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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Preliminary draft Unidroit Convention on stolen
or illegally exported cultural objects

(revised text prepared by the Unidroit Secretariat)

Rome, June 1992

INTRODUCTION

1. In accordance with a decision taken by the Unidroit committee of governmental experts on the international protection of cultural property at its second session, held in Rome from 20 to 29 January 1992, the Secretariat has prepared a revised text of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects.

2. In drawing up the text the Secretariat has, in respect of Articles 1 to 8, had regard to the text submitted by it to the committee at its second session in the light of the indications given by the drafting committee (document G.E./C.P., 2nd session, Misc. 37 - now reproduced in Study LXX - Doc. 29, pp. 48 as Misc. 37 rev.). As regards Articles 9 to 11, the Secretariat has added to the study group text proposals contained either in written observations preceding the second session of the committee or in working papers distributed during that session. The revised text also reflects proposals for new articles submitted during the committee's second session.

3. It will be recalled that at that session the committee proceeded to a number of indicative votes. Many of those votes yielded no decisive result and it is therefore only when a strong majority of over two to one emerged that the Secretariat has deleted language contained in earlier versions of the text or square brackets indicating a difference of opinion regarding the retention of a particular concept. In such cases a note has where appropriate been included in this document.

4. In conclusion the Secretariat would draw attention to the fact that the revised text should be read in conjunction with all the other documents issued since the first session of the committee of governmental experts (Study LXX - Docs. 24-29), in particular Doc. 27, containing a complete redraft presented by the German delegation and the discussion paper of the United States delegation in relation to Articles 3 and 4 (Study LXX - Doc. 29, pp. 18-24).

PRELIMINARY DRAFT UNIDROIT CONVENTION ON [THE INTERNATIONAL RETURN OF]
STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS⁽¹⁾

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

ARTICLE 1

This Convention applies [in international situations as described in Article 9]⁽²⁾ to claims for:

- (a) the restitution of cultural objects stolen or illegally removed by excavation on the territory of a Contracting State⁽³⁾ [and found on the territory of another Contracting State] [which have been moved across an international frontier];⁽⁴⁾
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law [applicable to the protection of cultural objects].⁽⁵⁾

(1) At its second session, the committee of governmental experts proceeded to an indicative vote on the question of whether the future Convention should deal only with international situations and that principle was adopted by 26 votes to none. The committee also decided by 25 votes to none that this should be stated both in the title and in Article 1 (Study LXX - Doc. 30, para. 23). The proposed title of the draft Convention, which was suggested by the drafting committee at the committee's second session (Study LXX - Doc. 29, p. 48), may well need to be revised, on the one hand because it fails specifically to mention objects illegally removed by excavation and on the other because the precise international connecting factors for the application of the future Convention have yet to be defined.

(2) The words in square brackets were proposed by the United States delegation at the first session of the committee (Study LXX - Doc. 22, Misc. 8). It should however be noted that an indicative vote at the committee's second session showed that only seven delegations favoured such a general reference to the international element while 16 preferred a more specific connecting factor of the type contained in Article 1(a) (Study LXX - Doc. 30, para. 24).

(3) An indicative vote at the second session of the committee showed 19 delegations to be in favour of a reference in Article 1 to clandestine excavations and to objects illegally removed from legal excavations and seven against (Study LXX - Doc. 30, para. 25).

- (4) The language "which has been moved across an international frontier" would permit a broader scope of application encompassing situations such as that which arose in the English case of *Winkworth v. Christie* (cf. Study LXX - Doc. 29, pp. 6-7).
- (5) At the second session of the committee, an indicative vote showed that only three delegations were in favour of the retention of the words "export legislation". 14 votes were cast in favour of the language "contrary to its law applicable to the protection of cultural objects" and six against with five abstentions while nine delegations preferred the shorter formula "contrary to its law", 13 voted against and four abstained (Study LXX - Doc. 30, para. 26).

ARTICLE 2⁽⁶⁾

ALTERNATIVE I⁽⁷⁾

For the purpose of this Convention, "cultural object" means any material object of outstanding cultural significance, for example, in an archaeological, artistic, historical, spiritual or ritual area.

