UNIDROIT 1991
Study LXX - Doc. 23
(Original: French)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Report on the first session (Rome, 6 to 10 May 1991)

Rome, July 1991

1. In opening the first session of the Unidroit committee of governmental experts on the international protection of cultural property at 11.00 a.m. on 6 May 1991, the President of Unidroit, Mr Riccardo Monaco, expressed his appreciation to Mr Francesco Sisinni, Director-General of the Italian Ministry of Culture, for having so kindly agreed to the holding of the session at the Complesso monumentale San Michele a Ripa in Rome.

2. After extending a warm welcome to the participants (see the list in APPENDIX I), he briefly recalled the reasons which had led Unidroit to undertake its current initiative in the field of the international protection of cultural property and more particularly the preparation of an international Convention on stolen or illegally exported cultural objects. He then invited the committee to proceed to the election of its Chairman.

Item 1 - Election of the Chairman

3. *On a proposal by the representative of Mexico, seconded by the representatives of France and Italy, the committee elected as its Chairman Mr Pierre Lalive (Switzerland).*

4. The Chairman expressed his gratitude to the committee for the confidence which it had placed in him.

Item 2 - Adoption of the draft agenda (G.E./C.P. - Ag. 1).

5. *The committee adopted the draft agenda prepared by the Secretariat (see APPENDIX II).*

Item 3 - Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects
(Study LXX - Docs. 19 - 21)

6. The Chairman suggested that before the committee consider in detail the articles of the preliminary draft Convention, the delegations present might wish to make statements of a more general character.

7. The representative of Egypt emphasised the importance of the questions before the committee in view of the wide acceptance of the fact that the cultural heritage contributes to the formation of national identities as well as to the culture of humanity as a whole, all the more so in a world where the illicit traffic in cultural objects is becoming ever more international in character.

8. The real challenge facing the committee was to strike an acceptable balance between the interests of the countries of origin of cultural objects and those of the importing countries and between countries

advocating the development of the art trade and those following a restrictive policy of cultural nationalism aimed at the retention of cultural property in the country of origin.

9. The developing countries of Africa, Asia and Latin America had long been the victims of the illegal removal from their territories, and hence the impoverishment, of their cultural heritage which constituted an assault on their cultural identity. From the most ancient times his own country had suffered from systematic spoliation as tombs were pillaged and their treasures taken abroad.

10. In these circumstances he suggested that the committee bear in mind a number of general considerations namely: (1) that the protection of cultural objects is not an individual responsibility but that of the international community as a whole; (2) that the protection of cultural objects is not only a legal matter but one with political and humanitarian dimensions; (3) that the greater the protection of cultural objects, the greater the chances of wide acceptance of the proposed Convention; (4) that there must be a clear distinction between the theft and the illegal export of cultural objects and (5) that it is difficult, if not impossible, to accept that an illegal act may become legal simply because it was committed before the entry into force of the proposed Convention.

11. The representative of France stated that in general his authorities viewed favourably the solutions proposed by the Unidroit study group in the preliminary draft Convention which addressed directly or indirectly most of the legal problems associated with stolen or illegally exported cultural objects. The preliminary draft offered therefore a sound basis for fruitful discussions and although his delegation had no major difficulties with the text it would have a number of proposals to make, some of them more in the nature of drafting amendments.

12. This being said he wondered whether a greater degree of flexibility might not be introduced into the discussions if, and here he had in mind the provisions dealing with theft, one were to start from the assumption that the Convention would deal only with situations in which an international element was present since delegations might be less willing to contemplate solutions involving a departure from the principles obtaining in their legal systems in respect of purely internal relations. This proposal, he insisted, was not intended to preclude further consideration of the scope of application of the future instrument but simply to permit a freer exchange of views than might otherwise be possible.

13. The representative of Senegal stressed the special interest of his authorities in the preliminary draft Convention in the framework of their

efforts to secure the preservation of Senegal's cultural heritage which was particularly under threat as a consequence of the increase in tourism. In the past, the cultural heritage of the countries of Black Africa had been intimately associated with cult and ritual but today artistic movements were developing outside those traditional spheres and many works in both public and private collections had been created for purely aesthetic purposes. In these circumstances, and given the fact that a greater quantity of cultural objects had been illegally removed from African countries than that remaining, those countries clearly had an interest in a Convention aimed at the restitution and return of such objects. The adoption of appropriate measures at international level was a matter of urgency not only for the States which were the principal victims but also for artists themselves as the theft of, and illegal commerce in, works of art seriously impaired the interests of artists who were deprived of the possibility of enforcing those intellectual property rights to which they might be entitled.

14. Generally speaking therefore, his delegation supported the Unidroit initiative although it would of course reserve the right to comment on the detailed provisions of the preliminary draft Convention.

15. The representative of Greece considered that it was commendable to seek to fill a gap in the existing private law regime relating to the theft and illegal export of cultural objects from which her country had suffered for centuries. She supported therefore an attempt to strike a fair balance between the interests of countries of origin and the possessors of cultural objects but in its present form the preliminary draft seemed to lean rather too heavily in favour of the latter interests, this being the case in particular in relation to the time limits envisaged for bringing actions under the prospective Convention and the exclusion from its scope of application of cultural objects stolen or illegally exported prior to its entry into force. These, and other matters, would be the subject of more detailed comment by her delegation when the individual articles were considered.

16. The representative of Portugal stated that generally speaking his delegation considered the draft to have achieved a reasonably fair balance given the wide number of States to which it was addressed. It should however be understood that its provisions ought not be seen as preventing States from seeking to go further in the direction of protection within regional groupings such as the European Economic Community. As to the specific provisions of the preliminary draft, he too would wish to comment in more detail at an appropriate time on a number of issues such as the concept of "fair and reasonable compensation", prescription and the burden of proof.

17. The representative of Austria expressed her scepticism as to the suggestion that the future Convention should apply exclusively to international situations, not least on account of the difficulty in deciding in certain cases whether situations were national or international.

18. The representative of the United States of America drew attention to the fact that the text of the preliminary draft Convention had been widely circulated in his country among governmental agencies and interested circles and that the process of exploration, questioning and examination was still underway. His delegation had therefore come to the first session of the committee of governmental experts with no fixed position and its contribution to the discussions should be viewed essentially as an attempt to seek clarification which would in no way prejudge its Government's attitude at the next session of the committee.

19. This being said, his delegation recognised the importance of considering the possibility of going beyond the 1970 Unesco Convention by developing additional rules of a private law character. In this perspective he stressed the need for adopting provisions which would meet with the widest possible acceptance by both exporting and importing States and to this end his delegation's comments at the present session would bear more upon the object and purposes of the future Convention than on detailed questions of drafting.

20. The representative of Hungary believed that the preliminary draft before the committee constituted, as a whole, a good basis for appropriate solutions. By way of general comment, he expressed the opinion however that certain issues had not been sufficiently addressed, for example the question of the invalidity of contracts of sale of cultural objects under the law of States of origin and the very wide degree of freedom accorded to States under Article 11 to extend the degree of protection accorded by certain provisions of the Convention so as to correspond to the rules of national law. In this connection it was important to avoid any discrimination in treatment between nationals of States where the object was located and claimants from other States and to this end the courts of States addressed should when necessary apply their own rules of conflicts of law to give effect to the law of the State of origin. What he therefore visualised was a combination of minimum substantive rules of private law established by the Convention with the application of those rules of national law, including rules of private international law, which afforded wider protection to claimants.

21. The representative of Turkey stated that it was his understanding of the objective of the future Convention that it was to clarify, and if possible to ensure a more satisfactory application of, the provisions of

Article 7(b)(ii) of the 1970 Unesco Convention. As the draft stood, it appeared to represent a substantial change in approach from that of the Unesco Convention, which had favoured countries of origin, by shifting the balance towards the interests of importing States, an imbalance which it was imperative to rectify.

22. The representative of the Union of Soviet Socialist Republics drew attention to the ever increasing phenomenon of the illegal export of cultural objects from countries which had no adequate mechanism to halt it, a tendency that was accompanied by an increase in authorised cultural exchanges between States which should be encouraged. In his delegation's opinion the preliminary draft Convention heralded a move in the right direction and the initiative was one particularly welcomed in his own country which was at present completely overhauling its legislation in the sphere of the protection of cultural property, in which connection the problem of combatting illegal export was of the greatest importance.

23. As to the preliminary draft Convention itself, he saw its main purpose as being to establish a mechanism which would lay down general principles for the defence of cultural property at international level while leaving the elaboration of detailed rules to national law and it might be the case that the prospective Convention ought to include a special chapter enunciating those general principles. The future instrument should moreover specify in greater detail the rights of possessors of cultural objects as well as the responsibility of those violating export legislation. He agreed with other representatives that the present text of the draft allowed too much scope for the concealment of stolen and illegally exported cultural objects and the draft should be revised so as to bring out clearly the responsibility of those countries which tolerated such practices.

24. It was, he admitted, extremely difficult to produce a satisfactory definition of cultural objects but it might be useful to recall that some cultural objects were not corporeal objects and that they might fall within the domain of intellectual property.

25. In the light of these general considerations it would be necessary to consider very carefully the draft chapter by chapter and article by article and from this examination an alternative approach might emerge. The task before the committee was a far from easy one but he was confident that the outcome of its work would be fruitful.

26. The representative of Belgium drew attention to the absence of legislation in his country prohibiting the export of cultural objects which would cause difficulties if it were to be called upon to accept the legislation of other States in respect of stolen or illegally exported cultural objects.

27. The Chairman considered that the general debate had thrown out many useful ideas which would no doubt be further developed in the course of the session as the committee addressed itself to the individual provisions of the preliminary draft Convention. The fact should not however be overlooked that, in common with other international instruments, the future Convention would be preceded by a preamble and he could imagine that some of the concerns voiced might be properly dealt with in that preamble.

28. Turning to the text of the preliminary draft Convention he suggested that the committee defer consideration of the title until such time as it had examined the substantive provisions, a procedure with which the committee agreed.

29. The committee accordingly proceeded to an article by article examination of the provisions of the preliminary draft Convention on stolen or illegally exported cultural objects as reproduced in Study LXX - Doc. 19,(1) in the light *inter alia* of the written observations of Governments and of international organisations contained respectively in Study LXX - Docs. 20 and 21.

Article 1

30. A number of representatives endorsed a written proposal by the Mexican delegation that the words "contrary to its export legislation" be replaced by "contrary to its legislation". In support of the amendment, attention was drawn to the fact that in some States the rules prohibiting or subjecting to conditions the export of cultural objects were contained in general legislation concerning the cultural heritage. Questions might in consequence arise as to whether such legislation was, technically speaking, "export legislation" and if the court or other competent authority of a State in which a cultural object was located were to give a narrow interpretation of the term then there was a risk, albeit unintentional, of restrictions being placed on the scope of application of the future Convention.

31. Other representatives however, while not necessarily opposing the amendment, considered that it would be preferable to defer taking a decision on the question until such time as the substantive provisions of the draft had been examined. It was their understanding that it had not been the intention of the study group, by including the word "export" in

---

(1) For the sake of convenience, the text of the preliminary draft Convention as submitted to the committee is reproduced in APPENDIX III hereto.

Article 1, to restrict the application of the Convention but it had to be borne in mind that a reference was made to "export legislation" also in Article 5 and that it was precisely a contravention of the rules of the requesting State governing the illegal export of cultural objects that triggered the mechanism established by Chapter III. The proposed amendment to Article 1 ought therefore to be considered in the context of the Convention as a whole.

32. In these circumstances it was agreed to revert to the Mexican proposal to delete the word "export" at a later stage of the committee's work.

33. A number of representatives referred to the suggestion made by the representative of France that consideration might, at least as a working hypothesis, be given to the possibility of excluding from the application of the future Convention purely domestic situations. There was general agreement with that proposal, without prejudice to the taking of a final decision on the matter as a question of substance once the committee had considered the draft as a whole and in particular the provisions of Chapter II, since it was evident that by its very nature Chapter III, dealing as it did with illegal export, could only apply to international situations.

34. This being said, a number of preliminary arguments were advanced both in favour and against the idea of restricting the scope of application of the future Convention to situations presenting international elements. On the one hand it was suggested that the novelty of certain solutions envisaged by the draft was such that they might prove to be more readily acceptable by many States if they did not involve a change in internal law as regards purely domestic cases while one representative stated that the proposal would be likely to appeal to his authorities as the uniform rules contemplated by the future Convention would otherwise replace not just one but fifty legal systems in his country. On the other hand, attention was drawn to the fact that adoption of the proposal on a definitive basis would, in the absence of national legislation extending the provisions of the Convention to purely domestic situations, result in the establishment of a dual regime. The greatest care would therefore have to be taken in drawing a distinction between national and international cases so as to avoid uncertainty as to which legal regime would apply in a specific case, and this would equally be true if the Convention were to be given a wide scope of application with the possibility for States to make a reservation in respect of cases involving no international element, however that element might be determined.

Article 2

35. In the course of a lengthy debate on this article, a number of criticisms were levelled at the definition of cultural objects. In the opinion of certain representatives the present definition was at the same time both too broad and too vague. In particular, it was suggested that if it were thought necessary to introduce special provisions on the restitution of cultural objects acquired in good faith, they should be limited to a well defined category of items deserving special treatment. It was therefore unacceptable to accord such treatment to anything which might be considered as a "cultural object" and only objects of great cultural significance should be covered. It had, in addition, to be recalled that the prospective Convention had substantial implications for the private law rules of States and it was questionable whether Governments would be prepared to contemplate changing those rules in respect of an ill-defined category of objects. It would therefore, even at the risk of restricting the scope of application of the Convention, be preferable to establish a more limited definition by requiring that the cultural objects to which it would apply should be of "great" cultural significance. Other possible tests which were suggested related to the age or value of the object or to the fact that it appeared on a list drawn up by a State.

