1886 and successive revisions), and that most laws governing artistic property contemplated the life of the artist plus fifty years. Such a long period would permit successors to affirm the artist's reputation abroad as well as at home, whereas a shorter period would be a sort of confiscation in their regard. As to the argument that such a period could create a risk of all the work of an artist disappearing from the country, it was replied that the State of origin had the possibility of purchasing the artist's work so as to conserve it in its museums or of making provision in its legislation for taxation benefits in the case of gifts (example of the Picasso law in France).

84. Without insisting, one member nevertheless pointed out that the text contained a disparity of treatment between theft and illegal export as the new Article 3 concerning stolen objects applied to them irrespective of whether the artist was dead or alive. He therefore proposed a narrowing of the definition of cultural property by excluding from the scope of application cultural objects created by living artists, since according to Interpol most cases dealt with by it concerned the theft of works of artists who had been dead for a very long time.

85. The other members of the group were of a totally different opinion, considering on the one hand that there was no difference in treatment as the two situations were totally different, namely: theft which was punished in all States and in respect of which the rules contained in the future Convention could not enter into conflict with the interests of the artist or the artist's family, and illegal export decreed by a State which most States did not in practice recognize, and where the export prohibition might, in certain cases, conflict with interests considered to be legitimate in the large majority of States of the international community. In these cases most States would be reluctant to sacrifice the interests of the artist or of his or her family, and would not therefore recognize export prohibitions.

86. The group finally decided to follow the example offered by copyright, and to exclude the application of the future Convention when the export took place during a period of fifty years following the death of the artist.

87. The group then turned its attention to the relative and absolute time limits laid down by *sub-paragraph (b)* of paragraph (2) in respect of the bringing of claims for the return of cultural objects. The time limits had been fixed at the last session at five and twenty years, notwithstanding the objections of two members of the group, but the question had been reopened following the introduction of two time limits in what had now become Article 3(2), with a view to seeking a degree of parallelism between the two provisions.

88. Some members favoured a modification of the time limits for reasons of parallelism with Article 3 and because two different periods could give rise to problems in regard to objects which had been both stolen and illegally exported. A larger number of members however believed that the two situations were different and that the suggested parallelism was not justified. As regards the shorter period, they suggested one of five years since one of three years was in their opinion too short for a State to be able to establish that an object had been illegally exported from its territory, in particular when its origin lay in clandestine excavations. As

to the absolute time limit, they thought that a period of thirty years was much too long and could cause difficulties for certain importing States which might refuse to recognize export prohibitions dating from too far back.

89. The group then considered the question of the time from which the periods should run. With regard to the shorter period, the group wished to add a reference to the place where the object was located as the present text mentioned only the identity of the possessor (with a view to providing the same alternative as that contained in Article 3). For the absolute time limit, one member pointed out that when the object had been discovered in the course of clandestine excavations and then illegally exported, nobody would know the date from which the period should begin to run. The group admitted that the present text was not perfect but that it would be difficult to improve upon it and that moreover the problem would become one of the proof to be brought by the two parties in the course of proceedings. Ultimately, the group agreed to retain the existing language of the sub-paragraph.

90. Concerned by the fact that national rules governing export are subject to change, one member of the group argued in favour of introducing a condition that for a request for return to be granted, the export legislation must be the same at the time when the claim was brought as it had been when the object left the territory of the requesting State. Other members of the group supported this proposal and a suggestion was made to add a new sub-paragraph (c) which would read as follows: "The provisions of paragraph (1) (a), (b) or (c) shall not apply when the export in question is no longer illegal at the time of the bringing of the claim", which would cover the case of conflicts of law in time and avoid a prohibition which had been lifted continuing to have effect. The group decided to include such a provision in the text while noting the opposition of one of its members.

91. The group then considered *paragraph (3)* of the article which had been included in the draft so as to take account of the wish of some of its members to indicate the circumstances in which the State addressed might refuse to accept the claim for return of the object or to subordinate its return to non-pecuniary conditions. The group examined a text which had been proposed by Mr Fraoua and Mr Lalive at the last session but which it had not been possible to consider in detail for lack of time. The purpose of the proposal had been to protect the object and at the same time to render the claim more credible without creating obstacles to the return of the object. This new formula provided for the giving of certain information which would be necessary for a request to be admissible.

92. One member deemed the provision to be superfluous as it did no more than indicate what the claimant would have to establish to win his case in any normal proceedings. He further noted that the idea of conservation contained in the second sentence was already to be found in the list of interests which the export would significantly impair (point (i) of paragraph (1)(b)): it was for the judge to determine what should happen after the return of the object.