ALTERNATIVE II⁽⁸⁾

For the purposes of this Convention, cultural objects are those objects designated by each Contracting State as being of anthropological, prehistoric, ethnological, archaeological, artistic, historical, literary, cultural, ritual or scientific significance or of significance for the natural heritage.

ALTERNATIVE III⁽⁹⁾

For the purposes of this Convention, "cultural object" means any material object designated by legislation as being of significance to the cultural heritage of a State.

ALTERNATIVE IV⁽¹⁰⁾

For the purpose of this Convention, "cultural object" means any material object of an artistic, historical, spiritual, ritual [,archaeological, ethnological, literary, scientific] nature which is of importance, is more than 100 years old and belongs to the following categories (categories set forth in Article 1 (a) through (k) of the 1970 Unesco Convention).

Proposed new paragraph (2)⁽¹¹⁾

In the application of this Convention each Contracting State shall take duly into account the law relating to the protection of cultural objects of the Contracting State from the territory of which the cultural object was removed.

(6) The various alternatives for Article 2 are those submitted by the drafting committee to the committee at its second session (Study LXX - Doc. 29, p. 49). As stated in the report on the

session "[some] representatives were opposed to an indicative vote on those variants and in particular to the introduction of a reference to the requesting State, since the implications of the proposed variants had not been considered, especially in connection with Chapter II." (Study LXX - Doc. 30, para. 36). The committee did however proceed to an indicative vote on whether it preferred a definition that would allow each Contracting State to determine its cultural objects for the purposes of the Convention (Alternatives II and III) or rather a definition of cultural objects that would be of general application (Alternative I). 19 delegations expressed support for a general definition which would in no way prejudice the regime subsequently to be established for Chapters II and III, while 15 delegations preferred a reference to the national legislation of the Contracting States and two delegations abstained (Study LXX - Doc. 30, para. 37). The committee preferred not to vote on the question of whether any further adjectives should be added, on the introduction of a reference to the State of origin and on the addition of the word "outstanding" to qualify "significance", since a decision had still to be taken as to whether the definition should apply only to Chapter II, to Chapter III or to both (Study LXX - Doc. 30, para. 38).

- (7) Cf. Study LXX - Doc. 29, p. 32, proposed by Austria, Belgium, Denmark, Finland, Germany, Ireland, the Netherlands, Poland, Sweden, Switzerland and the United Kingdom.
- (8) Cf. Study LXX - Doc. 29, p. 29, proposed by Greece, the Islamic Republic of Iran, Mexico, Nepal and Turkey.
- (9) Cf. Study LXX - Doc. 24, p. 1, proposed by Canada.
- (10) Based on an oral proposal by the United States delegation.
- (11) Cf. Study LXX - Doc. 29, p. 33, proposed by Finland. Paragraph 1 of the Finnish proposal corresponds to Alternative I.

CHAPTER II - RESTITUTION OF STOLEN⁽¹²⁾ CULTURAL OBJECTS

ARTICLE 3

(1) The [physical] possessor⁽¹³⁾ of a cultural object which has been stolen or illegally removed by excavation⁽¹⁴⁾ shall return it [to its owner]⁽¹⁵⁾ [subject to the terms of this Convention].⁽¹⁶⁾

(2) Any claim for restitution shall be brought within a period of [three] [five]⁽¹⁷⁾ years from the time when the claimant knew [or ought reasonably to have known]⁽¹⁸⁾ the location [or,] [and]⁽¹⁹⁾ the identity of the possessor [,] of the object, and in any case within a period of [six], [ten] [thirty] [fifty] years from the time of the theft.

(12) Depending upon the formulation of Article 1 (a), and in particular the reference to objects illegally removed from excavations, it may be necessary to develop the reference to "stolen" cultural objects.

(13) The committee has yet to decide whether a definition should be included in the draft Convention of such terms as "possessor" and "owner".

(14) On an indicative vote at the committee's second session, 23 delegations favoured a reference to illegal excavations while eight were opposed to it and seven abstained (Study LXX - Doc. 30, para. 55).

(15) An indicative vote at the committee's second session found 13 delegations to be in favour of the addition of the words "to its owner" and 17 against with six abstentions (Study LXX - Doc. 30, para. 56).