36. Other representatives however were opposed to such restrictions of the definition of cultural objects. As to the requirement that the object should be of "great" significance, it was suggested that this would introduce a subjective element that would not be easy to apply in specific cases and which, as the text now stood, would be entirely within the appreciation of the courts or other competent authorities of the State addressed which might not be familiar with the traditions and culture of the State of origin of the object. One representative in addition noted that the present text of Article 2 already represented a compromise for in his own legal system regard was had to the less stringent condition that an object be of cultural "interest" as opposed to cultural "significance".

37. Objections were also levelled against the notion of assessing the significance of a cultural object by reference to its value as this on the one hand ignored the fact that objects used for ritual purposes in certain societies might have a very small commercial value and that on the other the aim of the future Convention, at least as visualised by the study group, was to protect not only the interests of States but also those of private individuals who were equally or perhaps more exposed to the risk of theft of cultural objects in their possession.

38. Attention was also drawn to the fact that, broad as it might at first sight appear to be, the definition in Article 2 was already subject to certain limitations. The most obvious of these were the conditions laid

down in Article 5(3) for the return to the requesting State of illegally exported cultural objects and while it was true that it was for the court or other competent authority of the State addressed to decide whether one of the particular interests referred to in that paragraph had been impaired, undoubtedly one of the factors which it would take into consideration would be the significance attached to the object by the requesting State. In this connection it had also to be recognised that the definition in Article 2 was to some extent self-limiting as an individual or a State would only bring an action under the Convention for the restitution or return of a cultural object if the importance of the object were deemed to warrant the taking of such a step.

39. In the view of certain representatives, the principal issue was not so much that of providing a definition in the Convention of cultural objects as of determining who was to decide whether an object was cultural and to this end the Mexican delegation tabled a written proposal to add at the end of Article 2 the words "in accordance with the law of the requesting State". In support of this proposal it was recalled that Article 1 of the 1970 Unesco Convention provided that "[f]or the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance ...". It was moreover considered by some representatives that it was objectionable on grounds of principle that the question of what was of cultural significance for one State should fall to be decided by the authorities, whether judicial or otherwise, of another State and attention was drawn in particular to the possible conflict of interests which could arise under Article 6. It was therefore of the utmost importance to complete Article 2 by a reference to the law of the requesting State.

40. Other representatives, some of whom were not unsympathetic to the arguments advanced in support of the proposed amendment to Article 2, considered however that a reference to the requesting State at the end of that provision would be inappropriate as it would not necessarily be of relevance to Chapter II where the party seeking restitution of the cultural object might well be an individual rather than a State. Objections were also levelled against the proposal as a matter of legislative technique for, if it were to be accepted, the Convention would contain no uniform definition of cultural objects and judges called upon to apply it would be faced with as many definitions of cultural property as there were Contracting Parties.

41. A number of proposals were also made which were aimed at the introduction of additional adjectives in Article 2. Certain representatives called in particular for a specific reference to objects of archaeological significance which constituted an important element of their cultural heritage. It was moreover recalled that such a reference was to be found in

Article 1 of the 1970 Unesco Convention and fears were expressed that its omission in Article 2 could give rise to an *a contrario* interpretation. It was further suggested that the word "scientific" be added, which would track the reference in Article 5(3)(c), as well as "literary", "ethnological" and "palaeoethnological".

42. Some representatives were reluctant to extend further the list already contained in Article 2, all the more so as some categories of objects such as those of "spiritual" or "ritual" significance might already be considered to be somewhat imprecise. In the opinion of others the introduction of additional adjectives would do no harm, and might indeed increase the degree of precision, although the longer the list the greater could be the risk of its being considered to be exhaustive, notwithstanding the presence of the words "other cultural significance". No general formula of the type contemplated could be entirely watertight and what was important was to seek, as the study group had sought to do, not to exclude unintentionally categories of objects which should be covered.

43. One representative warned especially against the danger of broadening too much the coverage of the future Convention. He had in mind in particular certain references which had been made to intellectual property rights. Initial reactions in his own country to the draft had been that it did not apply to such rights and the greatest care should be exercised to avoid any overlap with existing international Conventions and national laws which specifically dealt with questions of intellectual property. This concern was echoed by other representatives who insisted that the definition of cultural objects in Article 2 be restricted to material objects.

44. Attention was also drawn by certain representatives to the desirability of ensuring close cooperation with the Commission of the European Communities as it considered the measures that might have to be taken in connection with the movement of cultural objects from one member State to another after the removal of the internal frontiers at the end of 1992 and especially the need not to overlook the importance of the concept of "national treasures" in Article 36 of the Treaty of Rome which some representatives saw as being much narrower than the present definition of cultural objects in Article 2.

45. In concluding the debate on Article 2, the Chairman invited delegations to give particular thought between the first and second sessions to the proposals which had been made and to submit amendments in writing for the next session. In this connection he recalled that when drafting the present text the study group had been conscious of the fact that unlike the 1970 Convention, the provisions of which were mainly of a public law character addressed to States, the instrument under preparation

in Unidroit was one which would be applied and interpreted essentially by judges and that its scope of application should therefore be determined in as clear and simple a manner as possible. It was furthermore open to question whether Article 2 ought to be viewed as laying down a definition *stricto sensu* as its purport could only be fully understood in relation to the following substantive provisions such as Article 5. One of the questions which he believed it to be useful to consider was in particular that of whether a broader range of cultural objects should be covered by the provisions of Chapter II than by those of Chapter III, a possible solution which some representatives had seemed to favour.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

46. One delegation referred to the difficulties which seemed to be caused by the dichotomy which existed between the regimes applicable respectively to stolen and to illegally exported cultural objects, for example in respect of the limitation periods which were different (Articles 4 and 7), and the principles governing restitution and return (Articles 3, 5 and 8). That delegation therefore suggested that regard be had to the possibility of overlapping claims under Chapters II and III, and to the need to solve those problems which might arise in situations where a cultural object had been both stolen and illegally exported.

47. One member of the Unidroit study which had elaborated and adopted the preliminary draft Convention (hereafter referred to as "the study group") recalled that the question of whether two distinct regimes should be established had been discussed at length and that the majority of the members of the group, being aware of the fact that there could be cases of theft followed by illegal export as well as of illegal export alone, had come to the conclusion that in the light of national laws governing theft (theft as an offence being treated in different ways), a distinction should be drawn in the text between the two offences. Moreover in the case of theft followed by illegal export, a State could, according to its interests and the conditions to be met, decide to leave it to the owner to claim the restitution of the object under Chapter II, or itself claim the return of the object under Chapter III.

48. The committee of governmental experts ultimately decided to examine at this stage only cases of theft or illegal export, and to defer discussion of situations where both elements were present (see the proposal in this connection concerning Article 9(1)).

49. Another representative raised a question of public international law, namely that a Convention only applies to Contracting States, so that it was not possible for certain rules to apply whether or not a State was

party to the Convention and to this end he proposed that Chapter II should only apply when a cultural object was stolen on the territory of a Contracting State. He insisted that since it was not intended to exclude more favourable regimes which might be applied by Contracting States, a general clause should be added to the future Convention according to which it would not prejudice claims brought under national law or under another international Convention by a claimant, irrespective of his nationality (see the proposal in relation to Article 11, paragraph 163).

Article 3

50. A number of representatives made proposals concerning paragraph 1 with a view either to replacing the term "possessor" or to defining it more precisely. Some of them pointed out that certain national legal systems distinguish legal possession from factual possession (possession in one own's name or that of another) whereas other legal systems drew no such distinction, and the question therefore arose as against whom the claim should be brought. Another representative, while admitting that a number of legal systems recognise different kinds of possessors (possessor, holder etc.), considered that it was not necessary, for the purpose of determining the question of the persons to whom stolen objects should be returned, to draw up a list and he did not favour the introduction of the term "holder". There would in effect be no problem if one person, whether a natural or a legal person, was at the same time both possessor and holder, and if on the other hand a situation were to exist involving two different persons, that representative was of the belief that the claim should be brought against the possessor. Another representative drew the committee's attention to those cases where ownership of an object is divided among a number of persons (spouses, the debtor and the holder of a security etc.).

51. Without taking any decision at this stage the committee recognised that this was a problem of drafting technique and that either one single term could be used, that of possessor, subject to an explanation that the term should be understood in the special sense accorded to it by the Convention which would not necessarily correspond to each of the internal laws of the Contracting States, or resort had to a periphrasis, so as to define that person more clearly.

52. Some representatives favoured specifying in the text of the article itself the person to whom the stolen object should be returned as the present version did not do so. One member of the study group recalled that there were so many persons to be taken into consideration (bank, gallery, restorer etc.), that the group had considered it preferable to leave the matter to be determined by the judge who was used to deciding questions of ownership rights and conflicting legal interests. One

representative proposed reformulating paragraph 1 to read as follows: "The State, the institution or the person who is the holder of a stolen cultural object shall return it to the requesting State". Another however preferred the present text, without any addition, in the belief that what was necessary was to establish the principle of the restitution of stolen cultural objects, whether in private or public ownership, and whether the possessor was in good or bad faith.

53. As to the question of principle, one representative expressed hesitations concerning the automatic restitution of stolen cultural objects. In his country, the dispossessed person could claim restitution of the stolen object from a purchaser in good faith, although the situation might be different elsewhere, but there did seem to be a trend in case law not to apply that principle too rigidly. He offered the example of a case in which the object had been stolen but the court had not ordered restitution on the ground that the dispossessed person had been negligent. He also wondered whether the principle established by Article 3(1) would always produce satisfactory results and whether some form of escape clause ought not to be provided for those countries which were not familiar with the theory of abuse of rights so as to permit them to restrict the application of the rule. He therefore proposed the introduction of a provision to the effect that in certain exceptional circumstances where a person has acquired an object in good faith, which could be set out in paragraph 1, the court would not be obliged to find in favour of the dispossessed person.

54. Some representatives moreover criticised the lack of precision of the concept of "stolen" cultural objects and suggested either defining them for the purposes of the Convention, or introducing a conflicts rule to indicate the law applicable for determining the notion of theft (law of the State where the act was committed, *lex rei sitae*, *lex fori*). Two representatives in fact believed that the concept of theft should be as narrow as possible and that a State should, if it so wished, be able to extend it to other criminal acts by means of Article 11(a)(i). Another representative noted that while it was true that the text contained no definition of theft, a universally known concept, it was evident that the judge would apply the definition of his own national legal system so that the application of that definition would necessarily be limited to the territory of the State which had decreed it.

55. In reply, one member of the study group recalled that a division had emerged among its members, some of whom believed that theft should be defined according to the internal law of the State where the act was committed and others who had argued in favour of the application of the law of the court seized of the case. The group had ultimately opted in favour of the present text which would permit the court to determine which

definition should be applied and which law should be taken into consideration (its own or that of the other State). In other words, the court would resolve the problem by reference to its own rules of private international law. He added that the committee might, if it so wished, introduce into the draft private international law rules to deal with the question.

56. Always in connection with the concept of theft, the representative of Mexico raised the question of whether objects originating in clandestine excavations should be considered as falling within the notion of stolen cultural property. It was his wish that this should be the case and, supported by other representatives, he proposed the insertion of a new article to that effect which might be worded as follows: "For the purpose of this Convention cultural objects obtained by illegal excavations are considered as stolen and are subject to Chapter II" (cf. Study LXX - Doc. 22, Misc. 11). It was however agreed to postpone any final decision on the question of whether a specific provision on this question should be included in the draft.

57. As to paragraph 2 of Article 3 concerning the limitation periods for the bringing of claims for the restitution of stolen cultural objects, opinions of representatives differed widely both as to the shorter period of three years and the absolute period of thirty years. Some stated that they were satisfied by those periods, recalling in particular that for Civil law systems the Convention, and in particular the limitation periods specified by it, would constitute a minor revolution in the internal law of many of those countries when compared to the protection which a possessor in good faith is entitled to expect from a legal system, by exposing him to claims which could be brought a very long time after the acquisition when the dispossessed person discovered the identity of the possessor or the location of the object. In fact, in France the period was one of three years as from the theft and paragraph 2 would permit a considerable extension beyond that period subject to the absolute limit of thirty years. For these reasons those representatives were unwilling to see the periods still further extended.

58. More particularly as regards the shorter period, some representatives believed that it could only be justified if the concern of the committee was simply to maintain the stability of the art market, which was not the only purpose of the future Convention. One delegation proposed lengthening that period because in most cases it would be the State which would bring the action and given the large number of claims to be dealt with three years would not be sufficient. Some representatives suggested extending the period to five years so as to bring about a certain parallelism with Article 7(b) relating to illegal export.

59. As regards the absolute period, a majority of those representatives who commented on it considered the period of thirty years for which provision was made to be insufficient and proposed the deletion of any period at all, thus following the rule of public international law which lays down no time limit for the restitution of war booty, believing as they did that it should always be possible to claim the restitution of a stolen cultural object. Some representatives proposed extending the absolute period to fifty years, or to speak of a period of "not less than thirty years" so as to lengthen the period if that available under internal law was shorter, but without excluding the mandatory application of internal law, including criminal law, which would provide greater protection. Some representatives moreover suggested that a shorter period would encourage the concealing of objects and that in such cases the absolute period would be of no value.

60. For their part, two representatives were of the opinion that the two limitation periods were at the same time both too long and too short and they proposed that exceptions be made to take account of the particular circumstances of each case, and this in particular so as to draw a clear distinction between situations where the possessor of a cultural object was himself the thief or an accomplice of the thief (in which case it should be possible to recover the object without any time limit), and those where the possessor had acquired the object in good faith. One of those representatives therefore proposed introducing a provision allowing for exceptional cases where the period was longer than would be reasonably necessary. The other representative suggested the addition of a provision to the effect that when the acquirer was in good faith the period should not exceed six years so as to avoid the necessity of amending his country's internal law governing ownership.

