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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Preliminary draft Convention  
on stolen or illegally exported cultural objects  
approved by the Unidroit study group on the international  
protection of cultural property

with

EXPLANATORY REPORT

(prepared by the Secretariat)

Rome, August 1990

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.

EXPLANATORY REPORT

(prepared by the Unidroit Secretariat)

I

BACKGROUND TO THE PRELIMINARY DRAFT CONVENTION

1. The origins of the decision taken by the Governing Council of the International Institute for the Unification of Private Law (Unidroit) at its 65<sup>th</sup> session, held in April 1986, to include the subject of the international protection of cultural property in the Work Programme of the Institute for the triennial period 1987 to 1989<sup>(1)</sup> date back to the beginning of the 1980's when certain international organisations, in particular Unesco, expressed their interest, in the context of their own work on cultural property, in Unidroit's draft Uniform Law on the acquisition in good faith of corporeal movables of 1974 (LUAB).

2. That draft aroused the interest of Unesco in connection with its Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and more particularly with one important private law provision, namely Article 7 (b)(ii) which provides that:

"The States Parties to this Convention undertake:

...

(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property ...".

3. With a view to clarifying, and if possible improving, the way in which this provision should be applied, Unesco requested Unidroit to prepare a study on the international protection of cultural property in the light in particular of the draft LUAB of 1974 and of the 1970 Unesco Convention. This study was entrusted to Ms Gerte Reichelt, Univ. Dozent at the Vienna Institute of Comparative Law. In this study,<sup>(2)</sup> Ms Reichelt first analysed these two international instruments and then considered the

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(1) See the Report on the 65<sup>th</sup> session of the Governing Council, p. 24 (Unidroit 1986, C.D. 65 - Doc. 18).

(2) See Unidroit 1986, Study LXX - Doc. 1.

concept of cultural property, its definition and the notion of "protection" in this field. She then classified in three groups the case law relating to the problem of the acquisition in good faith of cultural property and its protection, and concluded by examining some civil law, private international law and public law aspects of the international protection of cultural property and making a number of recommendations in those areas to which regard might be had in a future instrument. This study was submitted to the Unidroit Governing Council and to Unesco in 1987.

4. The Unidroit Governing Council then decided, at its 66<sup>th</sup> session in 1987,<sup>(3)</sup> to retain the subject of the international protection of cultural property on the Work Programme without priority, and to authorise the Secretariat to pursue its cooperation with Unesco with a view to the completion of a more detailed study of the problems at issue. Unesco requested Unidroit to prepare a second study on the question, with particular reference to the rules of private law affecting the transfer of title to cultural property and in the light of the comments received on the first study.<sup>(4)</sup> The second study was also entrusted to Ms Reichelt who, after a general survey of the transfer of ownership from the angle of comparative law, considered one method of providing effective protection for cultural property, namely the application of mandatory rules which could translate considerations of policy into legal concepts. Such a novel approach could take the form of the recognition of foreign law governing the export of cultural property. What was therefore important was to recognise the combined effect of civil law, private international law and public law when offering a global solution to the complex problem of the international protection of cultural property.

5. Subsequent to the 65<sup>th</sup> session of the Governing Council, the Unesco Secretariat informed the Unidroit Secretariat that Unesco did not, at least for the time being, envisage the preparation of any new international instrument dealing with private law aspects of the international protection of cultural property, as Unidroit was considered a more appropriate forum for such an initiative. Moreover the Unidroit Secretariat was informed that the European Committee on Legal Cooperation of the Council of Europe had decided not to proceed in the immediate future with work on the preparation of an additional Protocol to the European Convention on Offences relating to Cultural Property.

6. At its 67<sup>th</sup> session, held in Rome in June 1988,<sup>(5)</sup> the Governing Council decided, in the light of Ms Reichelt's two studies and of the new

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(3) See the Report on the 66<sup>th</sup> session of the Governing Council, p. 13 (Unidroit 1987, C.D. 66 - Doc. 20).

(4) See UNIDROIT 1988, Study LXX - Doc. 4.

(5) See the Report on the 67th session of the Governing Council, p. 32 (Unidroit 1988, C.D. 67 - Doc. 18).



information which had come to its notice, to accord priority status to the subject on the Work Programme and to set up a study group on the international protection of cultural property for the purpose of examining the different aspects of the subject on the basis of the documents already available, as well as the possibility and desirability of drawing up uniform rules on the international protection of cultural property.

7. Apart from the two preliminary studies, a document was prepared by the President of Unidroit, Mr Riccardo Monaco, proposing the outlines for a private law Convention on the international protection of cultural property.<sup>(6)</sup> This paper provided a very complete list of the problems which would be faced if a Convention on the subject were to be contemplated, and stressed the need for striking a balance between the interests of the countries of origin of cultural property and those referred to as importing countries. The second document examined by the Governing Council at its 67<sup>th</sup> session was a preliminary draft Convention on the restitution of cultural property, submitted by Mr Roland Loewe, Austrian member of the Unidroit Governing Council. This text, which was intended to serve as a basis for discussion by the study group, laid down a number of rules of substantive law, while intentionally leaving aside certain problems such as acquisition in good faith and the question of the transfer of ownership. The approach was essentially a pragmatic one based on the concept of the right to payment and of restitution.

8. The study group, the participants in which are listed in the ANNEX hereto, held three sessions in Rome, under the chairmanship of Mr Monaco, respectively from 12 to 15 December 1988, from 13 to 17 April 1989 and from 22 to 26 January 1990.<sup>(7)</sup>

9. At the end of its third session, the study group adopted the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects which is set out above. This preliminary draft was then submitted to the Governing Council for consideration at its 69<sup>th</sup> session, held in Rome from 23 to 26 April 1990, on which occasion the Council authorised the Secretariat to transmit the preliminary draft Convention, together with an explanatory report thereon, to Governments, interested organisations and recognised experts in the field with a view to obtaining their observations. It likewise decided to convene a first session of a committee of governmental experts in spring 1991 which should take as the basis for its work the preliminary draft and an analysis by the Unidroit Secretariat of the observations made on the text.

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(6) See UNIDROIT 1988, Study LXX - Doc. 2.

(7) The reports on the three sessions are to be found respectively in UNIDROIT 1989, Study LXX - Doc. 10; UNIDROIT 1989, Study LXX - Doc. 14 and UNIDROIT 1990, Study LXX - Doc. 18.

## II

### GENERAL CONSIDERATIONS

10. It is now fairly widely admitted that the cultural heritage contributes to the formation of national identity and that the fundamental geopolitical changes currently taking place, the creation of supranational entities and the simultaneous re-emergence of regional consciousness render still more urgent the recognition of the value of cultural property and its protection. Where however universal agreement is lacking is in connection with the international market in works of art, which has developed in a remarkable manner since the Second World War and has become at the present time the main cause of the impoverishment of the cultural heritage of certain nations to the advantage of others. In this connection two general tendencies or policies have emerged which are diametrically opposed. The first underlines the economic and cultural advantages deriving from a market which is in principle unfettered, thereby permitting as far as possible all nations to have access to the cultural heritage of mankind, with the consequence that only the most serious abuses should be the subject of sanctions. Apart from the economic advantages which it offers, a free-trade market in art - it is said - is likewise beneficial and desirable from the cultural point of view as the circulation of works of art across frontiers will indisputably contribute to that dialogue between national cultures which many see as the principal element directed towards concord among the peoples of the world and ultimately peace. It scarcely needs saying that this policy is most strongly advocated in those countries where the art trade is prospering and where there is abundant capital in search of investment - it is well known how attractive are investments in works of art - and where at the same time the amount of cultural property available is relatively small. On the other hand, there is evidence of a restrictive policy of cultural nationalism seeking to retain cultural property in its country of origin or its return to that country, an approach which cannot fail to appeal to those nations with a rich civilisation and culture but which are however poor in terms of material wealth.