93. Other members did not share this view, believing that the provision was fully in conformity with the philosophy of the Convention as a whole which was to protect cultural objects and not the interests of a State. It was further pointed out that there was an abyss between the political will to protect cultural objects and that of achieving their recovery, and that such a provision would be of assistance to authorities responsible for the protection of cultural objects in exporting countries.

94. Some members further emphasized that the provision should not become a condition for the admissibility of a claim for the return of a cultural object, but should be a simple recommendation in the sense understood by Unesco. However the authors of the provision insisted on maintaining, or even accentuating, the notion of admissibility. In this connection some members were of the opinion that the structure of the article should be reconsidered, as it was more logical to speak in the first instance of admissibility (paragraph (3)), and then of substance (paragraph (1)), and the question was referred to the drafting committee with a number of proposals intended to improve the wording without however questioning the maintenance of the provision which had both an educational and a political purpose.

95. Finally, the group considered the article which had been restructured by the drafting committee so as to make its presentation more logical. This article, which has now become Article 5, tracked the different phases of the proceedings as they would take place in practice: the first paragraph concerned the bringing of a claim by a State (former paragraph (1) of Article 4); the second dealt with the admissibility of such a claim (preliminary examination on the basis of certain information) (former paragraph (3) of Article 4); the third contained the list of interests which would be significantly impaired by the export of the object, with the addition in sub-paragraph (c) of the words "for example, a scientific or historical character" so as to take account of the suggestion made by one member of the group (cf. paragraph 77 above) in relation to the problem of clandestine excavations of archaeological sites. As regards the former paragraph (2) of Article 4 its wording remained unchanged apart from the addition of a new sub-paragraph (c) stating that the legislation prohibiting the export must not have been repealed at the time of the bringing of the claim. That paragraph has moreover now been renumbered as Article 7.

Article 5

96. This article described the circumstances in which an acquirer in good faith (in the sense that he neither knew nor ought to have known of the fact that an export prohibition had been infringed), and who is obliged to return the cultural object, might request payment of fair and reasonable compensation from the requesting State, choose to retain ownership of the object or transfer it to a person of its choice in the requesting State. At the end of the second session, different opinions had been expressed within the study group on various aspects of this article which explained why it contained a number of phrases in square brackets, upon which the group was called to decide.

97. One member drew the attention of the group to an oversight on its part, namely its failure to impute to the possessor the conduct of a predecessor from whom it had acquired the object by inheritance or otherwise gratuitously (who had no knowledge of the illegal export). He considered that it was necessary to state this as clearly as had been done in connection with theft (paragraph (3) of the new Article 4).

98. The group discussed a number of points at the same time and in so doing realized that the article was badly drafted for it confused different questions and its wording was sometimes inelegant. It therefore agreed that the drafting committee rewrite the article, no longer in the form of a single paragraph, but consisting of as many paragraphs as there were different ideas expressed.

99. Some members however wished to make certain suggestions to the drafting committee. As regards the last sentence of the article, which was placed in square brackets, one member expressed concern that the possessor, who might be a private person, could limit the intervention of a State by imposing conditions on a foreign State, even if the intention was to protect the cultural object. Another member replied that it was possible to provide that the State addressed could require certain guarantees for the return (guarantees regarding security, conservation, ...), but it was pointed out that this could give rise to duplication with the provision in paragraph (2) of the new Article 5 (former paragraph (3) of Article 4) which made those factors a condition for the admissibility of the claim for return. The language "to interfere in any other way with the possession" was moreover criticized by that same member for if the State receiving the object were properly to discharge its obligations, it would necessarily have to interfere with the possession (it would always do that when it wished to retain an object of public interest and leave it in the hands of a private person). He therefore proposed that the words in question be deleted.

100. Some members having suggested that the result should be a return to the *status quo ante*, one member expressed concern at the fact that it might facilitate speculation in connection with illegal export. In other words, if a person were permitted to return the object to another person, including the one who had illegally exported it, the latter might be able to re-export it to someone else in a State that was not a Party to the Convention. Other members saw merit in this argument and proposed amending the text so that the person in the country of origin of the object would have to offer all the necessary guarantees for its proper conservation. However it would be for the judge to choose from among the many persons offering guarantees.

101. On second reading, the group considered the text proposed by the drafting committee which took the form of four paragraphs, thus clarifying the different ideas expressed. *Paragraph (1)* maintained the principle according to which the possessor who did not know that the object had been illegally exported could call for payment of compensation by the requesting State. This was in effect the former text slightly modified to render it more elegant. The group had still however to decide whether the compensation should be "fair and reasonable compensation" or "the price paid by the possessor", both expressions appearing in the text between square brackets since, at the last session, some members had considered that the acquirer in "good faith" of an illegally exported cultural object should in all cases obtain full reimbursement. The group preferred the first proposal as fair and reasonable compensation, already chosen in the case of theft, would allow the judge to take account of all the circumstances.