61. In reply to these arguments, one member of the study group recalled that the text constituted a compromise which took account of the interests of the dispossessed owner and of the need for legal certainty in commercial transactions and he criticised opposition to a provision on the sole ground that it would necessitate a change in internal law. He emphasised that while it was necessary to start out from national law with a view to arriving at uniform rules, it was likewise essential to admit the possibility of the modification of national law as the positive law of a number of countries did not guarantee the protection of cultural objects. It had moreover not to be forgotten that the distinction between importing and exporting countries was one in a state of flux as any country might at the same time occupy both positions and the rules under consideration could work both ways. Another representative insisted on the need for the text to lay down limitation periods, the length of which had yet to be determined, as it was not possible for a situation of uncertainty to last for ever.

62. Whereas the length of the limitation periods gave rise to differing opinions, representatives were in agreement as to the point of departure. The words "or ought reasonably to have known" were however the subject of considerable criticism. Indeed some representatives sought their deletion on the ground that they were open to interpretation, ambiguous or even contrary to the interests of developing countries from which stolen cultural objects most frequently originated. Two representatives drew attention to the difficulty of proof, either because the various specialised reviews which sometimes permit the tracing of an object were not available in some parts of the world, or because in certain countries most stolen objects had not been inventoried as they came from clandestine excavations, with the consequence that it was impossible to dispose of information regarding an object whose existence was unknown.

63. One member of the study group explained that the language, which was moreover to be found in most legal systems to deal with similar situations, had been introduced precisely to cover those cases in which it was difficult to prove that the claimant knew the location of the object or the identity of the possessor or where the possessor alleged his ignorance of the fact that the object acquired by him had been stolen even though wide publicity had been given to the fact in the country of his residence. Another representative opposed the deletion of the words on the ground that the negligence of the dispossessed person ought not to be rewarded.

64. Still in connection with the words "or ought reasonably to have known" and more generally in relation to the limitation periods, one representative suggested that the text introduced an element of injustice since the dispossessed person was an innocent victim who, through no fault of his own, had been deprived of the object and this provision imposed upon him a duty of diligence to find out the location of the object or the identity of the possessor. No such corresponding obligation was placed on the possessor as regards the diligence which he ought to have shown to establish the origin of the object he had acquired. That representative therefore proposed that the obligation on the dispossessed person to take action within the time limits should be accompanied by one on the possessor to give publicity to his possession of the object or to prevent him from relying on the absolute period if he could not prove that he had exercised the necessary diligence in ascertaining the provenance of the object. This proposal would have the effect of deleting the words "or ought reasonably to have known" and of placing a qualification on the absolute period. In support of his proposal, he pointed out that Article 7 of the 1970 UNESCO Convention laid no obligation on the claimant to show that he had exercised due diligence to find the object. Moreover, his own national law did not permit the possessor to rely upon the limitation period without his having demonstrated that he had exercised the necessary diligence in respect of the provenance of the object.

65. Finally, one representative raised the question of the relation between the obligation on the possessor to make restitution of a stolen cultural object under Article 3 and his right to compensation under Article 4. He stated that his own internal law recognised the right of retention which gave the possessor the right to keep the object until his claim had been satisfied whereas it was his understanding of Articles 3 and 4 that they established no relation between the claims. He expressed the wish that it be made clear in the text whether or not the possessor could refuse to return the object until such time as he had received compensation.

Article 4

66. One representative pointed out that while paragraph 1 established the principle of the compensation of a possessor who is obliged to return a stolen object, payment of such compensation was however subject to the condition that he exercise the necessary diligence and he suggested that failure to provide compensation to a possessor who could not prove that he had exercised such diligence caused him a certain problem, although he was uncertain as to how it could be solved. In effect his country's internal law allowed for the payment of compensation to a possessor in "bad faith" corresponding to reimbursement of the cost of the necessary conservation of the object. He insisted on the importance of this provision for cultural property as a possessor who received no compensation for his expenses would not be concerned by the conservation of the object, which was certainly not the best way to ensure its protection, even if the possessor were ultimately to be held responsible for any damage suffered by the object.

67. Some representatives criticised the concept of "fair and reasonable" compensation which placed too heavy a burden on claimants and in particular on developing countries which would face difficulties in recovering cultural objects on account of their limited financial resources. One member of the study group however recalled that the choice of the words "fair and reasonable compensation" had been made precisely with the economic situation of those countries in mind, and that this universally recognised concept established a strict limit which would allow regard to be had to their financial means.

68. Moreover, one representative stated that the present language of the text which included the words "fair and reasonable compensation", was such that his country would be obliged to make a reservation as it had done in relation to the 1970 UNESCO Convention to the effect that a possessor who was the owner of the object would, according to his country's Constitution, be entitled to fair compensation. Other representatives, who expressed their support for this position, believed that it would be regrettable for a question of drafting to prevent certain important countries from adopting the future Convention.

69. With a view to allying these concerns and to facilitating the task of the judge, one representative suggested speaking of compensation which was "fair and reasonable in all the circumstances" a proposal which received the support of a number of other representatives. The Canadian representative in particular stated that her country's Cultural Property Export and Import Act contained a provision to the effect that the court may accord compensation to an acquirer in good faith, the amount of which would be equal to a sum which the court found just in the light of all the circumstances. Another representative took the view that it was unnecessary to describe the compensation in any way, while yet another recalled that the 1970 UNESCO Convention referred in Article 7(b) to the notion of "just" compensation. Those representatives however considered that the question was one of drafting policy to be determined either by including that expression in the text of the preliminary draft or by clearly explaining in the commentary what was meant by "fair and reasonable compensation".

70. While there was general agreement on the principle of using a general formula to describe compensation without any indication of the amount, one representative suggested that in the specific case of clandestine excavations the compensation should be determined by the judge with regard to the actual cost of the excavations and of transport and not by reference to the commercial value of the object.

71. Always in connection with the determination of the amount of compensation, another representative submitted a proposal to the effect that a possessor who acquires ownership of a stolen cultural object, as is already the case in some countries, should be entitled to full compensation under Article 4. He noted however that even in those cases where a country's legal system would not permit an acquirer in good faith to become the owner of a stolen object, Article 4 accorded him a right to compensation, a solution which was not satisfactory as it placed upon the original owner an absolute liability in the sense that he would have to pay compensation to somebody who would not as of now be entitled to it. He therefore proposed replacing the word "possessor" at the beginning of paragraph 1 by the words "a person who has a right of ownership" so that Article 4 would reflect the idea that in those States where the original owner was entitled to restitution of his property and where the acquirerer in good faith would have no right to compensation, the situation would remain unchanged, but in those countries where the acquirer in good faith had a right over the object, he would be entitled to compensation.

72. Another representative drew the attention of the committee to the question of the person required to pay the compensation, and noted that in this connection there were two persons involved, the acquirer in good faith of the cultural object who was in all probability innocent and the dispossessed owner who certainly was, both of whom would suffer as a result of an illegal act committed by a third person. It was for this reason that

she proposed contemplating the possibility, when this was possible and appropriate, of the compensation being paid to the possessor not by the dispossessed person, as was provided for in the present text, but by the seller in bad faith (cf. Study LXX - Doc. 22, Misc. 10). One representative believed that it might not perhaps be possible to achieve this result in the text of the Convention, but that provision could be made for such a solution in internal law.

73. Still in relation to the person who must pay the compensation decided by the judge for the restitution of stolen objects, and to the difficulties suggested by some representatives as regards the financial possibilities of the State or of a private individual to pay the compensation, the Italian delegation proposed adding to Article 4 the following paragraph 1bis: "When the dispossessed owner is unable to pay the compensation established, a third person, whether public or private, which is not necessarily the State of the claimant, and which pursues a cultural objective, may guarantee payment of the compensation, on condition that the object shall, on its return to its legitimate owner, be made accessible to the public in the State of the owner, and that the third person undertakes also to meet the cost of insuring and conserving the object in question" (cf. Study LXX - Doc. 22, Misc. 3). In reply to a question as to who was the third party contemplated, the Italian delegation suggested that it could be an institution of the State of origin of the stolen object, an institution of the State where the object was located at the time its restitution was claimed, or again an international institution. It insisted however on the fact that the important question was not that of which institution should act, but the objective of that institution, namely to make the object accessible to the public in the country of origin, an idea which was moreover to be found in Article 5 (2).

74. With regard to the requirement that the possessor must, to obtain compensation at the time of restitution, prove that he had exercised the necessary diligence, one representative drew attention to the fact that this provision shifted the burden of proof because, since good faith was as a rule presumed, it was necessary to prove fault and in this case it would be for the dispossessed person to prove that the possessor had acquired the object either with knowledge that it had been stolen or at least that he had serious doubts in that connection. It was replied, admittedly in a rather theoretical manner, that one could see this rule simply as an application of a general rule to the particular case of cultural objects with a view to achieving the objective of the Convention which was a greater protection of cultural objects. In effect the very nature of those objects was such that the acquirer could not in most cases ignore the fact that an object was a cultural object and in consequence it could be suggested either that he was in good faith, which he could always demonstrate, or that he was not. In any event, it was recalled from the perspective of comparative law that in some Civil law systems the principle

of good faith in certain circumstances leads to the shifting of the burden of proof, in particular when the claimant is in a situation in which it would be very difficult for him to adduce proof, as the defendant in good faith is under an obligation to assist in bringing evidence and even to provide it himself.

75. In addition, one representative proposed replacing the words "necessary diligence" by the more general concept of "reasonable diligence". She pointed out that Article 4 (1) provided for compensation of a possessor who could prove that he had exercised the necessary diligence when acquiring the cultural object. However, since he was in possession of a stolen object, it was clear that he had not exercised the diligence necessary to avoid the acquisition, and the term "reasonable" therefore seemed to be preferable. One member of the study group however explained that the words "necessary diligence" had been chosen because it had been considered that the diligence normally required for the acquisition of commercial objects was not sufficient for that of cultural objects, and that this difference in the degree of diligence required was necessary for the purpose of extending the protection of cultural objects.

76. As regards paragraph 2 which expands upon the notion of necessary diligence and indicates certain elements which permit its determination, some representatives stressed the importance attached in their countries to as clear a definition as possible of the diligence required from the acquirer. One of them in particular drew attention to the need, above all for art collectors, to know before buying an object what was the required degree of diligence so as to avoid subsequent legal problems, rather than to discover afterwards that their conduct had not met the required standard. In this regard she drew the attention of the committee to the increasing tendency in her country, for example on the part of museums, to carry out enquires with the Ministries of culture of countries of origin before acquiring an object, by reason of the absence of a complete register or of other sources of information. In this way it had been possible to ascertain that certain objects had in fact been stolen which had the happy result not only of avoiding acquisition in certain cases, but also of permitting the victim of the theft to discover where the object was located.

77. Faced with this understandable need for clarity, one member of the study group recalled however that the purpose of the paragraph was indirectly to provide a definition of good faith, a specific term whose use it had been sought to avoid, with a view to striking a balance between those countries which were familiar with that concept and others which were not, and for this reason it would be desirable not to be too precise. Another representative also emphasised the informative character of the provision, which served only as a guide for judges, as what was being done was to require a special degree of diligence from the acquirer of a

cultural object and not to lay down strict legal rules. Stress was furthermore laid on the drafting difficulties in this connection since what was needed was a general clause taking account of the diversity of national laws that would reconcile this requirement of legislative drafting with the necessary certainty for prospective buyers.

78. Conscious of this difficulty, but seeking at the same time to provide as comprehensive a text as possible, some representatives submitted proposals for the addition of other criteria for the determination of the diligence required of the possessor. It was in particular suggested that reference be made to "the nature of the stolen cultural object" so as to deal with the serious problem of clandestine excavations, or to the "civil or commercial" character of the parties. These elements had already been mentioned in the explanatory report on the preliminary draft Convention (cf. Study LXX - Doc. 19, paragraph 46) as being among the relevant circumstances surrounding the acquisition - and it was noted that these factors had been taken over from Article 7 (2) and (3) of the 1974 draft LUAB, suitably adapted to take account of the particular characteristics of cultural objects, and without employing the term "good faith" -, but those representatives considered that they should be mentioned in the text of the future Convention itself and not only in a commentary. For its part the study group had considered that it would be of no value to include all of the possible elements in the text because on the one hand such a list would never be exhaustive, and on the other because it was desirable to leave to judges an unfettered discretion to take account of all the circumstances from which they could establish whether the possessor had been in good faith.

79. Consultation of an accessible register of stolen cultural objects was seen as another element in the determination of the diligence of the possessor, and certain representatives suggested that the matter be clarified further, proposing for example to add the requirement that the register be "official". Fears were however expressed that such an addition could limit the protection of stolen objects in those cases where only a private register existed in a given country, for example one set up by an insurance company, and it was proposed that the register should be "reliable". The idea underlying this proposal was that if a number of registers existed in one country, the possessor should consult that which was the most complete and which had the greatest authority. It was also recalled that such registers of stolen objects do not exist in all countries, and that some of them are not accessible, and to take account of this state of affairs another representative proposed that the reference to an accessible register be completed by the words "if any".

80. One representative drew the attention of the committee in particular to the French version of paragraph 2 and inquired whether the consultation of a register was one of the "circonstances pertinentes de

l'acquisition" or whether it was a cumulative condition as the text seemed to suggest. A number of members of the study group noted that the English version was certainly clearer in that what was contemplated here were not a series of conditions but simply a non-exhaustive list of circumstances surrounding the acquisition.

81. The committee of experts then proceeded to consideration of paragraph 3 and experienced some difficulty in imputing to the conduct of the possessor that of a predecessor from whom he had acquired the cultural object by inheritance or otherwise gratuitously. Some representatives were in particular of the belief that there would be a certain injustice if this paragraph were to be applied to a person who had in good faith inherited an object from a person in bad faith, because he would have to return the stolen object without compensation even though he had never had access to the information available to the deceased person, and because it would be extremely difficult for him to prove the exemplary conduct of a donor many years before. He would therefore be in a worse position under the Convention than a simple possessor. Another representative suggested that one way of mitigating this injustice might lie in making provision for a shorter limitation period in Article 3 (2) when the object had passed through the hands of an acquirer in good faith, since it was easier to prove what had happened six years before than twenty-five years before. This proposal, which had the merit of stressing the connection between paragraph 3 and the limitation periods, did not dispel the concern of some representatives, unless the idea was not to award compensation to a person who had acquired the object gratuitously.