(16) This proposal was submitted by the United States delegation (Study LXX - Doc. 29, p. 61) in the interests of clarity and candour so as to make it clear that in certain circumstances (e.g. time limitations) restitution need not be made.

(17) The question of the inclusion of limitation periods was the subject of lengthy discussion at the committee's second session. While no delegation supported the deletion of the shorter period, five favoured the removal of the absolute period, 18 voted against any idea of deletion and six abstained. The committee decided to retain in square brackets different figures for the two periods, considering that the precise periods should be determined by the diplomatic Conference (Study LXX - Doc. 30, para. 57).

(18) An indicative vote at the committee's second session showed 17 delegations in favour of the retention of the words "or ought reasonably to have known" while 11 voted to delete them and two abstained (Study LXX - Doc. 30, para. 59).

(19) At the committee's second session 21 delegations expressed a preference for the word "or" while 12 favoured a cumulative solution and two abstained (Study LXX - Doc. 30, para. 58).

ARTICLE 4

ALTERNATIVE I

(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] [due]⁽²⁰⁾ diligence when acquiring the object.⁽²¹⁾

OR

(1) In the event of restitution, the rights of the *bona fide* possessor vis-à-vis his predecessor are reserved.⁽²²⁾

(2) In determining whether the possessor exercised [such] [due] diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid,⁽²³⁾ and whether the possessor consulted any accessible register⁽²⁴⁾ [or data base] of stolen cultural objects [or cultural property legislation]⁽²⁵⁾ which it could reasonably have consulted.

(3) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously [provided that the latter person acquired the object after the entry into force of this Convention in respect of the Contracting State where such person acquired the object or had its habitual residence at the time of the acquisition].⁽²⁶⁾

[(4) A third State, or a third party of a public or private character furthering cultural aims may, with the consent of the requesting State, and in its place, provide for the payment of the compensation established under paragraph (1) of this article, on condition that the object be rendered accessible to the public in that same requesting State and that payment of the cost of insurance and of conservation of the object be met.]⁽²⁷⁾

[(5) The provisions of this article do not apply when a possessor, under the law applicable, shall return the cultural object without compensation.]⁽²⁸⁾

ALTERNATIVE II⁽²⁹⁾

(1) The possessor of a stolen cultural object who is required to return it shall not be entitled to payment of compensation from the claimant.

(2) In cases where the possessor of a stolen cultural object has incurred expenses in the protection and restoring of the object, it shall be entitled to claim reimbursement of the expenses so incurred from the claimant.

(3) The cost of returning the cultural object shall be borne by the claimant.

(20) The word "due" was proposed in substitution for "necessary" by the Canadian delegation since if a possessor were in possession of a stolen object it clearly would not have exercised the diligence necessary to avoid the acquisition (Study LXX - Doc. 30, para. 64).

(21) Although a number of delegations were opposed to the payment of compensation, 20 delegations voted at the committee's second session in favour of compensating the good faith possessor and 10 against, with six abstentions (Study LXX - Doc. 30, para. 72).

(22) Cf. Study LXX - Doc. 29, p. 41, proposed by Cyprus, Greece and Turkey.

(23) At the second session of the committee suggestions were made that the list of criteria for determining the good faith of the possessor be extended to refer to the civil or commercial character of the parties or the nature of the cultural object (Study LXX - Doc. 30, para. 66).

(24) A proposal was made by the Chinese delegation to add such words as "official or authoritative" (cf. Study LXX - Doc. 24, p. 6).

(25) Cf. Study LXX - Doc. 30, para. 67, proposed by Canada.

(26) Text based on Article 10 of the draft EEC Directive and Article 4(3) of Alternative B of the United States Discussion Paper, (Study LXX - Doc. 29, p. 19).

(27) Discussion of this proposal by the Italian delegation (Study LXX - Doc. 29, p. 81) originally made in connection with Article 8, was deferred until the committee's third session.

(28) This proposal for a new paragraph was submitted to the second session of the committee by the Finnish delegation (Study LXX - Doc. 29, p. 63, Article 4(4)). In view of the novelty of the proposal the committee considered that it would be inappropriate to proceed to a vote at that time (Study LXX - Doc. 30, para. 74).