11. The question of the international protection of cultural property is therefore one of the greatest importance, in particular in those countries where a number of different cultures co-exist (tribal or mixed societies ...), all the more so on account of the illicit commerce in works of art which is increasing in a rapid and disquieting fashion. This commerce constitutes today a form of criminality which is in full expansion and which is at the same time becoming more international in character. The

increasing ease with which interstate frontiers are now crossed, for example between the countries of Western Europe and tomorrow between those of Europe as a whole, the appearance of new markets and of new clients in those States which have recently acquired wealth and the improvements in communications are all factors working in favour of the illegal market, as indeed is also the extraordinary increase in the value of works of art. This phenomenon is unlikely to slow down for works of art are costing more and more by reason of the influx of capital into the market. In fact, as a consequence of the ever closer link between traffic in works of art and the drug traffic, "dirty" money as well as that from legitimate sources is invested in the art trade. While many documents prepared by the United Nations express the wish that countries of origin permit and even encourage legal trade in cultural property, it is very rare for such a policy to be implemented. On the contrary total export bans are imposed even in relation to objects which are of no great importance. It really is essential to insist on the distinction between the licit and illicit market, since it is necessary today to face up to serious distortions in international trade. For this reason it is vital to encourage legal commerce as the art market has become a regular outlet for what is traditionally called "laundered" money; in point of fact many objects of doubtful origin are to be found on the legitimate market. However it is evident that the greater the difficulties put in the way of legal traffic, the more illegal traffic will prosper but on the other hand for as long as illegal traffic has not been stopped, it is politically difficult to encourage legal commerce. The two measures go hand in hand.

12. That being said, the serious difficulties posed by the conflict of interests in presence immediately become apparent when considered at national level. States naturally tend to adopt a position more favourable to the defence of their own particular interests. If a satisfactory solution is to be reached it will be necessary to look beyond these purely egoistic considerations. Regard will have to be had to all the competing interests and an attempt made somewhere to strike a fair balance. Moreover, apart from the conflict of interests between exporting States and importing States and between producers and consumers, the task is rendered even more arduous by the conflict of interests between the original owners of cultural property and potential purchasers and between commerce and the protection of ownership.

13. What is more, the human and financial resources available seem to be totally inadequate when measured against the urgent needs. Legislation and regulation are not capable of solving all problems and have not proved successful in coping with the financial storms which agitate the art market and which render such measures rather derisory. If it is true that illegal traffic has become internationalised, so have the means made available for

the struggle against it. On the strictly legal plane, the last thirty years have seen a proliferation of international agreements of broader or narrower scope, bilateral treaties, regional treaties such as the 1985 European Convention on Offences relating to Cultural Property and finally universal agreements of which the most famous are the conventions adopted by Unesco and in particular that of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereafter referred to as the "1970 Convention"). However, the reception given by some of the signatory States themselves to these agreements, coupled with the persistence of illegal traffic and the low percentage of objects recovered each year, are cause for doubting their effectiveness, probably because their authors had too many objectives in mind.

14. It was precisely because of the difficulties in its application encountered by an essential private law provision of the 1970 Convention, Article 7 (b)(ii) (the text of which appears in paragraph 2 above), that Unesco called upon Unidroit for assistance. This provision is concerned with cases of theft and illegal export of cultural property and makes provision for the restitution of an object even though it is in the hands of a good faith purchaser. Moreover, it lays down no time-limit within which restitution must be made although it does provide for compensation of the good faith purchaser. This article has created problems for certain States, in particular Finland and the Netherlands, which have indicated that there is a certain incompatibility between it and the provisions of their national laws concerning the *bona fide* purchaser.

15. The Unidroit study group, in whose work Unesco participated as an observer, was therefore convened with a view to considering the possibility and desirability of establishing uniform rules relating to the international protection of cultural property. As to the nature of such rules, the group was of the belief that only an international convention would be an effective instrument for the adoption of uniform rules in this field. It was naturally the desire of its members to contemplate as far as possible an instrument which would be compatible with the provisions of the 1970 Convention for while it is true that of the sixty-eight States which have deposited an instrument of acceptance or ratification of the Convention (the latest being Australia and China), most of them belong to the category of "exporting" nations and are in consequence victims of illicit commerce, there are some notable exceptions such as Canada and the United States of America, and it would be politically undesirable to draw up a new instrument which could create obstacles to further acceptance of the 1970 Convention.

16. As to the substantive content of the instrument, the members of the group were in agreement that every effort should be made to meet the various concerns of the different groups of States, for all of whom the increasing illegal traffic in works of art is in one way or another a source of anxiety. In order for a text to be genuinely applicable and effective, the study group considered that its aims should be limited and for this reason it chose to deal only with two questions; on the one hand the problems connected with the dispossession by theft of a person previously in possession of a cultural object and, on the other, those related to the consequences of the removal of cultural objects from the territory of a State in contravention of a national law prohibiting, or imposing conditions on, their export.

17. The theft of works of art or precious objects is nothing new. From the most ancient of times tombs in Egypt were pillaged and few are the riches which have escaped the consistent spoliation in that country over the centuries. In France the Renaissance owes much to the booty brought back from the wars in Italy. More recently, in the course of the Second World War, Hermann Goering is thought to have accumulated some 1600 paintings and other works of art. In Europe it should be recalled that over thirty years at least 100,000 works of art have been stolen in Italy while it has been established that 41,000, of which 21,000 paintings, have been stolen in the Federal Republic of Germany.<sup>(8)</sup> The phenomenon is therefore one which affects at the same time both industrialised and developing countries, although a quantitative assessment is difficult in the absence of a method of collecting data specifically devised for the theft of such objects. The principal source of difficulty lies in the definition of a work of art itself. The basic problem to be faced in a case of theft is that of the conflict of interests between a person (usually the owner) who has been dispossessed of an object and the purchaser in good faith of that object. Legal systems approach this problem in very different ways and the experience gained by Unidroit in connection with the 1974 draft LUAB has clearly demonstrated the difficulty of a rapprochement between the Common Law systems which have almost without exception followed the *nemo dat* rule and the vast majority of Civil Law systems which, to different degrees, have accorded greater protection to the acquirer in good faith of stolen property. The group sought therefore to establish a minimum uniform rule which could be acceptable.

18. The other main problem dealt with by the study group was that of cultural objects transferred across the frontiers of a State in violation of its export regulations. Almost all countries in one way or another exercise some control over the export of cultural objects but it is

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(8) See the report of Mr Stoffelen on international criminality, Council of Europe, Parliamentary Assembly, Doc. 5617.

difficult to establish exactly the volume of works of art and objects exported clandestinely. The exporting countries which are victims of illicit traffic are above all the developing countries of Latin America, Africa, Oceania and Asia, all of which possess their own particular cultural wealth which is much sought after, and which have only limited resources to ensure respect of their regulations. In many of those States the problem of exercising such control is exacerbated by internal conflicts or by war. Those acts which impoverish the cultural heritage of developing countries rich in cultural objects constitute an assault on their cultural identity and lead to a "cultural neocolonialism". However this desire to preserve the national cultural heritage is shared by a large number of Western European States which, after having been for so long importers of the cultural heritage of other States, are now anxious to protect their own. The difficulties are however considerable and result from the ignorance of importing countries of the regulations of exporting countries. In the present state of international law, measures taken in the struggle against the illegal export of cultural objects for which provision is made in national legislation are ineffective because of their limited territorial effect. This excludes any possibility of the return of an illegally exported object. The situation will change only if States are prepared to recognise on their own territory the legal effects of the regulations of other States by sanctioning their violation. The study group in effect recommended that States should give effect to foreign public policy (*ordre public*) in relation to the *sui generis* category of important cultural objects.