82. A member of the study group explained what had been its intention, namely that it would not be just that a person who had made no payment for the object should find himself in a better position than an acquirer in good faith who had paid a high price for it. The group had therefore been of the belief that if a person who had incurred such expenditure were to be compelled to return the object, the same should be true of a person who had received the object gratuitously. As regards the possible injustice for an acquirer in good faith or a person inheriting an object, the group had been of the opinion that if a person were found in possession of a stolen cultural object within the limitation period, that person should, in order to be compensated, have to prove that he had been diligent, and this would be the case whether that person had acquired the object gratuitously or for value. Another member insisted that what must be avoided was that a gift could "launder" an object whose provenance was doubtful. If an individual in bad faith were to obtain an object and, being unable to sell it, made a gift of it, the donee should necessarily have to return the object and would suffer the same fate as would have done the donor. It would indeed be too easy to make a gift of an object of doubtful provenance since the donee would not make enquiries of the author of the gift. The intention was therefore through the treatment of the donee to sanction the conduct of the

donor, which was perfectly normal for since the contract was not one for value, there was no warranty of title.

83. One representative suggested that it would nevertheless be appropriate to draw a distinction between the situation of a person who received an object as a gift and who would be under no obligation, except in those legal systems where a gift is considered to constitute a contract, and that of a person who had acquired the object under a contract and from whom one was entitled to require a certain degree of diligence.

84. Another member of the study group made the practical point that collectors are for example exposed to the risk of being deprived of an object and should therefore take precautions which commercially would mean obtaining insurance cover. Under this paragraph, the original owner had a prior claim, and a successor who was unable to prove the exercise of the necessary diligence should cover himself by insurance.

85. Following these different explanations, one representative wondered whether the provision was in fact useful for many legal systems where the effect of the *nemor dat* rule is that a donor in bad faith cannot create good faith on the part of a person receiving the object gratuitously. Only an acquirer for value should be entitled to compensation. If moreover the donee had received the object gratuitously, the compensation to which he would be entitled would be negligible if not inexistent since he would have paid nothing for the object.

86. With a view to meeting the concerns which had been voiced, one representative suggested using the word "illegimate" to describe the conduct of the possessor and this proposal received support because it expressly contemplated the situation of a donor in bad faith by clearly indicating that he could not create good faith on the part of the person who received the cultural object. It was moreover recalled that regard should be had to the principle of acquisitive prescription which existed in certain legal systems and whose application varied according to whether the acquirer was in good or in bad faith.

87. Finally, one representative referred to possible difficulties in regard to partial or serial gifts or to objects donated directly by purchasers to institutions such as museums or universities. He pointed out that it was in the first place difficult in the case of partial or serial gifts to establish ownership during the period in the course of which the gift was being made and the question arose of the application of the future Convention in such cases. One representative replied that the question of whether an acquisition was valid should be settled by the competent authority or the judge seized of the dispute. The other point raised concerned the situation where a person who might be the first owner makes a gift of it without himself having chosen it and would therefore have made

no enquiries into its provenance. In this connection it was noted that while it was true that museums were today following certain ethical standards in their acquisition policies and abstaining from the purchase of objects whose provenance was doubtful, it would be too easy for an institution which wished to project a favourable image to adopt such an acquisitions policy and then to persuade a donor, who did not have the same concern, to acquire an object whose provenance was not clear and to make a gift of it to the museum which would then claim that it was not for it to carry out any enquiries. The intention of the provision was precisely to avoid such situations arising.

88. One representative raised the problem of questions which were not settled by the Convention, either intentionally or because it was not possible to do so, and of the way in which certain concepts not expressly defined in the text should be interpreted. He suggested that such notions should be interpreted in an autonomous manner since what was being drawn up was a uniform law; hence the importance of the text being as clear as possible. Another representative added that in cases of claims for the restitution of movable property the law usually applied to solve conflicts of law was that of the place where the object was located (*lex rei sitae*), but that this law would in part be replaced by the uniform law provisions contained in the future Convention. He was of the opinion that a paragraph or even an article might be added inviting States to interpret the Convention in accordance with its international purpose and thereby to give a uniform meaning to the concepts contained in it.

89. Another representative drew attention to the question of overlapping between the 1970 Unesco Convention and the preliminary draft Unidroit Convention, and in particular the risk of conflicting obligations in those cases where the requesting State and the State addressed were parties to both instruments. The representative of Unesco replied that the two instruments were complementary and that the future Unidroit Convention should satisfy those countries which, while condemning the illegal traffic in cultural objects, had for different reasons been hesitant in becoming parties to the 1970 Unesco Convention, one of the reasons being the vagueness or ambiguity of the Convention which had led to different interpretations.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

90. Some representatives emphasised the extremely innovatory character of Chapter III, as it contemplated not only the application of foreign public law, but more generally the rules of mandatory application of a

foreign State. Apart from the 1980 Convention of the European Communities on the Law Applicable to Contractual Obligations and the 1978 Swiss law on private international law, there were not many rules of positive law establishing that principle but it was important to do so at international level as such an innovation was the expression of a greater awareness of international solidarity. The principle established was therefore that a State on whose territory a cultural object which had been illegally exported was located should return it, that is to say that a State which would ratify the Convention would undertake to respect the principles underlying rules of foreign law concerning illegal export.

91. A number of representatives were generally of the view that Article 5 was drafted in too vague a manner and that it was illogical, above all if it were to be compared with the provisions of Chapter II. In effect, the article began by describing rules of procedure while the substantive rule was to be found only in paragraph 3, and then completed in Article 8 by the principle of compensation, whereas some problems could be resolved if one were to begin with an enunciation of the principle of the obligation of return and then to pass on to questions of procedure (who may bring a claim, before whom, according to which procedure etc.).

92. As to the present text and to the novel features which it contained, it was important to circumscribe the notion of illegal export and in this connection one representative recalled the discussions of the committee of experts on Article 1. He believed that here again it would be preferable not to specify the law that had been contravened so as to avoid differing descriptions of it or too restrictive an application of the provision. He drew attention to the fact that certain countries had passed laws on the protection of the cultural heritage which directly made provision for measures to defend it and to prohibit the export of cultural objects. Another representative, who also favoured the use of broader language, considered however that reference should be made to a law or to rules affecting export or the removal from the national territory of cultural objects and that effect be given to those rules only. Yet another believed that the notion should not be extended too far so as to cover other contraventions of national law and that the future Convention should not apply for example to exports whose illegal character derived from the imposition of an embargo rather than from a text more specifically concerned with cultural property.

93. Two representatives suggested that procedures applied in their own national legal systems might be followed. The first indicated that the Canadian law governing the export and import of illegally exported cultural objects provided that when there was an agreement between Canada and another country it was illegal to import into Canada foreign cultural objects which had been illegally exported from that other country. This meant that when an action was instituted by the Canadian Government with a

view to the return of an object, the law provided that the State must prove that there was in fact a law prohibiting export and that the object had been exported in contravention of that law, a system which seemed to function well in practice. The other representative stated that a system could be introduced which would be based more on the application of import restrictions, in the sense that a State could under an agreement impose import restrictions on any object coming from another State and the latter would not have to prove anything, the object being seized at the frontier and returned (a kind of general embargo).

94. Finally, some representatives submitted proposals for amendment, for example a modification of the text to read "[w]hen a cultural object has been illegally removed ..." which would take over the wording of the 1970 Unesco Convention and cover objects which had been illegally exported but which were not covered by specific legislation in the country from which they had been exported. Another representative proposed a redraft to the effect that "[w]hen a cultural object ... contrary to its legislation on the subject", and the delegation of the United States submitted a written proposal intended to assist the draftsmen of legislation in countries from which cultural objects might be illegally exported as well as importing countries in determining the grounds of the illegality of the export which would read as follows: "[w]hen a cultural object ... contrary to a legislative provision prohibiting the export of cultural property because of its cultural significance, that State ..." (cf. Study LXX - Doc. 22, Misc. 6)

95. One representative further suggested that it be specified in the text that the illegal character of the export should be established only by reference to the laws of a State in force at the time of the export, since a lengthy period could elapse between the time of the illegal export and that of the bringing of the claim. In this connection it was suggested that the French version of the text was probably preferable as the English version seemed to allow a State to promulgate a law with retroactive effect and that even if in such cases a State could raise an objection on the grounds of public policy ("ordre public") and refuse the claim, such a risk should be avoided.

96. A representative also believed that it should be expressly stated in Article 5 that it is for the possessor to return the object to the requesting State by providing "... to order the possessor to return the object to the requesting State", since that was only apparent, as the text was presently drafted, from Article 8. Other representatives however feared that this would create a risk of limiting the freedom of the State addressed in regard to its internal organisation in the sense that since this was an inter-State claim it would be for the competent authority which each State was free to designate to decide to whom an order should be addressed. A similar objection was raised to a suggestion by one

representative that it was necessary to specify the procedure of seisin of the State addressed.

97. Other representatives criticised the language "court or other competent authority" and submitted proposals for the amendment of the provision so as to avoid any interference with national procedural rules or practice. Some representatives in fact stated that an express reference to a "court" created problems for them as it could be interpreted as imposing on all States an obligation to grant jurisdiction to a court, which had not been the intention of the study group. They preferred to retain only the reference to the competent authority and to delete the words "court or other", thus leaving each State free to decide which authority would be competent, whether it be a judicial, administrative or arbitral organ. Another representative supported this proposal but deemed it necessary to qualify the words "competent authority" by an adjective which would imply that it had a certain decision-making power, which was a necessary element for a Convention dealing with private law relations.

98. Yet another representative, fearing that the competent authority might not be empowered directly to order the return of a cultural object under the legislation of certain States, proposed that the text be amended to read "to order, or to take action necessary to obtain an order for, the return of the object to the requesting State". That representative however believed that the present text of paragraph 1 would allow regard to be had to the different national laws granting jurisdiction to a court, or to an administrative or any other authority.

99. Some representatives were unable to accept a simple reference to the "competent authority" on the ground that by ordering the return of an object to its country of origin, a restriction would be placed on the exercise of the right of ownership as the owner could not always enjoy possession of the object where he wished, and in certain countries it was the courts which were appointed as the guardians of property rights so as to avoid persons being dispossessed by the State. The fact that the protection of such rights was entrusted to an organ which was independent of the State made it necessary to retain the reference to a court in this paragraph. It was moreover suggested that if certain words were to be deleted, then the reference both to the court and to the competent authority should be removed so as simply to say "... that State may request the other Contracting State to order the return ...", and only to specify in paragraph 3 who in that State would order the return.

100. Another approach, which was suggested by two representatives, would be to maintain the present text and expressly to leave it to a State addressed to determine the competent authorities and the procedure to be followed. To implement this idea, they proposed including an article in the general provisions of the future Convention which would provide that each

Contracting State may, at the time of the deposit of its instrument of ratification, communicate to the depositary a declaration designating the competent authorities and that the depositary would in its turn communicate the content of that declaration to all other Contracting States so that each of them would know the authority which they should address.

101. A number of serious misunderstandings emerged with regard to the conditions of admissibility of claims for return in the form of a preliminary enquiry based on certain information which the requesting State must provide under paragraph 2. For this reason a number of members of the study group considered it necessary to recall the purpose of the provision. The group had started out from the assumption that laws prohibiting and controlling the movement of cultural objects could, on account of their severity, always give rise to abuse. The development of the black market and illegal export was the consequence of the failure of countries of origin to exercise adequate control over their cultural objects and the study group had wondered whether it would be just to require certain countries to apply the legislation of another country where the system of control had more or less broken down. The idea that a requesting State should, without any other conditions, simply have to show that the export had been contrary to its legislation had seemed both unjust and unrealistic to the study group which had been of the belief that States addressed would not accept such a system which would moreover risk endangering the whole of Chapter III and indeed the entire Convention. Since moreover the purpose of the future Convention was the protection of cultural objects, and here in particular their protection after their return, and not the reinforcement of foreign rules of public law, it was in the interest of the requesting State to provide as much information as it could to permit the judge seized of the case to take a decision in full knowledge of the facts.

102. These explanations failed to convince the majority of representatives who preferred the total deletion of the provision or at least the last part of it. One representative in fact criticised the ambiguities in the wording, in particular as regards the consequences of a failure to make available the required information or of the provision of incomplete information, as the Convention did not in such cases permit the State addressed to reject a claim for return. Another representative moreover feared that the conditions, in respect of which there existed no universally recognised criteria, could create obstacles to the return of cultural objects, and he moreover expressed the opinion that they fell squarely within the sphere of the internal affairs of the requesting State. Yet another pointed out that such questions would in any event be considered but he could not accept the paragraph because a State would most frequently be acting on behalf of private persons on whom one could not impose conditions of accessibility.

103. Some representatives believed that while it was true that the State addressed would not be satisfied in the absence of any proof, that of the illegal export should be sufficient to establish grounds for ordering the return of an object and that acceptance of paragraph 2 would be equivalent to allowing the State addressed to cast doubt on the relevant legislation of the requesting State for no apparent reason. One representative suggested that the effect of the paragraph was to transform a ground of admissibility into a substantive condition by reason of the reference to paragraph 3 and that by deleting paragraph 2 it would be possible to resolve in a uniform manner the difficulties of formulating complex legal concepts.