(29) Proposal by the Islamic Republic of Iran (Study LXX - Doc. 29, p. 30), as amended by the drafting committee (Study LXX - Doc. 29, p. 51). As mentioned above (note 21)), a large majority of delegations favoured retaining the principle of compensating the good faith possessor of a stolen cultural object (paragraph 1) while in respect of paragraph 2, 10 delegations supported the Iranian proposal, 14 voted against and 13 abstained (Study LXX - Doc. 30, para. 73).

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

ARTICLE 5⁽³⁰⁾

ALTERNATIVE I⁽³¹⁾

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its law [applicable to the protection of cultural objects],⁽³²⁾ that State may request the court or other competent authority⁽³³⁾ of a State acting under Article 9 (the State addressed) to order the return of the object [to the requesting State].⁽³⁴⁾

(2) [To be admissible,] any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessary to enable the court or other competent authority of the State addressed to evaluate whether the conditions laid down in paragraph (3) are fulfilled.⁽³⁵⁾

Paragraph (3)

Alternative A⁽³⁶⁾

(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 [certifies that the object is of outstanding cultural importance or if that State] proves that the removal of the object from its territory⁽³⁷⁾ 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].

Alternative B⁽³⁸⁾

(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 cultural object has been illegally excavated and/or exported from its territory or if that State proves that the removal of the object from its territory significantly impairs any 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.

Alternative C⁽³⁹⁾

(3) 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 [significantly] impairs the interests of the requesting State because of 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 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].⁽⁴⁰⁾

ALTERNATIVE II⁽⁴¹⁾

(1) (Unchanged)

(2) Contracting States shall prohibit the import of cultural objects in the absence of an authorisation issued by the State of origin of such objects.

(3) Any claim brought in accordance with paragraph (1) of this article shall be accompanied by the particulars necessary to enable the competent authority of the State addressed to determine whether the object falls within one of the categories of objects referred to in Article 2 and whether there has been a breach of the export legislation of the requesting State.

(4) (Former paragraph (3) of Article 5: unchanged)

Proposed new paragraph (4)⁽⁴²⁾

(4) The claim may also be brought, in conformity with paragraphs (2) and (3) of this article, by a Contracting State from whose territory a cultural object has been legally exported when, following one or more successive exports not contemplated by the law or export authorisation of that State or by an international agreement, the same effect is produced as would have been by the illegal export of the object to a Contracting State or by an infringement of cultural interests protected by the conditions which would have permitted the export of the object.

Proposed new paragraph (5)⁽⁴³⁾

(5) Each Contracting State shall ensure that the individual against whom the request for return of the object could be made also receives effective legal protection before independent courts in clarifying the question of whether the object concerned does represent a national treasure for the Contracting State.

(30) The alternative texts for Article 5 are basically those submitted by the drafting committee to the committee at its second session (Study LXX - Doc. 29, pp. 52-54). Those texts have, where necessary, been amended to reflect the outcome of certain indicative votes to which the committee proceeded on the basis of the texts drawn up by the drafting committee.

(31) Alternative I, paragraphs 1 and 2 substantially reproduce the study group text.

(32) Cf. note (5) above. In addition, a proposal was made by the United States delegation to substitute the language in square brackets by the following "contrary to a legislative provision prohibiting the export of cultural property because of its cultural significance" (Study LXX - Doc. 30, para. 79).