19. In these circumstances and given the increasing volume of commerce in cultural objects, the principal aim of the future Convention is to establish as clear and simple a regime as possible to govern the restitution of stolen cultural objects to the dispossessed person and the return of an object exported in violation of a prohibition to the State whose laws have been contravened.

20. As regards its structure, the preliminary draft Convention is composed of eleven articles divided into five chapters:

- Chapter I - Scope of application and definition (Articles 1 and 2)
- Chapter II - Restitution of stolen cultural objects (Articles 3 and 4)
- Chapter III - Return of illegally exported cultural objects (Articles 5 to 8)
- Chapter IV - Claims and actions (Article 9)
- Chapter V - Final provisions (Articles 10 and 11).

III

COMMENTARY ON THE PROVISIONS OF THE PRELIMINARY DRAFT CONVENTION

*Title*

21. The title of the preliminary draft Convention underwent a number of changes in the course of the work of the group, having originally read "Preliminary draft Convention on the restitution of cultural property", and then "Preliminary draft Convention on the restitution and return of cultural objects". Two questions were raised during the sessions, namely that of whether the group wished to include the words "restitution" and "return" in the title, and that of the choice between the terms "cultural objects" and "cultural property".

22. Some members of the group drew attention to the fact that the terms "restitution" and "return" could be understood in different ways. In fact "restitution" in English does not necessarily mean the restitution of the object as it may refer to financial compensation, which was not the intention here. Moreover the word "return" had in the 1970 Unesco Convention a very technical meaning (voluntary transfer to the country of origin) and since some articles of the preliminary draft could have a purely national application, it was necessary to avoid using in the title language which might suggest that it applied only to international situations. Although other terminology was suggested, the group finally decided to employ neither of the terms in the title, leaving more detailed explanation to the preamble. Furthermore, it seemed necessary to introduce a new article defining the scope of application of the preliminary draft Convention (see Article 1).

23. The second question which was considered on a number of occasions during the discussions of the group concerned the choice between the words "cultural objects" and "cultural property". In view of the differences in the opinions expressed and the arguments put forward, a distinction was drawn in this connection between the French and English versions of the text. As regards the former, the words "biens culturels" were retained as they were legal terms to be found in a number of national and international regulations and widely adopted in legal writings. The group considered that to alter this terminology would create an unfortunate precedent and could give rise to conflicts of interpretation. As regards the English version, the expression "cultural objects" was preferred to "cultural property" which had come into use only recently in Common Law systems.

## CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

### *Article 1*

24. This article, which describes the scope of application of the future Convention, did not exist in the preceding versions of the preliminary draft, and was introduced following the decision of 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 terms used.

25. The wording emphasizes the distinction which the group wished to draw in this article between theft and illegal export. In fact, the text speaks of theft irrespective of where it has been committed, the question of whether a State is a party to the Convention or not being irrelevant, whereas with respect to illegal export it is concerned only with objects exported from the territory of a Contracting State. The reason for this distinction is that the group was of the opinion that as theft is punished everywhere the place where it is committed need not necessarily be in a Contracting State. On the other hand, not all countries have adopted export regulations, and the group's wish was that a State which calls for respect of its own rules in this connection should be a party to the Convention, thus encouraging States to ratify it in order to be able to obtain protection thereunder.

26. It should be pointed out that the preliminary draft Convention contemplates not only international situations but also purely national ones. Although this question was raised on a number of occasions during the sessions of the group it was however never the object of detailed discussion.

27. The earlier versions of the preliminary draft contained a provision which defined the substantive scope of application of the future Convention and which read as follows: "This Convention governs neither the question of ownership of cultural objects or that of other rights which may exist over them; however, a possessor who has been obliged to make restitution of the cultural object to a person who has been deprived of possession or who, ..., has returned it against payment of compensation to the State of origin may no longer assert ownership or any other real right thereover". Although the group was as a whole in favour of the substance of the provision as it is necessary to avoid the possessor reaffirming its rights after the restitution or return of the object, it was unable to reach agreement on a form of wording, in particular because of the



difficulties created by the terms "ownership" and "real rights" in Common Law and in consequence it preferred to delete the provision. It is however quite clear that the intention of the group was not to deal with the general regime of ownership of movable property, but only with one of its aspects, namely that concerning cultural objects. The purpose of the Convention is to regulate, in a manner different from the traditional schemata, the situation of a person acquiring property in good faith, which evidently does have an impact on ownership.

28. That same provision contained a second sentence which provided that the Convention did not govern "the liability of experts, auctioneers or other sellers of cultural property". That language is no longer to be found in the text, one of the reasons being that the provision has ceased to be relevant in view of the absence of any reference to expertise in the present version. Moreover the words "other sellers" gave rise to difficulty as in some legal systems an auctioneer is not a seller and does not wish to be considered one, being nothing more than an intermediary. Moreover there could be other persons with an interest in the object, for instance someone who has advanced a loan on the security of the object. This type of liability is therefore not covered by the future Convention and will be regulated by the national law applicable to the transaction.

## Article 2

29. The delimitation of the category of the objects whose return may be requested is the most fundamental one for the scope of an international convention concerning cultural property, and at the same time one of the most delicate to be resolved. Moreover the difficulties are multiplied in the case of an international convention as opposed to purely internal protective legislation since it is necessary to establish a general definition which will take account of the cultural situation of each State and of its particular needs. A cultural object is defined in Article 2 as "any material object of artistic, historical, spiritual, ritual or other cultural significance". After considering the question of whether a definition was necessary, and having decided that it was, the study group opted in favour of a general definition rather than to employ the techniques of enumeration and registration which had been suggested. However stress was laid on the difficulty, if not indeed the impossibility, of framing *in abstracto* an objective definition of cultural objects since the attribution of the epithet "cultural" to an object is the consequence of a value judgment.

30. One member considered that it was important that the group had thus established a category of cultural objects for, if the Convention were

to enter into force, it would modify important sectors of civil law governing the recovery of stolen property. He believed however that the definition adopted was too general and that the solution should contemplate not an all-embracing intellectual definition, but rather a practical one seeking to cover certain categories of cultural objects only which would be considered to be particularly important and to which special protection should be granted. In fact, the new rules which it was wished to introduce for cultural objects under the Convention would of necessity derogate from the normal law regarding property in general which was to be found in almost all legal systems and an exception would have no significance unless its scope were clearly defined. He further remarked that Article 5 was not open to the same criticism for there the cultural object was defined indirectly in paragraph 3 by reference to its importance. He insisted on the fact that the more restricted the category enjoying special protection, the more effective that protection would be and the greater the chances of acceptance of the uniform law. He further recalled that in most countries there exist systems for determining *a priori* (that is to say before the theft or other illegal transaction) those objects considered to be specially important for the collectivity which consist in the establishment by the competent authorities of lists of objects of clear public interest and which are for that reason subject to a special legal regime. This was the system for the classification of historical monuments in France which is to be found in many other countries (or again the concept of the public domain which is however less precise) and which, he proposed, should be followed.

31. Another member of the group deeply regretted the absence of a reference to a given legal system (reference to the internal law of the State addressed), and suggested adding at the end of the text the words "under the law of the State Party where the object was located prior to the removal", which would be of assistance to a judge seized of a claim for the restitution or return of a cultural object who would thus know where the object was considered to be important so as to be covered by the future Convention. This proposal was not however adopted and it was agreed 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 also pointed out that since national laws do not define what is a cultural object in a more precise manner than does the preliminary draft, it would be of no value to refer to one law or another and that it was wrong to imagine that the private international law problem of what is the law applicable to the characterisation of a cultural object could be solved by way of a general definition, which indeed was not its intention.

32. Finally, another proposal was made to introduce into the definition a fixed or mobile date, specifying for example that the object

must be more than twenty years old. The group however did not support the proposal for reasons of simplicity and of drafting technique as it was preferred to leave to the judge a degree of discretion in determining whether an object had been or still was important.