104. One representative drew attention to the fact that the paragraph did not say what it was intended to say. It was quite reasonable to wish to lay down a moral obligation and indeed that was appropriate in a Convention seeking the protection of cultural objects which should not be limited to claims for recovery. As the text stood, however, the judge would have to determine whether the conditions established under paragraph 3 had been met, which was indeed evident and need not be repeated here, and whether the other information appeared on the file, which was not a genuine condition of admissibility. That representative further noted that the committee was faced with a choice either of turning a moral undertaking into a substantive condition and of placing it elsewhere in the text or of laying down a genuine moral obligation which was not without legal significance even though unaccompanied by any sanction, but then another form of wording should be employed which would render the paragraph acceptable such as: "The requesting State undertakes, if its claim is successful, to subject the object whose return it has obtained to minimum conditions of conservation and security and likewise undertakes to make it accessible to the public".

105. There was in sum a consensus within the committee of experts that paragraph 2 was not acceptable in its present form, but the committee preferred to proceed to consideration of paragraph 3 which contained the real substantive conditions, before taking a decision as to whether paragraph 2 should be deleted or rewritten.

106. As had been the case with paragraph 2, a large number of representatives called for the deletion of paragraph 3 which subjected the return of illegally exported cultural objects to conditions which took the form of a list of interests which the illegal export must have impaired. They invoked the same grounds of criticism as for the preceding paragraph, namely that the return should not be subjected to any condition other than proof of the contravention of a law and thus of the illegal character of the export. Some of them recognised that the list could favour the interst of the requesting State to protect a cultural object, but that it ought not to be a condition for return.

107. Other representatives on the other hand insisted on the need to maintain the paragraph which certainly represented a substantial change in existing law but which would make it possible to establish a degree of comparison between the different export legislations which, unlike theft, were very different and to achieve a balance among the different legitimate interests which were present. It was therefore necessary to affirm the principle of the respect of the legislation of the State of origin but the existence of that legislation and in particular its application to the cultural object had to be verified by the judge of the State addressed.

108. One member of the study group drew the attention of the committee of experts to the close connection which existed between this paragraph and Article 2 which defined cultural objects for the purpose of the Convention. Some members had stated that their countries would never accept the modification of their internal law so as to permit the return of an illegally exported object of which one of their citizens was the owner if such return were to be extended to all types of cultural objects. The group had therefore sought to restrict the category of cultural objects which might be subject to return. Once again the aim was not to reinforce the export control legislation of a certain group of States, but rather to strike a balance between the legitimate interests of different groups of States: on the one hand the interest of those whose cultural heritage was threatened by illegal commerce, the international market and clandestine excavations and on the other the interests of those who favoured the movement of cultural objects so as to permit the discovery of other cultures. In drawing up the list, the group had had regard to those interests which were considered worthy of protection. It was not a question of imposing conditions on the requesting State, but rather of specifying those categories of cultural objects which all States considered it to be necessary to protect irrespective of any other considerations.

109. While subscribing to those considerations, one representative stated that since one of the objectives of the draft, and in any event the most important innovation, was to give legal effect to the rules of other States, and since Article 4 (2) required of the possessor in good faith that he consult any accessible register, the paragraph should be completed by the following language: "The return of the cultural object shall also be ordered if the requesting State proves that it was registered as an object whose export was subject to permission" (cf. Study LXX - Doc. 22, Misc. 5).

110. Some representatives however believed that if the purpose of the paragraph was to provide a justification for a request for the application of the public law of one State by another, the five sub-paragraphs were insufficient and they proposed adding the words "in particular" after the words "significantly impairs". Other representatives were on the contrary of the opinion that this catalogue of interests should not be purely indicative but that it should, while certainly being open to interpretation

as is the case with any legal rule, limit the degree of judicial discretion. They were of the opinion that the judge's discretion should not be so broad as to result in certain circumstances in a distortion of the principles which underpinned the Convention and directly engaged the responsibility of the State where the cultural object was located. They furthermore recalled that sub-paragraph (e) had been drafted in the form of a general clause, and that if an object were not covered by any sub-paragraph, that would mean that it would not fall within the definition of cultural objects for the purpose of this article. Moreover, Article 11 permitted interests other than those mentioned in the paragraph to be taken into consideration.

111. One representative wondered in relation to Article 11 whether it did not in this connection reduce the significance of paragraph 3 by allowing regard to be had to other interests, thereby considerably broadening the category of objects whose return might be ordered and which it had been intended be extremely limited. One member of the study group replied that Article 11 had been drafted in such a way as to conserve existing systems which already provided for wider protection.

112. Another representative drew attention to the fact that the words "one or more of the following interests" could give rise to difficulty in that no single impairment might itself have been significant but that collectively they were, and he proposed a drafting improvement in that regard.

113. The question of ownership was raised on a number of occasions in connection with paragraphs 1 and 3 and certain representatives considered that the only evidence which need be adduced by the requesting State so as to obtain the return of a cultural object was the illegal character of the export and the fact that the State was the owner of the object. It was however replied that this chapter did not purport to deal with the question of ownership but rather to provide for the physical return of an object to the State of origin. Proof of ownership was not therefore relevant under Chapter III, for if a State were the owner of an object it could proceed under Chapter II where there was no limitation on the category of cultural objects. If however one were speaking in terms of illegal export, there was indeed a limitation but it had to be recalled that the owner was not necessarily a State and might indeed be an individual.

114. Paragraph 3 was moreover criticised on the ground that it would be difficult to apply in practice by the courts of the State addressed which, if they refused to return the object on the basis of the vague criteria set out in the paragraph, would commit an act which might be considered to be unfriendly by the requesting State. One representative therefore submitted a proposal to the effect that the claim for return should be brought by a court or other competent authority of the requesting State before a court

or other competent authority of the State addressed. That court should then simply take note of the claim for return and accept it without any further examination of the case and without requiring the requesting State to appear before the courts of the State addressed or to prove that the conditions required by the law of the requesting State had been met. It was moreover proposed to substitute the interests listed in the paragraph by objective criteria such as the age or value of the object, thereby removing an element of judicial discretion and permitting a reduction in the limitation periods provided for by Article 7(b).

115. Another representative likewise considered that the criteria set out in paragraph 3 were too vague and that they would oblige States to recognise all the export control laws of those countries which would become parties to the future Convention. The conditions for return listed in the provision should be made more stringent as the Convention would otherwise be unacceptable for a certain number of States. He expressed concern at the language used, above all in the context of the broad definition of cultural objects in Article 2, and believed it to be necessary to narrow it somewhat with a view in particular to providing assistance to judges. He therefore proposed amending sub-paragraphs (a) to (d) by adding at the end of sub-paragraph (a) the words "artistic or archaeological", clarifying the meaning of "a complex object" in sub-paragraph (b) and deleting the words "for example" in sub-paragraph (c), as well as adding the words "ritual or religious use" in sub-paragraph (d). An alternative solution which was proposed was to introduce language which would indicate which interests ought not to be taken into consideration by the judge.

116. Some representatives of the member States of the European Economic Community also raised the question of the possible incompatibility of the present text of paragraph 3 with Article 36 of the EEC Treaty and with Article XX of GATT. The member States of the Community were in effect not free to impose any restrictions which they might wish in connection with the import and export of cultural objects within the Community even though no specific EEC legislation existed. They were bound by the provisions of Articles 30 *et seq.* of the EEC Treaty in regard to matters of trade and in particular by those of Article 36 which permit certain restrictions to be imposed under the internal law of a member State for the protection of "national treasures possessing artistic, historic or archaeological value". Those measures had however to be absolutely necessary for the purpose of achieving the protection of cultural objects. The same was true of the member States of GATT which were bound by Article XX of the Treaty. The concern of those representatives was that under Article 5 a State could claim the return of an object which was not necessarily a national treasure and in cases where the export legislation which had been contravened went further than the protection reasonably accorded to national treasures. They feared therefore that the Convention might be seen as not being very attractive inasmuch as it reinforced systems which were more restrictive

than their own. One representative nevertheless suggested that a Community instrument would only be necessary if the laws of the member States differed substantially and if that were adversely to affect free exchange among the member States, but that could be avoided if the member States were to adopt adequate unified rules either among themselves or in the framework of an international Convention involving the participation of third States, since different solutions might give rise to discrimination. In conclusion he believed that the preliminary draft could represent such a solution on condition that it contained a restrictive definition of cultural objects and that it provided for a limitation to those measures absolutely necessary to avoid as far as possible impeding free trade.

117. Following discussions on Article 5, the delegations of China, Egypt, Belgium and Austria submitted a compromise proposal (cf. Study LXX - Doc. 22, Misc. 7) which retained paragraph 1, deleted paragraph 2 in accordance with what seemed to be the wish of the majority of the committee, and to some extent simplified the last paragraph in particular by no longer referring to the impairment as being "significant". This proposal was submitted to the committee as a whole but the discussion on it was postponed until the next session of the committee of experts given the limited time available. This provision was worded as follows:

> "(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) The court or other competent authority of the State called upon to adjudicate upon the request for the return of the [illegally exported] cultural object shall order such return if the export impairs the interests of the requesting State due to the outstanding cultural importance of the object for such requesting State, having regard also to 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."

Article 6

118. Notwithstanding the consensus within the committee of experts that it is frequent for a cultural object to have an important connection with the culture of more than one State, a possibility which is moreover

recognised by Article 4 of the 1970 Unesco Convention, a certain number of representatives proposed the deletion of this article for different reasons.

119. One of them considered that since the general objective of the draft Convention was to remedy the export of a cultural object from one country where it had apparently been in the hands of a legitimate owner, its return should not be refused on the ground that the court or competent authority in the country of the possessor considers the object to have a closer connection with another State. Another representative feared that this article would endanger the fundamental principle established by Article 5. He suggested that what was at issue was whether a cultural object illegally exported from a State only a short time before (the limitation periods laid down in Article 7 should be borne in mind) and which possessed one of the characteristics listed in Article 5 for the State from which it had been removed, should be returned to the country in which it had previously been located. It was his opinion that if the cultural object had a very strong connection with the culture of the State in which it was located after its illegal removal from another State, it was highly probable that the criteria set out in Article 5 would not be satisfied as the same cultural object could not at the same time have a special cultural importance for the State of origin and for the State in which it was located. For this reason he preferred a more watertight version of Article 5 without the possibility of exceptions being raised under Article 6. Another representative added that he could not accept that a decision against the claimant could be pronounced by an authority other than a court, although it was recalled that other representatives had expressed a different view on the matter (cf. paragraph 99) and that such a form of wording would constitute an interference with the internal organisation of the State addressed. Finally, other representatives feared that such a provision could give rise to political disputes between those countries with whose culture an object might have a certain connection, or even that this article might encourage illegal exports "sur commande".

120. A number of representatives however saw a certain value in the article, even though its drafting was too vague, as it had the effect of reducing the risk of too broad an application of the concept of public policy which would seriously detract from the importance of Article 5 by giving a judge in the State addressed an unlimited discretion to refuse a claim by another State. It had in effect to be borne in mind that the concern of the study group had been to avoid an unfettered recourse to public policy in those situations where a cultural object had a connection with the culture of more than one country. One representative also recalled that in cases of the recognition of, and giving effect to, foreign laws of mandatory application, it was necessary for the State of the forum to retain a certain measure of control by weighing the interests present, since those of the State addressed or of a third State might be such as to

call into question the decision of principle to return the cultural object to the requesting State.

121. The very fact that Article 6 permitted refusal to order the return of a cultural object on the ground that it had as close a, or a closer, connection with the culture of a third State gave rise to problems for certain representatives, in the sense that a State other than the requesting State could only bring an action for recovery if the object had been illegally exported from that third State. It was pointed out that this suggested that the State addressed might be authorised to retain an object in the absence of a reasonable or substantial connection with that State, so that a new provision should be added to the Convention to take account of such an eventuality. Another representative added that this would cause difficulties for the member States of the European Economic Community on account of the free movement in Europe and even outside it of cultural objects not covered by the exceptions laid down in Article 36 of the Treaty of Rome.

122. The Chairman noted the differing opinions within the committee and the necessity of finding a solution to the problem in view of the large number of cultural objects which could belong to the cultural heritage of more than one country. He suggested that the difficulty with Article 6, at least as it appeared from the statements of a number of representatives, was that it attempted to deal at the same time with two very different situations, namely that involving the requesting State and the State addressed which was easy to resolve, and that where there was an intervention by a third State which was powerless either because it was not a party to the Convention, or because it could not rely on Article 5 as the object had, for example, not been illegally exported from its territory. He therefore suggested to the members of the committee that Article 6 be simplified by deleting the reference to the third State ("or of a State other than the requesting State"),which would make clear the purpose of the article which was to limit the possibility for the State addressed to invoke its own doctrine of public policy. All other situations would then fall outside the scope of the Convention and could be settled through diplomatic channels.

123. Some representatives supported this idea of restricting the scope of Article 6 to bilateral relations between the requesting State and the State addressed. One of them however, recalling the general philosophy underlying Chapter III, namely the imposition of a sanction on illegal exports, believed that a more satisfactory compromise solution would be to limit the possibility of refusal to those situations where the object "manifestly" had as close a, or a closer, connection with the culture of the State addressed. He believed that this clarification was necessary on account of the notion of culture which was very broad, and by way of illustration he referred to the Greek and Roman cultures which had covered vast areas of territory and of which many countries were the heirs. Another

representative likewise suggested that guidance should be given to the judge to assist him in choosing between the two links, for while it was true that the notion of "as close a, or a closer, connection" was one known to private international law, it was necessary in this field to indicate the principal factors which the judge should take into account with a view to the future application of the Convention.

124. One representative however stated that he could not accept the deletion of the reference to the third State as this would impoverish the text and relegate the position of those States to the simple role of guardians of their national frontiers. He argued in support of a broader vision and of granting wider discretion to the judge, but so as to meet the concerns of other representatives, and to make the connection with the third State more concrete, he proposed stating expressly that a third State may bring an action by adding at the end of Article 6 the words "in which case that other State may present a claim for the return of the cultural object to it" (cf.Study LXX - Doc. 22, Misc. 10).