- (33) On an indicative vote at the committee's second session, 25 delegations expressed support for the retention of the words "or other competent authority" while only six called for their deletion and five abstained (Study LXX - Doc. 30, para. 113).
- (34) At its second session the committee deferred taking a decision on the retention of the words "to the requesting State" (Study LXX - Doc. 30, para. 114).
- (35) An indicative vote at the committee's second session showed that 11 delegations favoured the deletion of the whole of paragraph 2 and nine its retention, subject to certain minor amendments, while seven abstained. In an indicative vote on the last part of paragraph 2 "and shall contain ... requesting State" 23 delegations voted for its deletion and only three for its retention, with six abstentions. Finally, the committee deferred taking any decision on the words "[t]o be admissible" appearing in the text in square brackets (Study LXX - Doc. 30, para. 115).
- (36) The wording of Alternative A of paragraph 3 substantially corresponds to that of the study group text, subject to the addition of the language in square brackets proposed by the Canadian delegation (Study LXX - Doc. 29, p. 12). In the course of an indicative vote at the second session of the committee, 17 delegations considered a certificate of the kind contemplated by the Canadian proposal to be sufficient while 17 preferred the original text and one abstained (Study LXX - Doc. 30, para. 116).
- (37) A proposal was made by the Hungarian delegation to add at this point the words "violated its applicable [export] legislation" (Study LXX - Doc. 29, p. 4).
- (38) Text proposed by the delegation of Nigeria (Study LXX - Doc. 29, p. 14).
- (39) Amended version of a proposal submitted to the first session of the committee by the delegations of China, Egypt, Belgium and Austria (Study LXX - Doc. 22, p. 18 and Study LXX - Doc. 29, p. 54).
- (40) The deletion of the square bracketed language from line 3 to the end of the paragraph would reflect the essence of the Greek proposal in Study LXX - Doc. 29, p. 1.
- (41) Alternative II was proposed by the delegation of the Islamic Republic of Iran (Study LXX - Doc. 29, p. 54). An indicative vote at the committee's second session showed that 16 delegations supported the proposal, while 16 were against it and two delegations abstained.
- (42) Text proposed by the Italian delegation (Study LXX - Doc. 29, p. 82) in respect of which no decision has yet been taken by the committee.
- (43) This text reflects a proposal by the German delegation (Study LXX - Doc. 27, Article 5(4)). For lack of time the committee postponed consideration of the proposal until its third session (Study LXX - Doc. 30, para. 120).

ARTICLE 6⁽⁴⁴⁾

ALTERNATIVE I

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]⁽⁴⁵⁾ [shall] refuse to order the return of that object when it finds that it [manifestly] has [as close a, or] a closer [,] connection with the culture of the State addressed [or a State other than the requesting State].

Proposal for a new paragraph (2)⁽⁴⁶⁾

[(2) When the court or other competent authority finds that the cultural object has a close or closer connection with the culture of a third State, the State addressed has an obligation to give notice regarding the return of that object to the third State without undue delay.]

OR

[(2) If during the evaluation by the court or other competent authority of the State addressed under Article 5, it appears to the court or competent authority that the cultural object may have been removed from the territory of a third Contracting State (the third State) contrary to its legislation and that the cultural object may also have as close a, or a closer, connection with the culture of the third State, the court or competent authority may inform the relevant authorities of the third State, and may invite those authorities to bring an application to the court or competent authority under Article 5.]

Proposal for new paragraphs (2) to (4)⁽⁴⁷⁾

[(2) If the sale takes place within one Contracting State only, a claim for restitution exists only if upon reasonable consideration of all circumstances, pointers exist to indicate to the purchaser that:

- (a) the object is a national treasure for another Contracting State, and
- (b) the object was removed or exported from the State of origin in violation of legislation designed to protect national treasures before leaving the sovereign territory of the State of origin.

(3) A claim for return against the current possessor is excluded if a claim against the previous possessor is also excluded or would be excluded under the terms of the preceding provisions.

(4) Claims pursuant to Article 5 are excluded if they are to a large degree manifestly irreconcilable with the principles of law in the State where the cultural object is located. The same shall apply if the object was acquired as a result of the enforcement of a judgment. Such a claim is also excluded if the object was acquired at a public auction unless the conditions contained in Article 8, paragraph 1, second sentence are fulfilled. A public auction is merely an auction held publicly by a court officer appointed for the place of auction, or by some other official authorised to conduct auctions.]

ALTERNATIVE II (48)

When the conditions of Article 5 (3) have been met, the court or other competent authority may only refuse to order the return of the cultural object if it finds that it has a manifestly closer connection with the culture of, or that its territorial origin is in,

- (a) the State addressed, or
- (b) another Contracting State which, in such a case, shall be informed, so that it may bring a claim for return of the object to it in accordance with Article 5(3).

(44) The texts reproduced below are those submitted by the drafting committee to the committee at its second session. Alternative I corresponds more or less to the text of the study group, with the addition of a second paragraph dealing with the situation of third States while Alternative II reflects a formula proposed by the Greek delegation. The committee was however unwilling to take any firm decisions regarding the two alternatives as the second raised problems of substance which had not been examined in detail by the committee, in particular in relation to the mechanism permitting the intervention of a third State. The only question relating to this article which was voted upon was whether there should in principle be any reference to a third State; 13 delegations voted in favour of such a reference, 12 against and eight abstained (Study LXX - Doc. 30, para. 141).