102. *Paragraph (2)* provided for other possible choices to be exercised by the possessor in place of compensation: it could remain owner of the object or transfer it to a person of its choice in the requesting State. The original text was not amended, although the drafting committee introduced the idea that the person to whom the object was transferred must provide the necessary guarantees for the conservation of the object, as had been suggested by some members of the study group. Moreover, the sentence concerning the undertaking to be given by the requesting State not to confiscate the object nor to interfere in any other way with the possession was greatly abbreviated to read: "..., the object cannot be confiscated".

103. In connection with the addition regarding the guarantees required for the conservation of the object, one member expressed doubts as to the formula employed ("and who provides the necessary guarantees"), and asked whether it might not be necessary to link up that phrase with the new Article 5(2). It was explained that the drafting committee had ultimately decided unanimously to delete the original reference to guarantees

regarding the protection, conservation and security of the cultural object as opinions had differed widely on the meaning of the words "conservation" "protection" and "security". The present text was a compromise as it had seemed to the drafting committee that what was at issue was certainly a question of interpretation, but that the guarantees were necessarily those relating to the objective of the Convention which was the protection, conservation and security of the cultural object.

104. Subject to an improvement of the text, the group as a whole supported the retention of the idea that, in cases where the possessor was in "good faith", the requesting State should not be allowed to confiscate the object for otherwise there was a risk that the Convention would never be ratified. Moreover, the requesting State would, when ratifying the Convention, undertake to respect the choice offered to the possessor which would be legally guaranteed.

105. The new formulation of the former second sentence of the article, originally placed between square brackets, did not recommend itself to all members, some of them believing that it was less clear than the former text. It was for this reason, and because there exist many other measures which are equivalent to confiscation, that one member proposed adding to the existing text the words "... nor subjected to other similar measures". It was explained that the drafting committee had considered it appropriate and even necessary to delete a part of the former phrase because of the criticism by one member of the words "interfere with possession" (a State which for example took certain measures of classification could not avoid interfering with possession of the object). He was however in agreement with the proposal now made, since the notion of confiscation was not the same in all countries. The words "other similar measures" created a difficulty for one member who was uncertain as to their meaning. He asked whether they included measures limiting rights of ownership which had existed prior to the export of the object. For example, if the object was classified, would the State have to revoke the classification following the return of the object, or could it maintain it. Although most of the other members did not share this concern, in particular noting that judges had never had any difficulties in interpreting such language in connection with nationalisation, another text was proposed "... nor subjected to other measures to the same effect". The group as a whole accepted that proposal.

106. The group then considered *paragraph (3)* which had been introduced following a proposal by Mr Crewdson that the requesting State should be responsible for the expenses associated with the return of a cultural object. One member expressed his surprise that there should be a separate paragraph on this question as this was precisely one of those factors of which the judge should take account when calculating the fair and

reasonable compensation. He believed that by providing that this was a separate amount, one would in effect be "limiting" in some way the judge's freedom to calculate the fair and reasonable compensation, and he therefore called for the deletion of paragraph (3) or at least a restriction of its application to paragraph (2).

107. The other members of the group did not share this view and were opposed to the deletion or the restriction of the scope of the paragraph. One of them however admitted that it might seem shocking to require a requesting State to cover the costs of the return if the possessor chose to transfer the cultural object for value to someone in the requesting State, although he was quite satisfied that paragraph (3) should apply to the first two paragraphs. Another member considered that it was necessary to distinguish two cases. The first was that of a cultural object which was returned to the country of origin against compensation: it was useful in such cases to clarify that the costs of the return were not covered by the compensation as they were administrative or material costs and did not amount to compensation intended to avoid causing prejudice to a person in "good faith" (if he were not, he would have no claim for compensation as was provided in paragraph (1)). The second case was that where the object was transferred to a person in the requesting State, and in those circumstances it was pointless further to "punish" that person.

108. One member wondered, in connection with punishment, whether one ought not to "punish" a person who knew that the object had been illegally exported by making him pay the cost of the return. The other members of the group considered that it was for the requesting State to deal with this question after the return of the cultural object for if this distinction were to be introduced prior to it, then the return would be more difficult which was not the aim of the Convention.