33. Moreover, the choice of the group not to include a more detailed definition was dictated by a desire for simplicity and compatibility of the text of the preliminary draft with that of the 1970 Convention. The group felt that it was not possible to take over the definition contained in the 1970 Unesco Convention as the two texts had totally different objectives and because a list of that kind would create too many problems. It was furthermore recalled that although it contained a very long definition of cultural property in Article 1, when the Convention proceeded to establish practical provisions in Article 7, it had adopted a much more restrictive definition, namely "property documented as appertaining to the inventory" of "a museum or similar institution", the requesting State having to prove the entry in the inventory.

## CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

### *Article 3*

34. From the outset of the work on the draft a realisation emerged that the essential problem to be faced was that of the reconciliation of two equally legitimate interests: that of the person (usually the owner) who has been dispossessed of an object by theft and that of a *bona fide* purchaser of such an object. Ms Reichelt's second study had indicated the widely differing approaches in various legal systems to this problem while the experience of Unidroit in relation to the draft LUAB of 1974 had amply demonstrated the difficulty of bringing about any rapprochement between the Common Law systems which have almost unanimously followed the *nemo dat* rule and the bulk of the Civil Law systems which to varying degrees have accorded much wider protection to the good faith purchaser of stolen property. Paragraph 1 of Article 3 establishes the general principle of the restitution of stolen cultural objects, whether they be in public or private ownership, and independently of whether the person acquiring such an object is in good or bad faith ("[t]he possessor of a cultural object which has been stolen shall return it"). The distinction is of importance only when the question arises whether to compensate the person who has acquired the object (cf. Article 4).

35. This principle was affirmed by the study group at its last session to which what was then Article 2 had been submitted in the form of two

alternatives as no consensus had emerged during the first two sessions. The first alternative was based on the assumption that there would be no automatic restitution of a stolen object if the possessor could prove that it had taken the precautions normally taken when acquiring such an object. The second alternative provided on the other hand for the automatic restitution of a stolen object by the possessor. The group preferred to grant priority to the protection of the dispossessed owner as against the person who had acquired it, believing this to be the only realistic solution which could at the same time combat the illegal traffic in cultural objects. Only one member argued in favour of a solution based on the protection of the possessor, notwithstanding the fact that it implied an evidentiary burden which it would be difficult to discharge.

36. Faced with these clear alternatives, one member of the group suggested that it might be possible to envisage 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 that would be more clearly and rigorously defined. The group however did not accept this proposal for the reason that the distinction which would have to be drawn among cultural objects would risk limiting those which would be covered by the future Convention and that such a dualist system was too complicated to apply in practice.

37. It should be recalled that this provision is concerned only with the question of theft although originally the draft assimilated to theft "conversion, fraud, intentional misappropriation of lost property or any other culpable act assimilated thereto". 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 there should be no extension of the uniform law to less clearly defined cases which were treated differently from one country to another. Indeed in Common Law systems, the *bona fide* purchaser may, in cases of fraud or other criminal acts other than theft, acquire title. Others however preferred to retain the reference to "any other act" so as to cover acts falling within the concept of "vol" in Civil Law systems but which would not be comprehended by that of "theft" under the Common Law. The group finally decided to limit the application of the future Convention to theft, but to permit States to extend its application to other wrongful acts (cf. Article 11 (a)(i)). It emerges in addition from the discussions of the study group that it is for the court seized of the case to decide whether the act is wrongful, the court being free to choose between the direct application of its own law and the application of its rules of private international law to determine the applicable law.

38. Although paragraph 1 affirms the principle of the restitution of stolen objects, it does not, in its present version, specify the person to

whom the object must be returned, a question which was discussed during the work of the study group and raised once again at the 69<sup>th</sup> session of the Governing Council. In accordance with this provision the object must be returned to the dispossessed person, that is to say the person who was previously in possession of it, a concept which is clear and precise in civil law. That person need not necessarily be the owner, even though one member recalled that in his own country, Nigeria, restitution of the object would automatically be made to the original owner, that is to say the person who had title to the object before the theft. It should be borne in mind that for the restitution of stolen objects there would in most cases be a civil action and if the court were to decide that the claimant has established the necessary facts the object will be returned to it whether it be a bank with a security over the object, a museum or an art gallery to which a painting has been lent, or to any other person.

39. *Paragraph 2* is concerned with the limitation period applicable to claims for the recovery of stolen cultural objects. After the emergence of differences of opinion as to the length of the period which in the preceding versions had been thirty years as from the dispossession, and since some members preferred a shorter period with a view to respecting the requirements of the art market while others favoured a longer period so as to take account of the speculative factor (purchase of a cultural object by way of investment), the group agreed, notwithstanding the hesitations of some of its members, no longer to lay down a single period but two: an absolute limit of thirty years running from the time of the theft and a short period of three years which would begin to run from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor, of the object. This solution would moreover bring about a certain parallelism with illegal export in respect of which the group also established two limitation periods. It is in addition useful at this juncture to mention that the group introduced a provision permitting those States which so wish to accord a greater degree of protection to persons who have been dispossessed of cultural objects by applying their national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under paragraph 2 of Article 3 (cf. Article 11 (a)(ii)).

#### *Article 4*

40. Article 4 provides for compensation to be paid to a possessor who is required to return a cultural object under the preceding article, on condition that it proves that it took certain precautions at the time of the acquisition. It is then, as already mentioned above, when considering whether it is appropriate to allow compensation to the person acquiring the

object that the question of good faith becomes decisive. One of the principal merits of the initial preliminary draft was precisely that it avoided any definition of good faith or even reference to it, concentrating attention on the concept of possession rather than on that of ownership.

41. This "right to payment" represents an intermediate solution between the extremes of according unlimited protection to a person acquiring an object in good faith *a non domino* and a refusal to grant any protection: the preparation of new draft laws has shown a certain tendency to have recourse more and more frequently to this legal concept, which is applied in very different ways in different legal systems. By introducing this right, the preliminary draft seeks to create a situation in which all those systems which provide for good faith possession *a non domino*, without admitting the right to payment, would recognise the importance of this right for the protection of cultural property and incorporate it in their legislation.

42. Once the principle of compensation had been accepted, the important question arose of how to determine it and the compensation mentioned in paragraph 1 is described as "fair and reasonable" without any precise indication of the amount. In the first version of the preliminary draft, the solution was to reimburse the purchase price or an amount corresponding to the actual value of the object so as to avoid speculation by the possessor. Then, in a subsequent version, this amount became a maximum permitting the judge to award an equitable sum having regard to the financial possibilities of the dispossessed person and of any insurance which it might have taken out. Finally the present version makes provision for the payment of fair and reasonable compensation to be assessed in accordance with the circumstances of the case, without any further clarification.

43. The words "fair and reasonable compensation" did not however find unanimous approval within the study group and were also criticized by members of the Governing Council. In fact, one member of the group believed that a ceiling should be placed on compensation so as to avoid speculation and not to leave to the judge too wide a discretion by using so vague a term, when reference could be made to familiar concepts which would pose no problems in practice such as the purchase price, possibly increased by interest and the actual value of the object. That member further feared that in the absence of any ceiling the chances for the dispossessed person to recover the object would be seriously compromised by reason of lack of financial resources. He was in particular thinking of the economic situation of developing countries and their anxiety that they would be unable to obtain restitution of objects because of their inability to pay compensation. Moreover the group, while recognising that this was a

legitimate and understandable concern, did not accept that point of view, believing that the notion of fair and reasonable compensation, which had the added advantage of being a universal rule, laid down a very strict limit on compensation and allowed regard to be had to the financial resources of developing countries. It was stressed that a specific reference to the price paid or to the object's commercial value would encourage the judge to give too much weight to those factors in determining what is fair and reasonable and the group therefore preferred to leave it to the discretion of the judge to reach the same result. It may likewise be recalled that in public international law in connection with compensation for nationalisation, judges have for many years applied this notion with the idea that it corresponds to a sum lower, and sometimes very much lower, than the actual commercial value.