(45) In the event of this solution being preferred, proposals were submitted with a view either to deleting the word "only", or to replacing it by the word "nevertheless".

(46) The first alternative reflects a proposal by the Chinese delegation (Study LXX - Doc. 29, p. 55) and the second one by the Irish delegation (Study LXX - Doc. 29, p. 37).

(47) Proposals submitted by the German delegation (Study LXX - Doc. 27, p. 4).

(48) Proposal of the delegations of China, Cyprus, Egypt, Greece, Spain and Turkey (Study LXX - Doc. 29, p. 27).

ARTICLE 7

The provisions of Article 5 shall not apply where:

- (a) the cultural object was exported during the lifetime of the person who created it or within a period of [twenty] [fifty]⁽⁴⁹⁾ 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 [three] [five] years from the time when the requesting State knew [or ought reasonably to have known]⁽⁵⁰⁾ the location [or] [and]⁽⁵¹⁾ the identity of the possessor, of the object⁽⁵²⁾ and in any case within a period of [six] [ten] [twenty] [thirty] years from the date of the export⁽⁵³⁾ of the object,⁽⁵⁴⁾ or
- (c) the export of the object in question is no longer illegal at the time at which the return is requested.

(49) As had been the case with Article 3(2), the committee agreed at its second session that the precise periods referred to in paragraphs (a) and (b) should be determined at the diplomatic Conference (Study LXX - Doc. 30, para. 151).

(50) For the proposal to delete the words "or ought reasonably to have known" see note (18) above.

(51) An indicative vote at the committee's second session showed that 18 delegations favoured the use of the word "or" and 13 the word "and", with four abstentions (Study LXX - Doc. 30, para. 152).

(52) At the second session of the committee an indicative vote showed 25 delegations to be in favour of the principle of a shorter period, and one opposed to it while five abstained (Study LXX - Doc. 30, para. 151).

(53) On an indicative vote at the committee's second session 22 delegations supported the retention of an absolute period while 10 voted against and three abstained (Study LXX - Doc. 30, para. 151).

(54) The Israeli delegation proposed at the second session of the committee the addition at the end of sub-paragraph (b) of the following words: ", the time limits mentioned in this paragraph shall not apply to a State which cannot bring its arguments to the court of the State addressed, and application of the time limits concerned shall be postponed until it can bring its arguments to that court" (Study LXX - Doc. 29, p. 38). An indicative vote showed seven delegations in favour of the proposal and four to be against while 26 delegations abstained (Study LXX - Doc. 30, para. 153). The view was however expressed that if the proposal were ultimately to be retained, then a more appropriate place for the provision would be in the final clauses of the future Convention (Study LXX - Doc. 30, para. 149).

ARTICLE 8

(1) When the return of the cultural object is ordered, the possessor [who knew [or ought to have known] at the time of acquisition that the object had been exported contrary to the law [applicable to the protection of cultural objects] of the requesting State] shall not be entitled to claim compensation.⁽⁵⁵⁾

[(2) 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 law [applicable to the protection of cultural objects] of the requesting State [or that that fact ought to have been obvious to any reasonable acquirer].]⁽⁵⁶⁾

[(3) In cases where the possessor of a cultural object exported in breach of the law [applicable to the protection of cultural objects] of the requesting State has incurred expenses in the protection and restoring of the object, it shall be entitled to claim reimbursement of such expenses from the requesting State.]⁽⁵⁷⁾

[(4) When returning the cultural object the possessor may, [where appropriate], 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 based on the approval of that State]. [In such cases the object shall neither be confiscated nor subjected to other measures to the same effect.] [In such cases, the possessor has the right to payment of compensation, account being taken of its legal position once the cultural object has been returned to the requesting State.]]⁽⁵⁸⁾

OR

[(4) If it has not been established that the possessor knew or ought to have known of the illegal character of the export, it may either:

- retain ownership of the cultural object on condition that it return it to the territory of the requesting State;
- transfer ownership of the object to a person of its choice residing in the requesting State who provides the necessary guarantees, on condition that such person return the cultural object to the territory of the requesting State, or
- transfer ownership to the requesting State after payment by that State of fair and reasonable compensation.]