109. Strong reservations were expressed by one member, who believed that the judge should in certain cases be able to determine whether it was equitable to ask a requesting State also to pay the cost of the return, since it would already have incurred substantial expenses including those of the proceedings and the payment of compensation. That member would have preferred it to be possible for the judge to take those factors into consideration in a given case and it seemed that the present wording left the judge no such discretion.

110. Notwithstanding these hesitations, the group decided to leave the text as it stood, referring to the two previous paragraphs; it was in the last analysis of the belief that a State claiming the return of a cultural object which it believed to be extremely important for its cultural heritage would be prepared to pay whatever was necessary to obtain its

return, always subject to the possibility for it to seek an indemnity from the person responsible or the illegal export.

111. In conclusion the group agreed to the inclusion of paragraph (4) which imputed to the possessor the conduct of his predecessor from whom he had acquired the object by inheritance or otherwise gratuitously, an addition which had been called for by one of its members.

112. The article was renumbered Article 8.

Article 6

113. Although this article, the text of which was based on that of Article 5 of the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, had been deleted at the group's second session, it had been decided that an attempt should be made to include the content of that article in another provision so as to set out and to clarify certain well defined cases in which the principle of return contemplated in the draft Convention would not be applied. Some members had been of the belief that for the Convention to be acceptable it was necessary to retain the idea to be found in Article 4(2)(c) which had been deleted at the second session of the group and which read as follows: "The provisions of paragraph (1) shall not apply when ... (c) the object has a closer link with the culture of a State other than that on whose territory it was created." This provision had been deleted because the group had considered that nothing could ever oblige a State to return to another State an object which was for it of the greatest importance. The text of Article 6 had been retained in the preliminary draft between square brackets pending a new proposal from the group.

114. On first reading, the members of the group as a whole reiterated their wish to delete the reference to public policy (*ordre public*) which could create problems for certain States in ratifying the Convention. A majority believed that even if that concept were not mentioned in the text, States would in any event invoke it as a kind of reservation clause. One member further pointed out that the most frequent use of *ordre public* in the traditional sense had been eliminated by the inclusion in the draft of a provision which prevented "abusive" confiscation and that there was therefore no longer any need for a special provision. The example was also given of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction where the same type of problem arose and it was recalled that it had been expressly decided not to mention *ordre public* in that Convention, although special provisions had been adopted for specific cases contemplated by the Convention (grave risk of physical or

psychological harm to the child or of his being placed in an intolerable situation). It was therefore suggested that in the present case there should be a possibility to refuse the return of an object, without however speaking of *ordre public* in general, rather simply saying that the return could be refused if the circumstances envisaged by Article 5 obtained just as much in the State where the object was located as in the State of origin.

115. Another member believed that a provision on *ordre public* had no place in a text seeking to bring about unification. He considered that the only situation in which the authorities of a State could not be called upon to give effect to a claim of the kind described in Article 5 was that where the object had a very close connection with the State addressed. The fairest solution would be that the claim could be rejected if the object had for the State addressed as much importance as that required under Article 5 for the requesting State.

116. This notion of "close connection", or "as great an importance" received support within the group which believed that it reflected the actual relations between States but it nevertheless wished to see a written version of the provision before taking a decision. The text was therefore sent to the drafting committee.

117. The article proposed by the drafting committee read as follows: "The State addressed may [only] refuse to order the return of a cultural object when its own interest in that object [or that of another State] under Article 5 (3) is [equal to or] greater than that demonstrated by the requesting State". One member of the drafting committee explained that what was being done was, in a separate provision, to limit the grounds of refusal, and that it was precisely this concern, this political choice (it was stated that there was only one ground of refusal) which had justified the use of the negative formula which was to be found in the language employed in the Hague Conventions.

118. Some members were uncertain as to the meaning of the words "greater interest" and one of them in particular drew attention to a political difficulty facing a judge who would be called upon to make a comparative evaluation of the greater interest of another State, and he wondered whether a judge would be entitled to proceed to such an evaluation of interests when being obliged to take account of foreign laws. It was replied that judges are often called upon to make such comparative evaluations, especially of economic or cultural interests, even if that task could seem to be difficult. Moreover, under Article 5, the State addressed already had to determine the interest of the requesting State.

119. A majority of members preferred the expression "as close a, or a closer, connection", which seemed to be more objective, to the words "greater interest". The Chairman however warned against using the private international law concept of the closest connecting factor which was a technique for choosing the applicable law whereas in the present situation it was a question of evaluating a greater or lesser interest.