44. For the purpose of obtaining compensation at the time of the restitution of the object, evidence must be brought that the necessary diligence was exercised when acquiring the object, and the text provides that the burden of proof lies on the possessor. A few words should be said on the burden of proof in this provision as the solution varied throughout the sessions of the study group and the question of proof was discussed on a number of occasions. In fact, the group had initially chosen a solution under which restitution would not be automatic in the case of theft and, so as not to have to return the object, the possessor had to prove that it had taken all the necessary precautions. Moreover, so as to avoid having to pay compensation to the possessor in cases where the latter was obliged to return the object, the dispossessed person had to prove that the possessor had acquired the object in circumstances in which it knew that it had been stolen or should at least have had doubts in that regard. Subsequently however the group came to the conclusion that it would be preferable for the burden of proof to be placed on the possessor rather than on the dispossessed person, taking account likewise of the support of the insurance companies if the burden of proof were to be placed on the person invoking its good faith. The group then considered the possibility of automatic restitution, without however reopening the question of proof. The present version of the text is clear in this regard, it being for the acquirer in good faith to prove that it has taken all the necessary precautions.

45. However, so as to take account of the Common Law systems in which compensation is not normally accorded to the good faith possessor of stolen property who does not acquire ownership of it, the preliminary draft permits any Contracting State, in respect of claims brought before its courts or competent authorities for the restitution of a stolen cultural object, to apply its national law when this would disallow the possessor's right to compensation even though it has exercised the necessary diligence mentioned in this paragraph (cf. Article 11 (a)(iii)).

46. The principle of the right to compensation in cases where good faith is present having been established, *paragraph 2* describes certain factors to be taken into consideration with a view to determining whether the necessary diligence was exercised by the possessor. This provision is based on paragraphs 2 and 3 of Article 7 of the draft LUAB of 1974, suitably adapted to take account of the special characteristics of cultural objects and without mentioning the words "good faith". The lengthy and detailed formula of the draft LUAB was not retained so as to avoid complicating the understanding of the text and its interpretation. The paragraph speaks only of "the relevant circumstances of the acquisition, including the character of the parties and the price paid", thus leaving to the judge a discretion to decide which other facts he considers to be relevant. Among those are the other elements mentioned in paragraphs 2 and 3 of Article 7 of LUAB, namely the nature of the object, the nature of the trade of the person disposing of the object, any special circumstances known to the purchaser concerning the acquisition of the object by the person disposing of it (origin of the object), and the circumstances in which the contract was concluded and its provisions.

47. When determining whether the possessor exercised the necessary diligence regard is also to be had to whether it consulted any accessible register of stolen cultural objects. Consultation of such a register by any person acquiring cultural property is a supplementary precaution which that person is required to take, although this does not mean that for the person acquiring the object to be protected that object must be listed in a register. Some doubts were expressed within the group as to the existence and accessibility of registers and attention was drawn during the course of the discussions to the ineffectiveness of registers of stolen cultural property which exist at the present time, notwithstanding the important initiatives undertaken by, for example, Interpol, Lloyds of London and the International Foundation for Art Research. As regards the question of accessibility, the development of telecommunications in the coming years would be a determining factor. Moreover, the register established by Interpol was, for the purpose of efficiency, highly selective and registered therefore only one percent of stolen works of art with the consequence that no country is able to maintain a fully updated list. Furthermore, the problem of clandestine excavations should not be overlooked, since objects coming from such excavations obviously do not appear in any register and those acquiring them use this argument to invoke their good faith. Finally, in connection with the register, the group stressed that it is important to indicate the nature or quality of the person acquiring the object, since if that person is, for example, an antique dealer, this factor would have much more weight in determining the existence of good faith.



48. Finally, *paragraph 3* imputes "the conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously ... to the possessor". The effect of this provision is to assimilate the position of a purchaser who has acquired the object gratuitously to one who has acquired it for value and, to avoid any misunderstanding, it should be made clear that the group did not have in mind the agency situation. Two different situations arising under this paragraph were distinguished. The first is that of "innocent" successors of a possessor in bad faith, and in such cases they are by virtue of this paragraph also deemed to be in bad faith. The second situation is the much rarer one where the successors of a possessor in good faith come to know that the object had been stolen and in these circumstances those successors will be in the same position as the deceased according to the principles of the law of inheritance and will be deemed to be in good faith. It was suggested that in these admittedly very rare cases there could be results which some would consider to be of doubtful justice but it was recalled that the purpose of such a text was not to deal with marginal cases. It should further be noted, as was recalled by one member of the group, that the introduction in the preceding article of a three year limitation period for the bringing of a claim once the place where the object was located has been discovered, and that the conduct of the predecessor is to be imputed to that of the possessor, implies that in such specific cases the position of the successor of the dispossessed person should be the same: thus the three year period would begin to run from the time when the dispossessed deceased person had discovered where the object was located, and not from the time when the successor entered into possession of the inheritance.

### CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

#### *Article 5*

49. Whereas the preceding articles are concerned with the theft of cultural objects, this article deals more specifically with the question of their return when they have been exported in contravention of a prohibition. While the principal problem arising in relation to the theft of cultural objects is that of the *bona fide* purchaser, the main issue to be faced in connection with the illegal export of such objects is the extent to which States would be prepared to recognise foreign public law. The study group as a whole agreed that nothing would be gained from pursuing the doctrinal dispute of whether foreign law is in fact applied or recognised or whether it is simply taken into consideration, and that it would be preferable for political as well as practical reasons to treat the violation of an export prohibition or permission requirement regarding

cultural objects as a fact from which certain legal consequences would flow in the particular circumstances. In this connection attention should be drawn to the revolution in legal thinking which has found expression in texts such as Article 7 of the 1980 Convention of the European Communities on the Law Applicable to Contractual Obligations and Article 19 of the Swiss Law on Private International Law as well as the case law of some countries which have indicated a willingness in certain circumstances to be more generous in taking into consideration the mandatory rules of law of another State. However, when drawing up this provision the group was convinced that the giving effect to foreign public law by the courts of another State constitutes an exception to the law and practice of most States and that such an exception would have to be extremely limited if the future Convention were to have any chance of success. The group was conscious of the extremely innovatory character of the preliminary draft, and in particular of this provision, but it believed that in the absence of such a solution it would be impossible to deal with the problem of illegal export of works of art.

50. The structure of Article 5, which underwent a number of modifications during the course of the work, traces the different phases of the procedure for return in practice and renders its presentation more logical: the first paragraph concerns the request made by a State, the second relates to the admissibility of such a request (preliminary examination on the basis of certain information) while the third sets out a list of the interests which would be significantly impaired by the export.

51. *Paragraph 1* provides that when a cultural object has been removed from the territory of a Contracting State contrary to its export legislation, that State may request the court or other competent authority of a State acting under Article 9 to order the return of the object to the requesting State. The problem of proving the infringement of the export legislation was raised given the silence of the provision in that respect. The original idea had been not to introduce a rule of proof since it would be extremely difficult for a State to prove that the export ban had been infringed by an act of which it was not aware; it would in consequence be for the judge to decide whether there had been such an infringement.

52. It should also be recalled that a request for the return of a cultural object must be brought before a court or another competent authority of the State addressed. The words "other competent authority" were introduced because in some countries it is not only a court which may be seized of a dispute relating to a cultural object, as a government may create a special instance to deal with the case, and it is for this reason that the group was unwilling to place limitations on the authority which may determine whether or not a cultural object should be returned. It

should also be noted that one of the novel features of the text is that it confers jurisdiction on a national court to order the return of a cultural object which has not been stolen.