(5) The cost of returning the cultural object, in accordance with this article shall be borne by the requesting State.⁽⁵⁹⁾

[(6) A third State, or a third party of a public or private character furthering cultural aims may, with the consent of the requesting State, and in its place, provide for the payment of the compensation established under paragraph (1) of this article, on condition that the object be rendered accessible to the public in that same requesting State and that payment of the cost of insurance and of conservation of the object be met.]⁽⁶⁰⁾

(7) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously [provided that the latter acquired the object after the entry into force of this Convention in respect of the Contracting State where such person acquired the object or had its habitual residence at the time of the acquisition].⁽⁶¹⁾

(55) This paragraph reflects a French proposal, contained in Study LXX - Doc. 24, p. 9, which established the principle that the possessor is not entitled to compensation when it knew or ought to have known at the time of acquisition of the illegal export of the cultural object. The placing in square brackets of the words "who knew ... the requesting State" reflects the view of those who believed that the possessor should in no circumstances receive compensation in the event of the return of an illegally exported cultural object. An indicative vote at the committee's second session showed 16 delegations to favour the principle of compensation for the "good faith" possessor and 15 to be against while seven abstained (Study LXX - Doc. 30, para. 169). As elsewhere in the text, the words "or ought reasonably to have known" have been placed in square brackets. See also note (18).

The delegations of Canada and the Netherlands proposed the addition, in an appropriate place within Article 8, of the following language: " (...) In deciding whether the possessor [knew or] ought to have known that the object would be or had been exported contrary to the [export] legislation of the requesting State, 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 the relevant legislation of the requesting State and other relevant information which could reasonably have been consulted." (Study LXX - Doc. 29, p. 66).

(56) Paragraph (2) corresponds substantially to paragraph (1) of the study group text. Clearly, its retention is dependent upon the acceptance of the principle of compensation for the "good faith" purchaser, for which reason it is enclosed in square brackets, as also are the words "or that that fact ... any reasonable acquirer", suggested by the German delegation in its proposed Article 8(1) in Study LXX - Doc. 27, p. 5. A proposal was also made by the Turkish delegation to add the words "unless the possessor is unable to present a certificate of origin issued by the competent authorities of the requesting State" (Study LXX - Doc. 29, p. 34, Article 8(1)). This proposal should be considered in the light of that of the Islamic Republic of Iran for the establishment of an international identity card for cultural objects (cf. Study LXX - Doc. 29, pp. 77-78 and Study LXX - Doc. 30, paras. 75-76).

- (57) Paragraph 3 was proposed by the delegation of the Islamic Republic of Iran in Study LXX - Doc. 29, p. 31. On an indicative vote at the committee's second session, nine delegations voted in favour of the provision and 13 against with 14 abstentions (Study LXX - Doc. 30, para. 170).
- (58) Two alternatives for paragraph 4 were submitted to the committee at its second session by the drafting committee (Study LXX - Doc. 29, p. 58). The first alternative corresponds in large measure to paragraph 2 of the study group text, while the second alternative reflects the text proposed by the French delegation in its written comments (Study LXX - Doc. 24, p. 9). The committee decided at its second session not to vote upon the alternatives, nor upon the square bracketed language in the first alternative. The only question upon which the committee proceeded to an indicative vote was the inclusion in the text of the various options open to the possessor in place of compensation: 17 delegations supported the possibility of such alternatives while 11 voted against and 10 abstained (Study LXX - Doc. 30, para. 171).
- (59) Paragraph 5 corresponds to paragraph 3 of the study group text.
- (60) This proposal (Study LXX - Doc. 29, p. 81) corresponds to the proposal already made by the Italian delegation in connection with Article 4. In the absence of substantive discussion of the proposal, its consideration was deferred to the committee's third session (Study LXX - Doc. 30, para. 175).
- (61) Paragraph 7 reflects a revised version of paragraph 4 of the study group text to which has been added language proposed by the United States delegation (Study LXX - Doc. 29, p. 58).