120. Two members of the group, Mr Lalive and Mr Ajala, each proposed a new text for the article so as to take account of the different observations. The proposal of Mr Lalive read as follows: "The court or competent authority may [only] refuse to order the return of a cultural object when it finds that that object has a close, or closer, connection with the culture of the State addressed or of a State other than the requesting State." The second proposal, that of Mr Ajala, had essentially the same purpose, but was formulated in a positive manner and with an addition after the words "competent authority" namely the language "seized of a claim for the return of a cultural object".

121. The group had no difficulty in accepting the content of the texts, irrespective of whether the formulation be positive or negative. One member however saw a technical difficulty because it was said in Article 5(3) that when certain conditions were satisfied the return should be ordered, and the principal ground of refusal was that where the requesting State had failed to prove what was necessary for the order of return to be made. However, in the following article it was said that the only ground for refusing return was that there was a closer connection with another State. In the interest of logic he suggested that it be stated in the text that even when the conditions mentioned in Article 5 were met, there was still one situation in which the return would nevertheless be refused. The other members of the group were in favour of the reintroduction of the reference to Article 5 whose removal had caused concern to some. This would permit the negative formulation to be retained and it would no longer be necessary to include the words "seized of a claim for the return of a cultural object", proposed by Mr Ajala, as the new formulation now contained the same idea. Ultimately, the group decided to adopt the wording proposed by Mr Lalive, adding however the words "When a State has established its claim for the return of a cultural object under Article 5(3)" at the beginning of the sentence.

122. The last question to be considered by the group in relation to this article concerned its place in the text of the draft Convention. The group agreed that it should be placed after the article which laid down the basic principle according to which the courts of the State addressed shall order the return subject to certain conditions being met, because it established an exception to that principle. In the new structure of the draft the article remained unchanged as Article 6.

Article 7

123. This article, which dealt with the unit of account to be applied, had not been discussed at the second session of the group because the only indication of value, which had appeared in Article 4(1)(a), had been placed in square brackets given the differing opinions as to whether it should be retained or deleted. Since the group had now finally decided to delete that sub-paragraph, Article 7 no longer had any relevance.

Article 8

124. This article was concerned with the financial compensation to be awarded to a person acquiring an object in good faith but who was nevertheless obliged to return it. It had dealt not with the amount of compensation, but with the criteria for determining it. Since however the article was also connected with the application of Article 4(1)(a) which had now been deleted, the group decided that this article should likewise be deleted.

Article 9

125. This article, which specified what were, at the option of the claimant, the courts with jurisdiction over claims brought under the draft Convention, had received a favourable reception from the members of the study group at its second session. On that occasion, a decision had been taken to include in the first line of the article, but in square brackets on account of differing opinions, the words "or other competent authorities" after the words "the court" in the light of a proposal by one member who assumed, above all in the context of the new Article 8, that another authority might have jurisdiction.

126. On first reading, the group reiterated its satisfaction with the article, in particular because of the choice offered the claimant which introduced an element of flexibility. Being of the view that the words in square brackets raised nothing more than a question of drafting, the group referred the text to the drafting committee.

127. The drafting committee proposed the same text to the study group, without the square brackets, as it considered that it was necessary to have regard to other authorities which might have jurisdiction. Moreover, it divided the two sentences of the article into different paragraphs. The first offered claimants the possibility of bringing proceedings before the courts of the State of the habitual residence of the possessor or before

those where the object was located when the claim was brought. The second paragraph made provision for submission of the dispute to another jurisdiction or to arbitration.

128. As regards paragraph (1), the Secretary-General of the Hague Conference on Private International Law recalled that he had approved the creation of a new ground of jurisdiction, which would facilitate the application of the Convention, namely that of the place where the object was located, even though this was almost unknown in relation to claims for the recovery of movable property in Europe and was not to be found in the major codifications of rules governing jurisdiction at present in existence, in particular the Brussels Convention of 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, and the Lugano Convention of 1988 which bears the same title. What troubled him was that the present text sought to lay down exhaustive rules governing jurisdiction in connection with the questions dealt with by the Convention, because after it had stated that the courts where the possessor had its habitual residence or those of the State where the cultural object was located had jurisdiction, the only exceptions it admitted were courts chosen by the parties or arbitration.

129. He wished to draw the attention of the group to the enormous difficulties, both practical and above all political, to which such a solution, if maintained, would give rise, above all in connection with stolen objects. The problem ought not to arise in connection with illegally exported objects in relation to which the claimant would in most cases probably bring proceedings in the State where the object was located and which would be a Contracting State. If both States were Contracting States he could see no practical or political reason for excluding the normal grounds of jurisdiction or those provided by existing international Conventions, especially in the case of theft.