53. During the work of the group, some of its members expressed concern as to the need to indicate the circumstances in which the State addressed may refuse to accede to a request for the return of the object or to subordinate such return to non-pecuniary conditions. *Paragraph 2* therefore lays down the conditions for the admissibility of a request for return, in the form of a preliminary examination based on certain information which must be supplied by the requesting State. In no way is this meant to raise obstacles to the return of the object but rather to protect it and to render the request more credible (the provision of guarantees that the object will be conserved and not re-exported), which is in full conformity with the philosophy underlying the preliminary draft as a whole, that is to say the protection of cultural objects and not the interests of States. Moreover, given the chasm which exists between the political will to protect cultural objects and that of achieving their recovery, such a provision would be of great assistance to those authorities in exporting countries which are responsible for the protection of cultural objects. In fact, the purpose of this provision is twofold: first, to protect the cultural object through the moral undertaking required of the requesting State and, secondly, on account of that undertaking, to remove one of the arguments which the State addressed might raise to oppose the return of the object.

54. Thereafter, once the request has been judged to be admissible, the return of the object is subject to certain conditions. In the preceding version of the text there was a pecuniary condition, namely that it was sufficient for the requesting State to prove that the object had a value superior to X (amount to be determined), in order for the return of the object to be ordered. In the opinion of those who wished to maintain this condition it would simplify the evidentiary burden placed on the requesting State. However after certain doubts had been expressed with regard to this condition, either as a cumulative or an alternative one, the group finally decided to delete it, bearing in mind in particular the objections of those who argued that such a pecuniary condition could be deemed offensive to certain cultures especially when applied to ritual objects.

55. The alternative solution to the monetary criterion which in the present version of the text is the only one and which appears in *paragraph 3* of Article 4, takes the form of a list of interests which the illegal export of the object must impair in order for the court to order the return of the object to the requesting State. The purpose of this paragraph is extremely important, as it contemplates a change in the universal practice

of states by requiring them to recognise and to give effect to the export control legislation of a foreign State. However, with a view to achieving acceptance of this exception to the rule in respect of cultural objects, the group was of the opinion that it would be necessary to provide a reasonable description of the situations in which it would be appropriate to request States to give effect to the provisions of foreign law which they would not normally do. These are the situations which are set out in paragraph 3.

56. These situations are to be found in a list which has the merit of clarity, although during the preparatory work some members of the group had proposed a modification of its structure with a view to avoiding a single sentence and this for reasons of consistency with the drafting technique used in the preceding article and also for reasons of presentation as the list seemed to accord the same importance to all situations when this was not the case in practice. The requesting State must therefore prove that the removal of the object from its territory has significantly impaired one or more of the five interests mentioned therein. Sub-paragraph (a) speaks of the physical preservation of the object or of its context and sub-paragraph (b) of the integrity of a complex object. The third interest which the export of the object would significantly impair is that mentioned in sub-paragraph (c), namely the preservation of information regarding the object which is of importance for the culture of humanity as a whole and not just for the requesting State. The words "of, for example, a scientific or historic character" were included so as to take account of the problem of clandestine excavations in archaeological sites since an object originating in such excavations should *ipso facto* be considered as falling within the category described by the sub-paragraph. The text then makes reference in sub-paragraph (d) to the use of the object by a living culture, thus seeking to recognise and respect every living culture without distinction.

57. Sub-paragraph (e) permits the requesting State to obtain the return of an object whose export significantly impairs the outstanding cultural importance of the object for the requesting State. This text caused considerable problems to the group, certain members of which believed that it left to the judge too wide a degree of discretion. A proposal setting out the elements permitting the determination of the importance of the object was put forward but for reasons of consistency with the drafting of the preceding article where the judge was left a certain degree of discretion, those elements are not included in the present text. They should however be mentioned: the particular cultural importance of the object for the requesting State must be determined in the light of the extent and richness of the existing stock of its heritage material whether in public or private ownership and the degree of

uniqueness of the object. As regards the French text, the word "particulière", which qualifies the importance, was chosen in preference to other words such "grande" or "exceptionnelle", as it conveyed the idea that even if the object in question was not in itself exceptional, it was important in the circumstances of the case which justified its return. In the English text the choice of the word "outstanding" did not achieve as wide a degree of support.

58. It should in conclusion be noted that the list of interests which the removal must significantly impair is by no means exhaustive and indeed Article 11 (b)(i) provides that each Contracting State shall remain free in respect of claims brought before its courts or competent authorities for the return of a cultural object removed from the territory of another Contracting State contrary to the export legislation of that State to have regard to interests other than those mentioned in paragraph 3 of Article 5.

59. One member of the study group submitted a proposal for the insertion of a new provision in Chapter III 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 to that institution at the time of the alleged theft". 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 is being made for the return of an illegally exported object. That member of the group also cited by way of example the laws of certain States which confiscate an object exported in infringement of their export rules, thus permitting such States to appear before a foreign court as the owner of the object seeking its recovery.

60. He also mentioned the fact that this problem had been the subject of lengthy consideration by the committee which had drawn up the 1970 Unesco Convention, the results of whose efforts were to be found in Article 7 (b)(i). He insisted on the need for such a provision to be included in the draft as it already appeared in the principal texts relating to theft and to illegal export and had been carefully examined at international level, and since it seemed desirable to avoid any conflict with the provisions of the 1970 Unesco Convention to the extent that the problems dealt with were the same.

61. A majority of the members of the group however viewed the proposal, which had been submitted at a late stage of the work, with a certain degree of scepticism, in particular on account of its highly political character. Various arguments were put forward, among which the fact that such a text would constitute 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, and that this question was one which fell within the discretionary power of the judge who should determine whether the conditions had been met in each case. The group therefore decided to defer any discussion on this proposal to a later phase of the work.

#### Article 6

62. This article provides that even when the conditions laid down by Article 5 have been fulfilled, there is nevertheless one situation in which a request for return may be refused, namely when the object whose recovery is sought has as close a, or a closer, connection with the culture of the State addressed or of another State than with that of the requesting State. In other words it lays down an exception to the basic principle set out in the preceding article. The language employed ("may only refuse"), which is to be found in the Hague Conventions, is justified by the desire to limit the grounds of refusal, and reflects the political choice of the group finally to provide one such ground only, and that in a separate provision.

63. From the outset of its work, the group noted that exceptional situations could be imagined, for example an export prohibition relating to the works of a particular ethnic group within the requesting State, in which the courts of the State addressed would find it offensive for reasons of public policy (*ordre public*) to recognise the prohibition in any way. There was however no general wish to make an express reference to public policy so as to avoid compromising ratification of the future Convention by certain States and because even if the concept were not to be mentioned in the text a State could in any event invoke it as a kind of reservation clause. The example was 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, without any express mention of *ordre public*, special provisions had been adopted for certain cases contemplated by the Convention (grave risk of physical or psychological harm to the child or of his being placed in an intolerable situation).

64. The words "as close a, or a closer, connection" were included in the text although this idea was not a new one as similar language had already been contained in an earlier version of the preliminary draft as a situation in which Article 5 would not apply (cf. Study LXX - Doc. 11, paragraph 2 (c) of Article 4). This was in essence a concept of private international law which is in principle a technique for the determination of the applicable law, used as a means for assessing a greater or lesser

interest. It will be for the court or competent authority of the State addressed to determine this connection by proceeding to a comparative evaluation of the cultural interests whereas, under Article 5, it is already required to measure the interest of the requesting State.