125. The committee took no decision on these various proposals but it emerged from the discussions that a solution might lie in drawing a distinction between the two situations by including one article restricted to relations between the requesting State and the State addressed and another concerning third States, since it was almost impossible to find a satisfactory general formulation which would cover those different cases.

Article 7

126. A certain number of representatives were unable to support a proposal to add the word "legally" before "exported" in sub-paragraph (a) so as to indicate more clearly that legally exported cultural objects were not covered by the provision. They saw no need for the introduction of the word "legally" for if the export had been legal there would be no ground for the return of the object to the country of origin. Furthermore, the idea underlying this sub-paragraph was to restrict the application of the notion of cultural property by excluding the work of living artists or those who had died within the last fifty years. Some representatives moreover recalled that it was necessary to give encouragement to artists while they were still alive and the interest of this sub-paragraph was to reaffirm their freedom to sell their works abroad whatever might be the law of the State where those works had been created; if some States prohibited living artists from selling their work abroad, they could not count on other States to order the return of such illegally exported objects. The committee believed that the language of the provision was perhaps misleading and that an attempt should be made to find another formulation which would avoid misunderstanding.

127. It was to this end that another proposal was submitted to complete sub-paragraph (a) by the following words "by, or with the consent of, the creator or his/her successor in title" (cf. Study LXX - Doc. 22, Misc. 13).

128. Some representatives however believed that a country should be entitled to protect the work of its living artists, especially if only a few of their works remained in the State where they had been created, and they therefore proposed recognising, at least in certain circumstances, export prohibitions placed upon cultural objects during the lifetime of the person who had created them. It was however replied that a comparative analysis of legislation governing the protection of cultural objects showed that almost all of them excluded the work of living artists from their scope of application, and that sub-paragraph (a) did not prevent States from imposing such restrictions in their national legislations but simply excluded such works from the scope of application of the future Convention. Moreover, a State which sought to retain on its territory such works could buy them on the open market and it would not be fair to reduce the value of those works and to prejudice the rights of artists by paralysing the international circulation of the artistic heritage.

129. While there was general agreement that prohibitions on the export of cultural objects exported during the lifetime of the creator or during a certain period after his death would not be effective, no consensus emerged as to the length of such a period. Some representatives believed that the period of fifty years reflected in the text was unacceptable because it was too long. The parallel which had been drawn with copyright Conventions was not in their opinion convincing because the situations dealt with here were concerned only with the need to authorise the removal of a cultural object from the territory of a State and there were many objects to which the provisions governing copyright did not apply, for example ethnographic works. A number of representatives therefore supported a proposal to reduce the period to one of twenty years which is to be found in a large number of laws relating to the artistic heritage.

130. Other representatives however argued in favour of maintaining the period of fifty years, believing that a shorter period would give rise to conflicts between existing copyright Conventions (the 1886 Berne Convention and successive revisions) and the preliminary draft. One representative further suggested that if the reason for choosing the period of fifty years in the Berne Convention had been to allow the heirs of a deceased artist to profit from the sale of his work, the same should be the case for cultural objects.

131. The committee of experts then considered sub-paragraph (b) of Article 7 which also excluded from the application of the future Convention objects in respect of which a claim for their return had not been instituted within the prescribed periods. Some representatives recalled the

observations they had already made concerning the words "or ought reasonably to have known" in Article 3 (2), which were just as applicable here.

132. Another representative once again raised the question of the periods to be applied when a cultural object had been both stolen and illegally exported. An initial reply having already been given earlier, the Chairman recalled that the committee had decided to deal for the time being in Chapter III only with cases of illegal export as the possibility had been left open of establishing a special rule for such mixed situations.

133. Recalling the importance of the starting point of the shorter period which represented a considerable concession for many countries, but which was necessary especially for objects from clandestine excavations, a number of representatives argued in favour of the five year period. Some of them moreover once again insisted on there being a parallelism with the periods established in Article 3 (2) and, as they had called for the deletion of the absolute period in that provision, they wished to see the same solution in sub-paragraph (b), although the Chairman once again warned against the absence of any limitation period.

134. Sub-paragraph (c) was not the subject of lengthy discussion as the committee as a whole agreed that since the purpose of Chapter III was to combat illegal export, it would be difficult to imagine a claim for return being bought at a time when the export was no longer illegal.

Article 8

135. The expression "fair and reasonable compensation", to be found in paragraph 1 of Article 8 did not give rise to any particular comments as it had already been discussed during the consideration of Article 4 (1), although some representatives believed that there should be a different criterion for compensation in the case of illegal export than in that of theft. Here again the language employed would allow the judge to take into consideration not only the differences between certain prices (the purchase price, the purchase price plus interest, the commercial value of the object in the State where it was located or in the State of origin, etc.), but also the circumstances of the case such as for example the conduct of the possessor and the possibility for the requesting State to pay the compensation.

136. One representative then raised the question of the burden of proof which, according to the study group, would already have been discharged under the preceding articles. In her opinion the question at issue here was not that of proving the illegal export, which would in fact already have been done, but rather the good faith of the possessor. She suggested that,

in distinction to the case of theft, the burden of proving the possessor's bad faith should lie on the requesting State, and she proposed amending paragraph 1 to read as follows: "..., unless the requesting State proves that the possessor knew or ought to have known that the cultural object had been illegally exported". One member of the study group however recalled that it had been the view of the group that in cases both of theft and of illegal export the burden of proof should lie on the possessor (he must prove his diligence), for the reason that this would make purchasers much more cautious as to the provenance of objects acquired by them. The committee of experts believed that the present wording did not properly reflect that idea and that an alternative drafting should be found.

137. As to the rule that a possessor who, through his own fault, did not know that a law had been contravened, would not be compensated under the terms of paragraph 1, one representative considered that it would be unjust to take into consideration all degrees of fault, for there were very many national laws governing export, and an individual could not be expected to be aware of all of them. He therefore suggested that regard should be had only to the gross negligence of the possessor, believing that such a restriction in Article 8 was necessary as one could not require of an ordinary possessor the same degree of diligence in respect of theft and of illegal export. A solution was therefore suggested according to which a distinction, which is already to be found in some legal systems, should be drawn between professionals who could be required to enquire into the export, and the amateur collector upon whom it would be difficult to impose such an obligation. Another solution suggested was that of reformulating paragraph 1 along the lines of Article 4 (2) by specifying the criteria which would determine whether the possessor had exercised the necessary diligence.

138. One representative was concerned as to whether the possessor should have to prove his good faith or that of preceding acquirers of an object that had been through a number of changes of ownership. It was replied that it was sufficient for this provision that the possessor had doubts as to whether the object had been illegally exported, without his having to concern himself with each change of ownership. The question then was what he knew or ought to have suspected.

139. A number of representatives believed that paragraphs 1 and 2 should be amalgamated so as more clearly to bring out their intention, and that a certain sequence should be laid down in accordance with which it would be indicated that return did not necessarily imply dispossession. One of those representatives understood Article 8 as settling the problem of the return of an illegally exported cultural object to the country of origin without any need to speak of dispossession. The possessor in good faith ought always, as a consequence of his being unaware of the illegality of the export, to be able to choose between retaining possession of the

object in the country of origin either himself or through another person, or requesting the State of origin to compensate him for the value of the object.

140. Always in connection with ownership and possession, one representative suggested the deletion in the English version of paragraph 2 of the term "possession" and the retention only of the words "to retain ownership" since the idea was that the possessor could choose to remain the owner of the object and there was a risk of creating a rather difficult legal situation in cases where a non-resident would be obliged to return an object while at the same time retaining ownership and possession. The French version of the text would remain unchanged.

141. A certain number of representatives proposed deleting the words "and who provides the necessary guarantees ... other measures to the same effect" on the one hand because it was not clear what those guarantees were and on the other because the last sentence of the paragraph placed limits upon the sovereignty of the State in regard to ownership. One representative added that his country could not accept that wording since its law made provision for the immediate confiscation of illegally exported objects considered to belong to its cultural heritage as defined by national law.

142. Noting that the present text accorded to the possessor a choice between remaining owner of the object and transferring it to another person on its return, some representatives proposed that this option should, at least in part, be exercised by the requesting State which had done all it could to obtain the return of the illegally exported object. It was likewise pointed out that such a solution would avoid the danger to which reference had in particular been made in the explanatory report on the preliminary draft (cf. Study LXX - Doc. 19, paragraph 74) of the possessor's returning the object to the person who had illegally exported it.

143. Fearing that this provision, which authorised the possessor to transfer the cultural object to another person residing in the requesting State, might lead to conflict with the mandatory rules of law of that State and that in such cases there would be no official authorisation by the requesting State and no guarantee that the object would not be confiscated, another representative proposed adding the language ", after obtaining the permission of the requesting State or the dispossessed owner," after the word "possessor" in the first line of the paragraph.

144. Ultimately the committee came to the conclusion either that the paragraph should be deleted or that it should be redrafted as it was clear from the discussions that it would be ineffective in the absence of agreement between the two parties.

145. One representative found **paragraph 3**, at least as presently drafted, to be unacceptable and proposed either that it be deleted, leaving it to the judge to determine who should pay the costs, or that it be specified that the cost of returning the object should be borne by the requesting State, unless the possessor knew or ought to have known of the illegal export of the object at the time of its acquisition, as was stipulated in paragraph 1 of the article.

146. **Paragraph 4** was not the subject of any lengthy discussion by the committee which limited itself to recalling the observations that had been made in the course of the consideration of Article 4 (3).

Article 9

147. One representative insisted on the optional character of the grounds of jurisdiction established in this article as well as on the fact that they should not be exhaustive but rather additional to those provided for by national law or by international Conventions such as the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters or the 1988 Lugano Convention which bears the same title. This had moreover been the intention of the study group (cf. explanatory report, Study LXX - Doc. 19, paragraph 78).

148. The Secretary-General of the Hague Conference on Private International Law recalled the importance of Article 9, **paragraph 1** of which directly established grounds of jurisdiction, and in particular that of the court of the State where the object was located, which was at present almost unknown in relation to claims for the recovery of movable property under the normal rules of law in Europe, and which was totally ignored in the existing codifications of rules governing jurisdiction. Although it presented the additional advantage of eliminating problems concerning enforcement, he drew attention to the difficulties which could arise in connection with judgments given by courts of the State where the possessor had his habitual residence in cases where the object was located in another Contracting State. He suggested that one way of solving the problem would be by adding to the text the words "such a judgment shall be enforced in the Contracting State where the object is located in accordance with the normal rules governing recognition and enforcement", as had been done in certain other Conventions. However the procedure of *exequatur* was not known in all legal systems and was of uncertain application.

149. He further emphasised that there were two specific obstacles to the enforcement of foreign judgments deriving from the rules of the future Convention itself, namely Article 6 which could provide a basis for a refusal of enforcement (if the State where the possessor had his habitual

residence had ordered the return, the court in the State where the object was located might consider that it had a closer connection with its own culture), and Article 11 under which the State where the possessor was resident might have extended the protection accorded to the victim (longer limitation periods, broader concept of theft etc.) whereas this had not been done by the State where the object was located which would refuse to enforce the judgment. He suggested that one solution to these difficulties might lie in adding the words "and there shall be no ground for refusal". In conclusion he recalled that in international matters, if an action were not instituted at the place where the object was located, it would be necessary to allow for the taking of provisional, including protective, measures when the judgment on the merits of the case was to be enforced in another country.

150. After thanking the Secretary-General of the Hague Conference for having drawn attention to the problems which might be caused by Article 9 and by the possibility of two fora, the Chairman recognised that the drafting was defective and that Article 11 could give rise to serious difficulties unless the text were to provide that "there shall be no ground on which enforcement may be refused in the State where the object is located of a judgment given in respect of cultural property in the State where the possessor has his habitual residence". The question however arose of whether the committee would be prepared to go that far and thereby to risk certain States not accepting the Convention and the Chairman wondered whether it might not be preferable to sacrifice the jurisdiction of the State of the possessor's residence, which would be in conformity with the general philosophy of the draft and would have the advantage of avoiding the need to include a provision concerning provisional and protective measures.

151. The committee having on a number of occasions contemplated the possibility of a special provision being introduced to deal with those cases where a cultural object had been both stolen and illegally exported, one representative suggested that this could be done in Article 9 by adding at the end of paragraph 1 a new sentence which would read as follows: "The said action may be brought under either Chapter II or Chapter III of this Convention if the cultural object is both stolen and illegally exported" (cf. Study LXX - Doc. 22, Misc. 14).

152. The United States delegation stated its concern at the fact that the various articles of the preliminary draft Convention relating to claims for restitution or return did not specify that the claims must be international. To cover this lacuna, it suggested specifying the claims which might be brought under the future Convention (cf. Study LXX - 22, Misc. 8). This concern was similar to that which had been expressed in regard to Article 1, namely the desirability of restricting the scope of application of the proposed Convention to international situations only.

Article 10

153. Some representatives criticised the provisions of Article 10 on the ground that, by disapplying the Convention in respect of cultural objects that had been stolen or removed from the territory of a Contracting State contrary to its export legislation prior to the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim was brought for the restitution or return of such objects, they effectively declared an amnesty in respect of such illegal acts and set a seal of legitimacy upon them.

154. Other representatives considered such a reading of Article 10 to be based on a misunderstanding of its purpose and effect which ought, it seemed, to be more clearly expressed in the explanatory report on the future Convention so as to avoid any ambiguity. In the first instance, it was suggested that Article 10 did no more than endorse the well recognised principle laid down in Article 28 of the Vienna Convention on the Law of Treaties that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party", and to that extent Article 10 might be regarded as unnecessary. From a political standpoint, however, the rule enunciated by Article 10 was almost certainly essential for many States if they were to contemplate accepting the future instrument which, it should not be forgotten, would entail a number of significant changes to their law and practice.