130. By way of conclusion he proposed adding to the present text the following language: "Apart from the grounds of jurisdiction provided by internal law and international Conventions, the courts of the place where the object is located shall also have jurisdiction", that is to say that they would always be competent even though jurisdiction had not been conferred upon them by national law or by other international Conventions. Such jurisdiction would in other words be a special one founded on a Convention and this would fit perfectly into the "great Brussels-Lugano codification" which recognized special grounds of jurisdiction in exceptional cases in addition to those already existing. On the other hand he had no objections to the creation of a new rule as set out in paragraph (2).

131. The drafting committee replied that it had not intended to lay down exclusive grounds of jurisdiction. So as not to exclude other grounds, a new proposal was made to begin the first paragraph with the words "The claimant may bring an action under this Convention". This proposal met with the full satisfaction of the study group and was adopted.

Article 10

132. The group had not, at its second session, taken a final decision on the article which permitted any State to go further than that which was provided for in the draft Convention, as a new form of wording had been proposed and they wished to see the redraft in writing before considering its implications. The former text "may extend the protection accorded", which had been the subject of criticism, had been amended to read "may accord a wider protection", the term "accord" being understood as meaning to maintain or to extend, with a view to catering for those States which already offered wider protection. Another purpose of the proposal was to make it clear that a requesting State could not, on the basis of the wider protection which it itself accorded, request another State to provide the same extended protection. In consequence any wider protection would only be accorded by a State which was in the position of the State addressed.

133. While one member wished to see the text amended as he feared that the article as drafted could result in differences in treatment and deprive the Convention of its uniform character, another stated that he had no difficulties with the substance of the provision. The intention was that the State addressed could be more liberal, that is to say more favourable to the interests of a dispossessed person or a State whose laws had been infringed, and not to bring about a unification from which it was impossible to derogate. It was only the drafting of the provision which needed to be reviewed so as more clearly to bring out its purpose.

134. Some members were less optimistic, considering that the article dealt with very different situations (that of a dispossessed person and that of a requesting State). They wondered, when considering these two situations, whether such an article might not allow a State, because its legislation were more favourable to a dispossessed person or to the requesting State, to upset entirely the balance which the group had sought to establish between the conflicting interests involved, since the present text could give rise to different interpretations. Another member insisted on the fact that this provision, in permitting a State on the one hand to retain its more protective rules (e.g. the restitution of stolen objects would not give rise to compensation in Common Law systems which would not give up that rule) and on the other to go further than the minimum required

by the Convention in different respects (e.g. the concept of theft is narrower in Common Law than in Civil Law) mixed up different considerations and that the present drafting was not sufficiently clear (in particular as regards what was meant by the words "in any other way"). She therefore suggested that it would be preferable to distinguish the different situations rather than to have a general rule covering all of them.

135. Mr Loewe explained what had been the purpose of this provision in his preliminary draft which had sought to achieve a certain balance but that balance had itself been considerably altered subsequently. He indicated that had his preliminary draft been accepted then it would have been possible to extend the protection accorded. But in some States this was already greater than that afforded by the Convention which would therefore have represented a step backwards, which was not the object if the exercise. It was however clear that the requesting State could not, by going further itself, influence the decisions of a court of another State. He added that it was not possible to unify legal systems and traditions, and that the article had been conceived precisely to avoid those differences being too significant as in any event it was not possible to go below that which was provided for in the draft Convention.

136. Since there was full agreement as to the principle established by Article 10, the group requested the drafting committee to prepare a redraft. The committee substantially amended the text in the light of the observations made within the group, in particular drawing a distinction between theft and illegal export, while at the same time seeking to preserve the greatest degree of unification possible. The new text therefore contained an exhaustive list of matters in respect of which a Contracting State could accord wider protection either to a dispossessed person or to a requesting State and to this end the article was divided into three paragraphs, one concerned with theft, the second with illegal export and the third contemplating a possible temporal extension of the scope of application of the future Convention.

137. The first paragraph concerning stolen objects was divided into three sub-paragraphs: the first made provision for the possible extension of the Convention to acts other than theft; the second gave an option to States to extend the period during which a claim for restitution of the object could be brought while the third permitted a State to apply its national law when this would disallow the possessor's right to compensation even though it had exercised the necessary diligence. This last sub-paragraph was included with a view to the special situation in Common Law systems regarding the restitution of stolen objects, although the drafting committee recognized that there could be other situations.

138. The second paragraph was more particularly concerned with objects which had been illegally exported and consisted of two sub-paragraphs. The first allowed a requesting State to allege that the export of an object from its territory would significantly impair an interest other than those listed in Article 5(3). The second sub-paragraph contemplated the extension of the application of Article 5 in cases otherwise excluded by Article 7 (one of these would be the time limit for bringing a claim for return).