#### Article 7

65. This article establishes three exceptions to the principle of the return to the requesting State of objects which have been illegally removed from it. The first, dealt with in paragraph (a), reflects the idea that export provisions 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. The group as a whole found this principle to be acceptable and, notwithstanding a proposal to the effect that it is the artist's death which should be taken as the beginning of the period, it rejected that proposal which could constitute a serious infringement of the rights of artists as it would paralyse the international circulation of the artistic heritage.

66. Agreement having been reached on the principle, the length of the period following the death of the artist proved to be the subject of long discussion. The original text had made provision for a period of fifty years, based on an analogy with copyright (Berne Convention of 1886 and successive revisions), and which is the period to be found in most laws governing artistic property. It was argued that such a period would permit successors to affirm the artist's reputation abroad as well as at home, whereas a shorter period would constitute a kind of confiscation in their regard. Others however found this period to be too long and observed that there was in some countries no period of this nature following the death of the artist, or a shorter one of for example twenty years, and that to contemplate a period of fifty years would create a risk of all the work of an artist disappearing from the country. The group however believed that in such cases 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 and finally, it decided to exclude the application of the Convention when the export occurs within a period of fifty years following the death of the artist.

67. The future Convention will likewise not apply when no claim for the return of the object has been brought before a court or other competent authority within the two periods, one relative and one absolute, fixed in paragraph (b) at five and twenty years respectively. The length of these periods was queried with a view to obtaining a parallelism with Article 3 (2) which makes provision for periods of three and twenty years. The

majority however did not consider such a parallelism to be justified as the two situations were different. As regards the shorter period, one of less than five years was considered to be too brief for a State to be able to establish that an object had been illegally removed from its territory, in particular when it had come to light in clandestine excavations. As to the absolute time limit, thirty years seemed to be too long and could cause difficulties for certain importing States which might refuse to recognise export prohibitions dating back too far.

68. As to the time from which the periods should run, they are the same as in the case of theft, that is to say the time when the requesting State knew or ought reasonably to have known the location of the object or the identity of its possessor for the five year period and, with respect to the absolute period, twenty years from the date of the export of the object. The group was aware of the fact that as regards the absolute period the State could not know the date of export in those cases where the object had been discovered in the course of clandestine excavations but, finding it impossible to improve the wording of the provision, it agreed that the problem would be resolved by the evidence brought forward by the two parties in the course of the proceedings.

69. Finally, concerned by the fact that national rules governing export are subject to change, the group agreed to introduce in the text, as a condition for a request for return to be granted, a provision to the effect that the export legislation must be the same at the time when the claim is brought as it was when the object left the territory of the requesting State. This is the effect of *paragraph (c)* which provides that the provisions of Article 5 shall not apply when the export of the object in question is no longer illegal at the time when return is requested. This solution deals with the case of conflicts of law in time and avoids a prohibition which has been lifted continuing to have effect. One member of the group was however strongly opposed to the introduction of such a provision.

70. If the national law of a Contracting State is such that it would apply the provisions of Article 5 in situations which are excluded by Article 7, the draft Convention permits such a State to apply its national law in respect of claims brought before its courts for the return of illegally exported objects in accordance with Article 11 (b)(ii).



*Article 8*

71. Chapter III of the preliminary draft presents a logical structure: in the first place it lays down the basic principle of the return to the requesting State of illegally exported objects as well as the procedure to be followed to that end. Article 8 states what will happen in the event of the return of the object to the requesting State, namely the possibility for the possessor to obtain fair and reasonable compensation or to make a different choice. The article now contains four paragraphs which seek to clarify the different ideas contained in it.

72. *Paragraph 1* lays down the principle that a possessor of an illegally exported object may require that the requesting State pay it compensation unless it 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. Opinions were divided during the sessions of the group as to whether the possessor or the requesting State should bear the burden of proving the possessor's knowledge. Ultimately, the problem was resolved in the sense that such evidence would already have been adduced by the requesting State under the preceding article and that it was therefore no longer necessary to deal with it in this article which is concerned only with compensation.

73. The expression "fair and reasonable compensation" which was already employed in Article 4 (1) in connection with theft is also to be found in this paragraph but, as regards illegal export, some members of the group considered that one could not impose on the good faith possessor of an object which had previously been illegally exported a calculation based on the notion of equity, being of the opinion that the possessor should receive full compensation, that is to say reimbursement of the price paid. However, given the very high prices reached by works of art and the limited financial possibilities of certain States, and so as not to encourage speculation, it was agreed that the possessor should be entitled, at the time of the return, to a payment equivalent to fair and reasonable compensation to be determined by the judge in the light of the circumstances of the case.

74. In addition, the text of the preliminary draft makes provision for certain other options open to a possessor who is obliged to return the cultural object to the requesting State in lieu of compensation. In effect *paragraph 2* allows the possessor to retain ownership of the object or to transfer it against payment to a person of its choice residing in the requesting State. The idea was that the result should be a return to the *status quo ante*, but concern was voiced that this would encourage

speculation in connection with illegal export. In fact, if a person were to be permitted to return the object to another, including the one who had illegally exported it, the latter would be able to re-export it to somebody in a State which was not a party to the Convention. It is for this reason that paragraph 2 requires that that person must provide "the necessary guarantees". These guarantees relate to the protection, conservation and security of the object but on account of the differences of opinion which emerged regarding the meaning of those terms, the text does not make express reference to them but rather constitutes a compromise for while the question is one of interpretation, what are envisaged are of necessity guarantees relating to the objective of the future Convention which are the protection, conservation and security of the cultural object. It will be for the judge to decide among the many persons who may offer those guarantees.

75. The last sentence of the paragraph reflects the notion that when the possessor is in good faith, the requesting State cannot confiscate the object as otherwise ratification of the future Convention would risk being seriously compromised. Moreover, the requesting State would, when ratifying the Convention, undertake to respect the choice offered to the possessor, which choice would thus be legally guaranteed. If this were not stated in the provision, the person obliged to return the object would always choose to request compensation and if the requesting State could not pay the compensation, there would be no return. Given moreover that the notion of confiscation is not the same in all countries, the group added the words "nor subjected to other measures to the same effect", language which judges have never had any difficulty in interpreting in connection with, for example, nationalisation.

76. The effect of *paragraph 3* is to place on the requesting State the costs associated with the return of the cultural object. There was no unanimity within the study group as regards this paragraph as some members believed that the cost of return was itself one of those factors which the judge should take into consideration when determining the fair and reasonable compensation. Others did not share this view, considering that it might seem shocking to require a requesting State to cover the costs of the return if the possessor were to choose to transfer the object for value to a person in the requesting State and that it was necessary to distinguish two situations. The first of these was that where the cultural object is returned to the country of origin against compensation: in such cases the costs of return should not be covered by the compensation as these were administrative and material expenses and did not constitute compensation intended to avoid causing prejudice to a person in "good faith" (if he were not, he would have no claim for compensation as provided for in paragraph 1). The second case was that where the object is

transferred to a person in the requesting State and in these circumstances it was pointless further to "punish" that person. One member of the group considered that it would be inequitable to require a requesting State to pay the costs of the return since it would already have incurred substantial expenses including those of the proceedings and the payment of compensation. Finally, the group decided to leave the text as it stood, being 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, subject to the possibility of its seeking an indemnity from a person who knew that the object had been illegally exported.

77. Finally, *paragraph 4* imputes to the possessor the conduct of the predecessor from whom it had acquired the object by inheritance or otherwise gratuitously. The group was in effect of the belief that this should be stated expressly as had been done in the case of theft (cf. *paragraph 3* of article 4).

#### CHAPTER IV - CLAIMS AND ACTIONS

##### *Article 9*

78. This article specifies what are, at the option of the claimant, the jurisdictions competent to determine claims governed by the preliminary draft convention. It contains two paragraphs, the first of which offers a choice to the claimant to bring an action before the courts of a State where the possessor is habitually resident or those of the State where the object is located at the time a claim is made. It is however clearly to be understood that the traditional grounds of jurisdiction provided by national legislation and international conventions are preserved. The second paragraph makes provision for a dispute to be submitted to another jurisdiction or to arbitration. The group was of the opinion that the article as a whole, and in particular the choice offered to the claimant, was particularly satisfactory in view of the element of flexibility provided.