155. More particularly, it had in no way been the intention of the study group that the Convention should, on the basis of an *a contrario* interpretation, legalise what would otherwise be deemed to be illegal acts. Some States already recognised claims by States from whose territory cultural objects had been illegally exported and laws and practices to that effect were preserved by Article 11(c) of the draft Convention which left each Contracting State free in respect of claims brought before its courts or competent authorities 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". Similarly, the future Convention would in no way interfere with existing or alternative procedures for the recovery of stolen or illegally exported cultural objects, for example through diplomatic channels, whether or not based on bilateral agreements, nor would it prejudice claims which were already the subject of negotiations.

156. Some representatives would have preferred to see a broader temporal scope of application of the Convention and made certain proposals to that effect. These essentially involved the drawing of a distinction between stolen and illegally exported objects. One such suggestion was that

while the principle of non-retroactivity should apply to illegally exported objects, theft was an act punishable in all legal systems with the consequence that the Convention should apply to all stolen objects whenever the theft took place. A less radical proposal was that the Convention should apply to claims for the restitution of stolen cultural objects even though they had been stolen prior to the entry into force of the Convention for the State before whose courts or competent authorities the claim was brought, on condition that the theft occurred within a period of, say, forty or fifty years before the Convention's entry into force.

158. While recognising that courts in some States had shown themselves favourably disposed to entertaining claims for the restitution of cultural objects stolen many years before the bringing of such claims and independently of the existence of any obligation to return than under an international Convention, some representatives were reluctant to accept the possibility, apart from Article 11(c), of exceptions under the future Convention to the principle of non-retroactivity in respect of stolen cultural objects as they would make still further inroads on the provisions of national law governing the position of good faith purchasers and the limitation of actions.

Article 11

158. One representative believed that the very nature of the uniform rules established by the future Convention was in contradiction with the technique followed by the study group in the wording of Article 11, which corresponded to a formula to be found in other international Conventions which were not properly speaking uniform law Conventions, by providing that "[t]he present Convention shall not prevent the application of a more favourable regime". Furthermore, in relation to the question of whether the possibility offered by Article 11 would deprive the Convention of its character of a uniform law, he feared that the contradiction to which he had referred might introduce a diversity of regimes which would prejudice the aim of establishing a uniform law and render more difficult acceptance of the Convention by certain States to the extent that it would perpetuate differences between national legislations in regard to matters governed by the Convention.

159. The Secretary-General recalled that while the classic reservation clauses to be found in uniform law Conventions as a rule reduced the obligations of States under the Convention, there were however precedents for provisions similar to Article 11 which permitted those Contracting States which so wished to accord greater protection to victims of damage, in conformity with the provisions of their own national law, than that provided by the Convention. The preliminary draft under consideration was a uniform law which laid down minimum rules concerning the restitution and

return of cultural objects and the fact that it made provision under Article 11 for a State to go beyond that minimum in relation to certain aspects of the draft did not in his opinion deprive the Convention of its character of a uniform law Convention.

160. Another representative however pointed out that the establishment of minimum rules and the approach followed in Article 11 could lead to a lack of uniformity which would have a negative effect on the application of the future Convention. This lack of uniformity would moreover risk creating distortions in the art market which would permit cultural objects of doubtful provenance to be acquired and circulated more easily.

161. The committee of experts believed that it would be necessary to reflect on these questions and to seek to reduce to a minimum the disadvantages caused by the lack of uniformity while preserving the advantages of Article 11 whose purpose was to facilitate the restitution and return of cultural objects.

162. In reply to a question by one representative as to which was the State which could extend the protection offered by the future Convention, it was recalled that the intention was that it was the State addressed which could be more liberal, that is to say more favourable to a dispossessed person or to a State whose laws had been contravened. This emerged from the fact that under both Chapter II and Chapter III the only State which assumed obligations was the State addressed; no State could extend the obligations of another State, which meant that if the requesting State's legislation offered greater protection, that State could not invoke such legislation against the State addressed (cf. paragraphs 89 and 90 of the explanatory report, Study LXX - Doc. 19).

163. Another representative would for his part have preferred to substitute a general formulation for the present exhaustive list of situations in which a Contracting State could apply its own national law when this was more favourable to the claimant than were the provisions of the Convention. He proposed amending sub-paragraphs (a) and (b) in he following way: "This Convention shall in no way be interpreted to prevent the application of any relevant rule of the substantive and private or criminal international law of the State in which the claimant started proceedings, as well as of other applicable international treaties binding the Parties concerned, in so far as those laws and treaties guarantee more extensive protection than specifically provided for in this Convention for beneficiaries of rights in cultural objects, in general, and for the creators of such objects and their successors in title in Article 7 (a), in particular". Given the lack of time, the committee of experts was unable to consider this proposal during the meeting.

Article 12
(new)

164. On a number of occasions during the discussions, some representatives voiced their concern in regard to cultural objects from clandestine excavations and suggested the possibility of drafting a specific provision to deal with the problem. It was with this in mind that the Mexican delegation proposed a new Article 12 which would consider such objects as being stolen and in consequence subject them to automatic restitution under Chapter II of the preliminary draft Convention. The text of the new article read as follows: "For the purpose of this Convention cultural objects obtained by illegal excavations are considered as stolen and are subject to Chapter II" (cf. Study LXX - Doc. 22, Misc. 11).

165. This proposal will be considered by the committee of governmental experts at its second session.

Article X
(new)

166. With a view to the protection and conservation of cultural objects, the delegations of Egypt, Mexico, Greece, Cyprus, India and Guatemala submitted the following joint proposal: "The possessor of a cultural object is under an obligation to conserve and maintain it in its original condition" (cf. Study LXX - Doc. 22, Misc. 9 rev.). This proposal will also be considered by the committee at its next session.

Item 4 - Other business

167. At the invitation of the Chairman, the Secretary-General outlined a tentative schedule for the future work of the committee, in which connection he recalled a suggestion made earlier during the session that a small group reflecting different tendencies within the committee and representing the various regional groupings be convened prior to the next session with a view to accelerating progress on the draft. He wondered however whether the convening of such a group at this stage might not be premature and whether it would not be preferable to envisage such a meeting between the second and third sessions of the committee when a clearer picture should have emerged of possible consensus solutions in the light of more precise proposals which would, he hoped, be submitted by Governments in writing in advance of the second session of the committee. If this procedure were followed then it might be desirable to contemplate the second session's lasting for a week and a half which would also permit a drafting committee to begin its work.

168. While it was true that the members of the committee would, before the end of the present session, receive a paper (Misc. 4) setting out the proposals for amendment made and the principal issues raised, that document was of an interlocutory character and was not intended to substitute the detailed report on the session which the Secretariat would hope to circulate to the participants during the month of July. If Governments were to submit their written proposals by the end of October those could already be sent out by the Secretariat together with the invitations to attend the second session of the committee which would be held in the first quarter of 1992. The progress made at that session, as well as budgetary considerations, would then indicate whether the third, and probably last, session of the committee would be held late in 1992 or early in 1993. If such a timetable were to prove realistic then it might not be unduly optimistic to be thinking in terms of a diplomatic Conference for the adoption of the future Convention being convened by one of the member States of the Institute towards the end of 1993 or during the first half of 1994 at the latest. It was certainly too early to speculate on the exact time or the venue of a diplomatic Conference but he believed that it would be useful to have some general notion of the likely time-scale within which the committee was operating.

169. The Chairman expressed his thanks to the Secretariat for the paper it had produced briefly setting out the amendments proposed and issues discussed at the first session of the committee. Inevitably such a document focussed on criticisms of the draft but the full report to which the Secretary-General had referred would no doubt indicate that on some issues a consensus was already developing on which the committee would be able to build in the future and he was particularly encouraged by the fact that the general structure of the preliminary draft Convention had remained more or less intact after the first reading and that, to his recollection, no proposals had been made to delete one or another chapter of the draft.

170. He agreed with what he saw as being implicit in the Secretary-General's suggestions regarding the future work of the committee, namely that the momentum already gained should not be lost and while the composition of delegations was obviously a matter within the exclusive control of Governments he was nevertheless of the firm belief that continuity in the membership of delegations was an important factor contributing to the effective conduct of international negotiations of the kind in which the committee was engaged.

171. After noting that the committee was in agreement that its second session be held during the first quarter of 1992, at a time to be announced as soon as possible by the Secretariat, and that no other business remained to be discussed, the Chairman expressed his appreciation to all the participants for having so signally contributed to the undoubted success of the session which he declared closed at 11.00 a.m. on 10 May 1991.

ANNEXE I
APPENDIX I

LISTE DES PARTICIPANTS
LIST OF PARTICIPANTS

ETATS MEMBRES D'UNIDROIT - *UNIDROIT MEMBER STATES*

AFRIQUE DU SUD - *SOUTH AFRICA*

M. George HOFMEYR, Director, National Monuments Council, P.O. Box 4637, Cape Town

ALLEMAGNE - *GERMANY*

Dr. Jürgen SCHMIDT-RAENSCH, Regierungsdirektor, Mitarbeiter im Sachenrechtsreferat des Bundesministeriums der Justiz, Heinemannstr. 6, 5300 Bonn 2

M. Werner von TRUETZSCHLER, Bayerisches Staatsministerium für Unterricht, Kultur, Wissenschaft und Kunst, Salvatorplatz 2, 8000 München 2

ARGENTINE - *ARGENTINA*

M. Héctor MASNATTA, Ministre affaires scientifiques, technologiques et culturelles, Ambassade d'Argentine en Italie, Piazza dell'Esquilino 2, 00185 Rome

AUTRICHE - *AUSTRIA*

Dr. Sylvia STROLZ, Juge, Ministère de la Justice, Museumstrasse 1, 1010 Vienne

Dr. Gerte REICHELT, Professeur, Institut de droit européen, Université de Vienne, 1090 Vienne

Dr. Alexandra STROBEL, Service juridique du Ministère de l'Education et de l'Art, Freyung 1, 1010 Vienne

BELGIQUE - *BELGIUM*

Mme Catherine DEBOYSER, Conseiller juridique adjoint, Ministère de la Justice, Place Poelaert 3, 1000 Bruxelles

Mme Marthe BLANPAIN, Chargée de mission, Ministère de la Culture et des Affaires sociales de la Communauté française de Belgique, Bld. Léopold II, 44, 1180 Bruxelles

M. Hans FEYS, Secrétaire d'administration, Ministère de la Culture de la Communauté flamande, rue des Colonies, Bruxelles

M. Philippe CANTRAINE, Attaché de la Communauté française de Belgique, Via di San Valentino 48, 00197 Rome
Mme Irène DE HERTOGH, Premier Secrétaire, Ambassade de Belgique en Italie, Via Monti Parioli 49, 00197 Rome

CANADA

M. Robert DESJARDINS, Conseiller juridique, Ministère de la Justice, West Memorial Building, Piece 5150, Ottawa
Mme Marion HAUNTON, Conseiller juridique, Ministère de la Justice, 300 Slater St., Ottawa

CHINE - *CHINA*

M. Yuqing ZHANG, Division Chief, Department of Treaties and Law, Ministry of Foreign Trade, 2 Dong Chang An Jie, Beijing
M. Xiaodong LI, Professor Archaeologist, Director of Research Division, State Bureau of Cultural Relics, 29 Wusi Street, 100009 Beijing
Mme Weiwei SHENG, Second Secretary, Foreign Affairs Division, State Bureau of Cultural Relics, 29 Wusi Street, 100009 Beijing

COLOMBIE - *COLOMBIA*

M. Manuel URUETA, Ministre Conseiller, Ambassade de Colombie en Italie, Via Pisanelli 4, Rome

DANEMARK - *DENMARK*

M. Michael B. ELMER, Deputy Permanent Under-Secretary of State, Ministry of Justice, Slotsholmsgade 10, 1216 Copenhagen

EGYPTE - *EGYPT*

M. Mamdouh SHAWKY, Conseiller, Service juridique et des traités internationaux, Ministère des Affaires étrangères, Le Caire
M. Mahmouh SAMI, Troisième Secrétaire, Ambassade d'Egypte en Italie, Via Salaria 267, 00199 Rome

ESPAGNE - *SPAIN*

M. José Maria FERRE, Chef adjoint du Service juridique international, A.J.I. Ministère des Affaires étrangères, Plaza de la Provincia 1, 28071 Madrid

ETATS-UNIS D'AMERIQUE - *UNITED STATES OF AMERICA*

M. Harold S. BURMAN, Executive Director, Secretary of State's Advisory Committee on Private International Law, Office of the Legal Adviser, Suite 402, 2100 K Street, N.W., Washington D.C.