139. The third and final paragraph of this article concerned both theft and illegal export and would permit a Contracting State, if it so wished, to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object had occurred before the entry into force of the Convention in its regard.

140. Some members of the study group wondered whether this language would not permit a Contracting State to broaden the obligations of other States, for their interpretation was that each State could go further by extending its own obligations but not those of other States, which meant in effect that the provision would only apply when the State wishing to grant wider protection was the State addressed. They insisted that there should be no ambiguity on this point and proposed adding in the introductory language the words "when it is seized of a claim for restitution or return". Another member however criticized this addition on the ground that it introduced a temporal element, and he proposed rather to say "shall itself remain free".

141. Another member observed that whatever the formulation chosen, these provisions would only apply in two cases. First, when the State extending protection was that where the object was located: it would be very simple for such a State to accord more favourable treatment to a dispossessed person or to a State whose prohibition had been infringed, and to send back the object under more favourable conditions. The second case was that where it was the State of residence of the possessor which had exercised the option, for example by ordering restitution without compensation in accordance with its own law and when the case was brought before its courts. When enforcement of the judgment would be sought in the State where the object was located (and that State had not exercised the option) it would refuse enforcement as being contrary to its own public policy (*ordre public*). In effect the draft Convention could not oblige other States to follow indirectly one which had exercised one of the options by enforcing a decision.

142. Ultimately, the group decided in favour of the more detailed formulation proposed by the drafting committee and adopted the text with a slight amendment regarding its presentation so as to make it clear that

when a State exercised one of the possible options it did not bind other States. In addition, the group reversed the order of this article and the following one which established the principle of the non-retroactivity of the Convention.

Article 11

143. This article specified the temporal scope of application of the draft by providing that the future Convention is concerned only with situations arising after the entry into force of the Convention. At the second session of the study group some members had suggested that the Convention should also have retroactive effect so as to avoid what was an illegal act becoming a legal one because it had been committed before the entry into force of the instrument, which in a certain way amounted to approval of illegal acts. A new proposal had been made but, given the differences of opinion, the group decided to send the text to a future drafting committee without taking any decision.

144. This proposal, which read: "However, it shall not affect any provisions in this respect which were in force at the time of the dispossession or of the infringement prior to its entry into force" met no opposition in the study group at its last session except for the use of the word "however" which was not thought to be appropriate as there was no contradiction between the two sentences. Nevertheless the members of the group wondered whether it was indeed necessary to introduce such a provision.

145. One member observed that it was still necessary to determine what was meant by entry into force as there were two possible dates. The first of these was the objective entry into force of the Convention and the second the entry into force for a given State. He drew attention to the fact that apart from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards where express reference was made to the objective entry into force, the practice was to speak of the entry into force for the State which must apply the text. Since the group was of the opinion that no questions of substance were at issue, it decided to refer the article to the drafting committee for redrafting in the light of the observations which had been made.

146. The drafting committee submitted a slightly modified version of the text so as to take account in particular of the remarks made in connection with the entry into force of the Convention. The text now sought to make it clear that the cultural object must have been stolen or illegally exported from a Contracting State after the entry into force of

the Convention in respect of the Contracting State before the courts or the competent authorities of which a claim was brought for the restitution or return of such an object.

147. The members of the study group unanimously adopted the new text of Article 11 subject to a minor amendment to the English text, that is to say the substitution of the words "shall apply" for the word "applies".

148. Finally, since the group did not wish to establish the principle of retroactivity in this article, believing that any doubt on this point would render highly improbable the signature and ratification of the future Convention by many States, it decided to reverse the order of Articles 10 and 11 of the draft so that the principle of non-retroactivity would be established before reference was made to the possibility in the new Article 11(c) to accord retroactive effect to the Convention.

Proposed new article

149. Mr Merryman submitted to the study group a proposal for the insertion of a new provision in Chapter III concerning the return of illegally exported cultural property, the text of which read as follows: "A State shall be treated as proceeding under Article 5 unless it shows that the object was stolen from a museum or a religious or secular public monument or similar institution and that the object was documented as appertaining to the inventory of that institution at the time of the alleged theft".

150. He stated that the purpose of such a provision was to prevent States systematically calling for the restitution of a stolen object, because the conditions seemed less severe than those required when a claim was being made for the return of an illegally exported object. Moreover, he cited by way of example the laws of certain States which confiscate an object exported in infringement of their export rules, thus permitting such a State to appear before a foreign court as the owner of the object seeking its recovery. He also made reference to a Peruvian law according to which all pre-Colombian and colonial objects found in the country are the property of the State, which would have the same effect as automatic forfeiture provisions.