79. The claimant may therefore, in accordance with *paragraph 1*, bring an action for the restitution of stolen cultural objects or for the return of cultural objects removed from the territory of a Contracting State contrary to its export legislation before "the courts or other competent authorities". This language was introduced as the study group assumed, above all in the context of the new Article 8, that another authority might have jurisdiction.

80. The first ground of jurisdiction provided for in paragraph 1 is that of the courts of the State of the habitual residence of the possessor. It should be noted that many Conventions refer to domicile rather than to residence but in the special case under consideration the group believed that it was preferable to choose the residence of the possessor as a cultural object is a movable and as this ground of jurisdiction would in most cases be additional to the traditional grounds.

81. The second ground of jurisdiction is that of the courts of the State where the cultural object is located. This constitutes a new special ground of jurisdiction under the future Convention which will facilitate its application although it is almost unknown in relation to claims for the recovery of movable property in Europe and is not to be found in the existing codification of rules governing jurisdiction, in particular the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and the Lugano Convention of 1988 which bears the same title. The concern of the study group was, in regard to the specific case of cultural objects, to grant jurisdiction to the courts of the State where the object is located so that an object in a Contracting State may be returned even though the possessor has its domicile or residence elsewhere.

82. *Paragraph 2* permits the parties to submit their dispute to another jurisdiction or to arbitration. The study group was of the belief that the choice of forum is an essential procedural freedom and that the omission of such a provision could create an obstacle for certain States to ratify the future Convention. Moreover the choice of forum is widely recognised in private international law and does not cause problems of enforcement even though recourse is rarely had to it. The option of arbitration on the other hand leads to the respect of confidentiality and it is to be expected that the 1985 UNCITRAL Model Law on International Commercial Arbitration will be widely accepted, also by developing countries. In addition there would be no problem regarding enforcement since recourse to arbitration is dependent on the consent of the two parties and in particular of that of the person claiming restitution.

## CHAPTER V - FINAL PROVISIONS

### *Article 10*

83. This article clearly determines the temporal scope of application of the preliminary draft Convention by providing that it applies only to situations arising after the entry into force of the Convention. The

cultural object must therefore have been stolen, or illegally removed from the territory of a Contracting State, after the entry into force of the Convention in respect of the Contracting State before whose courts a claim is brought.

84. The fact that this article takes into consideration only situations arising after the entry into force of the future Convention did not satisfy all members of the study group, some of whom would have preferred the Convention to have retroactive effect so as to avoid an illegal act becoming legal simply because it had been committed after the entry into force of the instrument which in a certain way amounted to setting the seal of approval on illegal acts. While other members fully understood this very important concern, especially for developing countries, they believed that the granting of retroactive effect to the future Convention would render the chances of its being accepted by those States which would have to return cultural property virtually nil. They therefore preferred, for political reasons, to attempt to improve the situation for the future while recognising that there existed problems relating to the past that still needed to be solved.

85. The intention of this provision is to lay down, by a slow process of education, ethical or moral principles for the exchange of cultural objects and, with a view to the future, to focus the attention of importing countries on those objects already in their territory. It was moreover emphasized that even if the text concerns only the future, it could have an important effect on practice generally and on judicial practice in particular as regards those objects which had previously been stolen or illegally exported. There are many examples of private law Conventions which have not been ratified but which have been considered to express the existing state of public policy or international morality and which have served as a reference point for judges even in those States which have not ratified them (for example the Unesco Convention of 1970).

86. While believing that the present wording of Article 11 met the preoccupations of those concerned by past events and those who did not wish to sanction existing practice, the study group suggested that mention be made in the preamble of the intention not to recognise past practice as a *fait accompli*.

87. Finally, while the group was unwilling to establish the principle of retroactivity in this article, considering that any doubts in that regard would render highly improbable the signature and even more so the ratification of the future Convention by many States, it has made provision in Article 11 (c) for the possibility for a State before whose courts or competent authorities a claim is brought to apply the Convention

retroactively 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.

#### *Article 11*

88. This article lays down an exhaustive list of situations in which a Contracting State may apply its own law when this would be more favourable to the claimant than would be the provisions of the Convention. The preceding version of this provision took the form of a general formulation which recognised the impossibility of unifying legal systems and traditions while at the same time seeking to avoid divergencies in the application of the Convention being too great and in particular a weakening of the protection provided for in the Convention.<sup>(9)</sup>

89. This general formulation however failed to gain wide approval as it was feared that it could result in differences in treatment and thus deprive the provisions of the Convention of a uniform application. The intention was that the State addressed could be more liberal, that is to say more favourable to the dispossessed person or to a State whose export laws had been infringed, and not to bring about a unification from which it would be impossible to derogate. Some members of the group considered that this 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 was 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 text could, as drafted, give rise to different interpretations. Another member insisted on the fact that the 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), mix up different considerations and that a general formulation was not sufficiently clear (in particular as regards what was meant by the words "in any other way"). They believed therefore that it would be preferable to distinguish the different situations rather than to lay down a general rule covering all of them.

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(9) The text read as follows: "Any State Party to this Convention may accord wider protection to a person dispossessed of a cultural object ... or to the rights of a requesting State ... by disallowing or restricting the right to compensation of the person in possession of the object or in any other manner".

90. Since there was general agreement as to the principle established by Article 11, the general formulation was abandoned in favour of a more detailed provision which in particular draws a distinction between theft and illegal export, while at the same time seeking to preserve the greatest degree of unification possible. The present text contains therefore an exhaustive list of matters in respect of which a Contracting State may accord wider protection either to a dispossessed person or to a requesting State. To this end the article has been divided into three paragraphs, the first concerned with theft, the second with illegal export and the third contemplating a possible temporal extension of the scope of application of the Convention. The wording of the introductory sentence of the article has been drafted in such a way as to make it quite clear that each State may go further than the Convention by extending its own obligations but not those of other States, in other words the provision will only apply when the State according wider protection is the State addressed.

91. Paragraph (a) which concerns stolen objects is divided into three sub-paragraphs: the first (sub-paragraph (i)) makes provision for the possible extension of the application of the Convention to acts other than theft; the second (sub-paragraph (ii)) gives an option to States to extend the period during which a claim for restitution of the object may be brought, while the third (sub-paragraph (iii)) allows a State to apply its own law when this would disallow the possessor the right to compensation even though it has exercised the necessary diligence. This last sub-paragraph was included to take account of the special situation in Common Law systems regarding the restitution of stolen objects, although it could relate also to other situations.<sup>(10)</sup>

92. Paragraph (b) is more particularly concerned with objects which have been illegally exported and consists of two sub-paragraphs. Sub-paragraph (i) allows a requesting State to claim that the removal of an object from its territory would significantly impair an interest other than those mentioned in the list contained in Article 5(3). Sub-paragraph (ii) contemplates the extension of the application of Article 5 to cases otherwise excluded by Article 7 (one of these being the time limit for bringing a claim for return).

93. The third and final paragraph of this article, paragraph (c), concerns both theft and illegal export and permits a Contracting State, if it so wishes, to apply the Convention notwithstanding the fact that the theft or illegal export occurred before its entry into force for that State.

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(10) The language of this provision was amended by the Governing Council to avoid a possible misunderstanding as to its meaning.

94. In conformity with practice within Unidroit the study group left the drafting of the other final clauses and of the preamble for a later stage of the work, either by a committee of governmental experts or by a diplomatic Conference at which the future Convention would be adopted.



ANNEXE  
APPENDIX

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