M. Ely MAURER, Assistant Legal Adviser, Department of State, Washington D.C. 20520

Mme Linda F. PINKERTON, Secretary and Trust Counsel, The J. Paul Getty Trust, 1875 Century Park East n. 2300, Los Angeles

FINLANDE - *FINLAND*

M. Mikko KÖNKKÖLÄ, Legislative Counsellor, Ministry of Justice, Eteläesplanadi 10, 00100 Helsinki

FRANCE

Mme Catherine BOIVINEAU, Chef de la division des conventions judiciaires et de la nationalité, Ministère des Affaires étrangères, 21bis rue la Pérouse, 75775 Paris Cedex 16

M. Jean-Paul BERAUDO, Magistrat, Chef du Bureau du Droit européen et international, Direction des Affaires civiles et du Sceau, Ministère de la Justice, 57 rue St. Roch, 75001 Paris

M. LABREGERE, Magistrat, Bureau du Droit pénal, international et européen, Ministère de la Justice, 13 Place Vendôme, 75001 Paris

M. LECAT, Inspecteur général de l'administration, Conseiller juridique de la Mission pour les Affaires européennes, Ministère de la Culture, 4 rue d'Aboukir, 75002 Paris

M. Marc GIACOMINI, Premier Secrétaire, Ambassade de France en Italie, Piazza Farnese 67, 00186 Rome

Mme Sylvie FORBIN, Conseiller culturel adjoint, Ambassade de France en Italie, Piazza Farnese 67, 00186 Rome

GRECE - *GREECE*

Mme Phani DASKALOPOULOU-LIVADA, Assistant Legal Adviser, Legal Department, Ministry of Foreign Affairs, 3 Zalokosta St., Athens

HONGRIE - *HUNGARY*

Dr. Gyorgy BOYTHA, Associate Professor of Law, Director General of the Hungarian Bureau for Authors' Rights, Vorosmarty Tér 1, 1051 Budapest

Dr. Miklos MOJZER, Director of the Museum of Fine Arts, Dòzsa Gy. ùt 41, 1146 Budapest

INDE - *INDIA*

M. Yashvardhan Kumar SINHA, Premier Secrétaire, Ambassade d'Inde en Italie, Via XX Settembre 5, 00187 Rome

REPUBLIQUE ISLAMIQUE D'IRAN - *ISLAMIC REPUBLIC OF IRAN*

M. Sabri ANOUSHEH, Attaché culturel, Ambassade d'Iran en Italie, Via della Camilluccia 651, 00135 Rome

IRLANDE - *IRELAND*

M. John F. BUCKLEY, Commissioner, Law Reform Commission, 111 St. Stephens Green, Dublin 2

ITALIE - *ITALY*

M. Umberto LEANZA, Professeur de Droit International, II Université de Rome, Expert juridique du Ministère des Affaires étrangères, Rome
Mme Margherita SABATINI, Chargée du secteur Unesco, Ufficio II, Direction générale des Relations culturelles, Ministère des Affaires étrangères, Piazzale Farnesina, 00194 Rome

MEXIQUE - *MEXICO*

M. Jorge Antonio SANCHEZ CORDERO DAVILA, Notario, Arquimedes 36 Polanco, Mexico City
Mme Patricia GRANADOS GARCIA, Coordinador Técnico del Ministerio de Relaciones Exteriores, Hanero 213 Polanco, Mexico D.F.

NIGERIA

M. Edward EGBARA, Minister Counsellor, Embassy of Nigeria in Italy, Via Orazio 14/18, 00193 Rome
M. Olatunji Olabisi ABIODUN, Senior Counsellor, Consular and Education, Embassy of Nigeria in Italy, Via Orazio 14/18, 00193 Rome

NORVEGE - *NORWAY*

M. Morten HOLMBOE, Senior Executive Officer, Ministry of Justice, Department of Legislation, Postboks 8005 Dep, 0030 Oslo 1

PAKISTAN

M. Rab Nawaz KHAN, Chargé d'affaires, Ambassade du Pakistan en Italie, Via della Camilluccia 682, 00135 Rome
M. Shah M. JAMAL, Troisième Secrétaire, Ambassade du Pakistan en Italie, Via della Camilluccia 682, 00135 Rome

PAYS-BAS - *NETHERLANDS*

Mme Marisa HUEBER, Counsellor of legislation, Ministry of Justice, P.O. Box 20301, 2500 EH THE HAGUE

Mme Sabine M. GIMBRERE, Deputy Head of the Bureau for Multilateral Cultural Cooperation, Ministry of Cultural Affairs, P.O. Box 5406, 2280 HK Ryswyk

POLOGNE - *POLAND*

M. Wojciech KOWALSKI, Associate Professor at the Department of International Public Law, Faculty of Law, University of Silesia, ul. Bankowa 8, Katowice

M. Alberto SOLDANI, Lawyer, Specialist for Legislation, Ministry of Culture and Art, Krakowskie Przedmiesci e 15/17, Varsovie

PORTUGAL

M. António MARQUES DOS SANTOS, Assistant à la Faculté de droit à l'Université de Lisbonne, Cidade Universitária, 1600 Lisboa

ROUMANIE - *ROMANIA*

M. Gheorghe MILOSAN, Deuxième Secrétaire, Ambassade de Roumanie en Italie, Via Tartaglia 36, 00197 Rome

ROYAUME-UNI - *UNITED KINGDOM*

Mme Carolyn MORRISON, Head of the Heritage Unit, Office of Arts and Libraries, Horse Guards Road, London SW1P 3AL

M. Martin HEMMING, Legal Adviser, Treasury Solicitor's Department, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS

SAINT-MARIN - *SAN MARINO*

S.E. Savina ZAFFERANI, Ambassadeur, Ambassade de Saint-Marin en Italie, Via Eleonora Duse 35, 00197 Rome

Prof. Avv. Corrado PECORELLA, Professeur à l'Université de Turin, Magistrat d'appel, Corso Sempione 49, 20145 Milan

SAINT-SIEGE - *HOLY SEE*

Prof. Pio CIPROTTI, Président du Tribunal de l'Etat de la Cité du Vatican, 00120 Cité du Vatican

Prof. Tommaso MAURO, avocat consistorial, Bureau juridique du Gouvernement, 00120 Cité du Vatican

SENEGAL

M. Ahmed Amine DABO, Directeur Général du Bureau sénégalais du Droit d'Auteur, 44 Rue J. Ferry, Dakar

M. Sidaty AIDARA, Conseiller, Ambassade du Sénégal, Via Lisbona 3, 00198 Rome

SUEDE - *SWEDEN*

M. Magnus ERIKSSON, Senior Legal Adviser, Ministry of Education and Cultural Affairs, Mynttorget 1, 103 33 Stockholm
Mme Kerstin FREDRIKSSON, Legal Adviser, Ministry of Education and Cultural Affairs, Mynttorget 1, 103 33 Stockholm

SUISSE - *SWITZERLAND*

M. Pierre LALIVE D'EPINAY, Professeur de droit, Université de Genève, rue Sénebier 20, 1211 Genève, Président du Comité/*Chairman of the Committee*
M. Ridha FRAOUA, Adjoint scientifique, Office fédéral de la justice, Palais fédéral Ouest, 3003 Berne

TCHECOSLOVAQUIE - *CZECHOSLOVAKIA*

M. Peter PAULEN, Conseiller, Ambassade de Tchécoslovaquie en Italie, Via dei Colli della Farnesina 144, 00194 Rome

TUNISIE - *TUNISIA*

M. Mongi LAKHDAR, Avocat Général à la Cour de cassation, Directeur des Affaires pénales, Ministère de la Justice, Avenue Bab Benat, Tunis

TURQUIE - *TURKEY*

M. Kutlu ÖZGÜVENC, Directeur du Département, Direction générale des affaires culturelles, Ministère des affaires étrangères, Mesrutiyet Cad. 27, Ankara
M. Mehmet YILMAZ, President of Museums and Excavations section, General Directorate of Monuments and Museum of Cultural Ministerium, Ankara
M. Aykut CINAROGLU, Professor of near eastern Archaeology Chair, Dil ve Tarih-Cografya Fakültesi, Ankara

UNION DES REPUBLIQUES SOCIALISTES SOVIETIQUES/
UNION OF SOVIET SOCIALIST REPUBLICS

M. Eduard RENOV, Deputy Minister of Culture, Arbat 35, Moscow
M. Lev YAKOBSON, Adviser on economic issues to the Minister of Culture, Arbat 35, Moscow
M. Nicolay ARUTIUNOV, Expert of the Foreign Department, Ministry of Culture, Arbat 35, Moscow

URUGUAY

Mme Nury BAUZAN SENES, Conseiller, Ambassade d'Uruguay en Italie, Via Veneto 183, 00187 Rome

VENEZUELA

Mme Carmen MARTINEZ DE GRIJALVA, Conseiller, Ambassade du Venezuela en Italie, Via Nicolò Tartaglia 11, 00197 Rome
Mme Flor ACCONCIAMESSA DE RODRIGUEZ, Premier Secrétaire, Ambassade du Venezuela, Via Nicolò Tartaglia 11, 00197 Rome

YOUGOSLAVIE - *YUGOSLAVIA*

M. Nino MALJEVIC, Counsellor, Embassy of Yugoslavia in Italy, Via dei Monti Parioli 20, 00197 Rome

OBSERVATEURS - *OBSERVERS*

ETATS NON MEMBRES - *NON-MEMBER STATES*

BURKINA FASO

S.E. Bruno Nongoma ZIDOUEMBA, Ambassadeur du Burkina Faso en Italie, Via Alessandria 26, 00198 Rome
M. Thomas PALE, Conseiller des Affaires étrangères, Chef de la Division Traités-Accords, Ministère des Relations Extérieures, B.P. 7038, Ouagadougou
M. Simon OUEDRAOGO, Directeur du Bureau burkinabé du Droit d'Auteur, B.P. 3926 Ouagadougou 01
M. Francis IBRIGA, Premier Conseiller, Ambassade du Burkina Faso en Italie, Via Alessandria 26, 00198 Rome

CHYPRE - *CYPRUS*

M. Alecos EVANGELOU, Senior Counsel of the Republic, Nicosia

GUATEMALA

M. Alfonso René ORTIZ, Consultant juridique, Ministère de la Culture et du Sport, 7a Avenida 8-92, Zona 9, Guatemala

MADAGASCAR

M. Bruno JOSEPH, Conseiller Culturel, Ambassade de Madagascar en Italie, Via Riccardo Zandonai 84/A, 00194 Rome

MALTE - *MALTA*

M. Anthony BORG BARTHET, Attorney General, The Palace, Valletta
M. Tancred GROUDER, Director, Department of Museums, Auberge de Provence, Republic Street, Valletta

PEROU - *PERU*

M. Luis Felipe GALVEZ, Ministre, Ambassade du Pérou en Italie, Via Po 22, 00198 Rome

PHILIPPINES

M. José ROMERO, Ambassadeur des Philippines en Italie, Via di San Valentino 12, 00197 Rome
M. Gabriel CASAL, Directeur, Musée National des Philippines, P. Burgos St., Manille
M. William GARCIA, Attaché culturel, Ambassade des Philippines en Italie, Via San Valentino 12/14, 00197 Rome

THAILANDE - *THAILAND*

M. Chairat SIRIVAT, Troisième Secrétaire, Ambassade de Thailande en Italie, Via Nomentana 132, 00167 Rome

ORGANISATIONS INTERGOUVERNEMENTALES - *INTERGOVERNMENTAL ORGANIZATIONS*

ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE/
COMITE JURIDIQUE CONSULTATIF AFRIQUE-ASIE

M. Ismail El KATTAN, Deputy Secretary General, 27 Ring Road, Lajpat Nagar-IV, New Delhi 110024

CENTRE INTERNATIONAL D'ETUDES POUR LA CONSERVATION ET LA RESTAURATION DES BIENS CULTURELS/
INTERNATIONAL CENTRE FOR THE STUDY OF THE PRESERVATION AND THE RESTORATION OF CULTURAL PROPERTY

M. Andrzej TOMASZEWSKI, Professeur, Directeur, Via di San Michele 13, 00153 Rome
M. Jean-Michel DUBOIS, Chargé des affaires juridiques, Via di San Michele 4, 00153 Rome

CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE/
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

M. Georges DROZ, Secrétaire général, Scheveningseweg 6, 2517 KT La Haye

ASSOCIATION INTERNATIONALE DU BARREAU/
INTERNATIONAL BAR ASSOCIATION

M. Richard CREWDSON, Field-Fisher-Waterhouse, 41 Vine Street, London EC3N 2AA

ORDRE SOUVERAIN MILITAIRE DE MALTE/
SOVEREIGN MILITARY ORDER OF MALTA

S.E. M. Aldo PEZZANA CAPRANICA DEL GRILLO, Ambassadeur, Largo Teatro Valle 6, 00186 Rome

ORGANISATION DES NATIONS UNIES POUR L'EDUCATION, LA SCIENCE, ET LA CULTURE/
UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Mme Lyndel PROTT, Chief, International Standards Section, Cultural Heritage Division, 1 rue Miollis, 75015 Paris

UNION INTERNATIONALE DU NOTARIAT LATIN/
INTERNATIONAL UNION OF LATIN NOTARIAT

Me Giancarlo LAURINI, Via Carducci 42, Naples

Secrétariat UNIDROIT:

Prof. Riccardo MONACO, Président/*President*
Dr. Malcolm EVANS, Secrétaire Général/*Secretary-General*
Dr. Walter RODINO', Secrétaire Général Adjoint/*Deputy Secretary-General*
Mme Marina SCHNEIDER, Chargée de recherches/*Research Officer*, Secrétaire du Comité/*Secretary to the Committee*

APPENDIX II

AGENDA

1. Election of the Chairman

2. Adoption of the draft agenda (G.E./C.P. - Ag. 1)

3. Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects

4. Other business

APPENDIX III

PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

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

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

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

Article 2

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

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

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

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

Article 4

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

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

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

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its export legislation, that State may request the court or other competent authority of a State acting under Article 9 (the State addressed) to order the return of the object to the requesting State.

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

(3) The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or of its context,

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

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

(e) the outstanding cultural importance of the object for the requesting State.

Article 6

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

Article 7

The provisions of Article 5 shall not apply when:

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

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

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

Article 8

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

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

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

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

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

(1) The claimant may bring an action under this Convention before the courts or other competent authorities of the State where the possessor of the cultural object has its habitual residence or those of the State where that object is located at the time a claim is made.

(2) However the parties may agree to submit the dispute to another jurisdiction or to arbitration.

CHAPTER V - FINAL PROVISIONS

Article 10

This Convention shall apply only when a cultural object has been stolen, or removed from the territory of a Contracting State contrary to its export legislation, after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim is brought for the restitution or return of such an object.

Article 11

Each Contracting State shall remain free in respect of claims brought before its courts or competent authorities:

(a) for the restitution of a stolen cultural object:

(i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object;

(ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3 (2);

(iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by Article 4 (1).

(b) for the return of a cultural object removed from the territory of another Contracting State contrary to the export legislation of that State:

(i) to have regard to interests other than those material under Article 5 (3);

(ii) to apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7.

(c) to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object occurred before the entry into force of the Convention for that State.