151. Mr Merryman also mentioned the fact that this problem had been the subject of lengthy consideration by the committee which had drawn up the Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the

result of its efforts was to be found in Article 7 (b)(i). He insisted on the need for such a provision to be included in the draft since it already appeared in the principal texts relating to theft and to illegal export and had already been carefully examined at international level.

152. One member of the group stated that he was fully satisfied with the proposal which was similar to one he had already made in the course of previous discussion. A majority of the other members were however more sceptical as regards the proposal, in particular on account of its highly political character. One member considered that such a text constituted a kind of definition which would introduce a distinction between different categories of cultural objects (those stolen from museums), which the group had sought to avoid by the adoption of a very broad definition. Another was of the belief that the provision was not indispensable because in his opinion this question fell within the discretionary power of the judge who should determine whether the conditions had been met in each case and that the judge's discretion should not be fettered.

153. Subject to certain observations which she would make later after a more detailed examination of the text, Ms Prott stated that the introduction of such a provision would cause her a number of problems. The first would be that it would be almost impossible for a State to recover an object of an ethnographic character. She recalled that the limitation period was much too short, in particular for ethnographic objects belonging to indigenous communities in the Pacific and in Africa and that if one were to insist that they found their claims on the basis of illegal export rather than on theft then the Convention would lose any interest for them. The second problem related to material found in clandestine excavations or even in those which were authorised as it would often be difficult to prove how it had left the territory of the country of origin. There again the problem of the short limitation period was critical for certain categories of cultural objects. Lastly, a third difficulty was associated with the theory of international law which suggested that the right of each State to determine rights of ownership within its own frontiers for objects located on its territory could not be contested.

154. In reply to certain members who had suggested that the proposal introduced a new idea into the text, Mr Merryman noted that the group had not attempted to deal with the question of which law should be applied by the judge or the competent authority in determining whether the object had been stolen or illegally exported. At present, the judge would characterise the claim in accordance with his or her own law and it was precisely that result which did not satisfy him. It was moreover desirable to avoid any conflict with the provisions of the 1970 Unesco Convention, to the extent that the problems dealt with there were analogous.

APPENDIX II

AGENDA

1. Adoption of the draft agenda (S.G./C.P. - Ag. 3)

2. Feasibility and desirability of drawing up uniform rules relating to the international protection of cultural property (Study LXX - Docs. 15 to 17)

3. Other business

APPENDIX III

PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(approved by the Unidroit study group on the international protection of cultural property at its third session on 26 January 1990)

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

This Convention applies to claims for the restitution of stolen cultural objects and for the return of cultural objects removed from the territory of a Contracting State contrary to its export legislation.

Article 2

For the purpose of this Convention, "cultural object" means any material object of artistic, historical, spiritual, ritual or other cultural significance.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

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

(2) Any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of thirty years from the time of the theft.

Article 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled to payment at the time of restitution of fair and reasonable compensation by the claimant provided that the possessor prove that it exercised the necessary diligence when acquiring the object.

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

(3) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its export legislation, 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 to the requesting State.

(2) To be admissible, any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessary to enable the competent authority of the State addressed to evaluate whether the conditions laid down in paragraph (3) are fulfilled and shall contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State.

(3) The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State 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 6

When a State has established its claim for the return of a cultural object under Article 5 (3) the court or competent authority may only refuse to order the return of that object when it finds that it has as close a, or a closer, connection with the culture of the State addressed or of a State other than the requesting State.

Article 7

The provisions of Article 5 shall not apply when:

(a) the cultural object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person; or

(b) no claim for the return of the object has been brought before a court or other competent authority acting under Article 9 within a period of five years from the time when the requesting State knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of twenty years from the date of the export of the object, or

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

Article 8

(1) When returning the cultural object the possessor may require that, at the same time, the requesting State pay it fair and reasonable compensation unless the possessor knew or ought to have known at the time of acquisition that the object would be, or had been, exported contrary to the export legislation of the requesting State.

(2) When returning the cultural object the possessor may, instead of requiring compensation, decide to retain ownership and possession or to transfer the object against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees. In such cases the object shall neither be confiscated nor subjected to other measures to the same effect.

(3) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State.

(4) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

(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.

CHAPTER V - FINAL PROVISIONS

Article 10

This Convention shall apply only when a cultural object has been stolen, or removed from the territory of a Contracting State contrary to its export legislation, 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.

Article 11

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).

(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.

(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.