[ARTICLE 8 bis (new)⁽⁶²⁾

The court or other competent authority of the State addressed, in ascertaining whether there has been an illicit removal of a cultural object in the meaning of Article 5, may request that the requesting State obtain from the court or other competent authority of the requesting State a decision or other determination that the removal of the object was illicit under Article 5.]

(62) This text was submitted to the committee at its second session by the Finnish delegation (Study LXX - Doc. 29, p. 72). For lack of time, consideration of the proposal was deferred to the committee's third session.

CHAPTER IV - CLAIMS AND ACTIONS

ARTICLE 9⁽⁶³⁾

ALTERNATIVE I⁽⁶⁴⁾

(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.

ALTERNATIVE II⁽⁶⁵⁾

(1) Without prejudice to the normal rules, or rules established by Conventions, concerning jurisdiction in force in the Contracting States, the claimant may in all cases bring a claim under this Convention before the courts or competent authorities of the Contracting State where the cultural object is located.

(2) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or return of the object is brought before the courts or competent authorities of another Contracting State.

ALTERNATIVE III⁽⁶⁶⁾

(1) A claim may be brought under this Convention by a claimant who is a habitual resident of a Contracting State against the possessor before the courts of another Contracting State where the stolen cultural object is located.

(2) A claim may be brought under this Convention by a claimant who is a habitual resident of a Contracting State against a possessor who is a habitual resident of another Contracting State in the courts of that State, in a case where the stolen object is located outside any Contracting State.

(3) Neither paragraph 1 nor 2 shall apply to a case involving a claimant who is a habitual resident of a Contracting State bringing suit against a habitual resident of the same Contracting State in the courts of that State.

(4) Paragraph 1 shall not apply to a claim by a habitual resident of one Contracting State brought against the possessor who is a habitual resident of another Contracting State where the stolen cultural object is located in that State and has never moved out of that State.

ALTERNATIVE IV⁽⁶⁷⁾

(1) The claimant may bring an action under this Convention before the court or other competent authorities

- (a) of the State where the possessor of the cultural object has its habitual residence, or
- (b) of the State where the object is located, or
- (c) of the State where the illegal act (theft, illegal excavations, illicit export) was committed.

(2) (Unchanged).

[ARTICLE 9 bis

(1) A decision rendered in a Contracting State shall be enforced in another Contracting State

- (a) if it was rendered by an authority considered to have jurisdiction under Article 9;
- (b) if it is no longer subject to ordinary forms of review in the State of origin; and
- (c) if it is unenforceable in the State of origin.

(2) Provisionally enforceable decisions and provisional measures shall be enforced in the State addressed even if they are subject to ordinary forms of review.

ARTICLE 9 ter

Enforcement of a decision may, however, be refused in the following cases:

- (a) if the decision was obtained by fraud in connection with a matter of procedure; or
- (b) if it is established that the restitution of the cultural object would significantly impair the interests mentioned in Article 5(3), (a) and (c).

ARTICLE 9 quater

Enforcement may not be refused for the sole reason that the court of the State of origin has applied a law other than that which would have been applicable according to the rules of private international law of the State addressed.

ARTICLE 9 quinquies

There shall be no review of the merits of the decision rendered by the court of origin.]

(63) Although the committee proceeded at its second session to discussion of Article 9, no votes were taken on the various proposals made which indicate widely differing approaches (cf. Study LXX - Doc. 30, paras. 178-191). For these reasons the Secretariat has reproduced the text of Article 9 as proposed by the study group as well as three other alternatives submitted in writing to the committee.

(64) Alternative I is the text proposed by the study group.

(65) Alternative II was submitted by the Secretary-General of the Hague Conference on Private International Law and the delegation of the Netherlands (Study LXX - Doc. 29, p. 68). Paragraph 2 of the proposal also seeks to meet a concern expressed by the Chinese delegation in Study LXX - Doc. 24, p. 5 and the Egyptian delegation in Study LXX - Doc. 29, p. 71.

(66) Alternative III reflects a proposal by the delegation of the United States of America already submitted to the committee at its first session and reproduced in Study LXX - Doc. 29, p. 79.

(67) Alternative IV contains a proposal by the Greek delegation which deals not only with the question of jurisdiction but also with enforcement of judgments (cf. Study LXX - Doc. 29, pp. 64-65).

CHAPTER V - FINAL PROVISIONS

ARTICLE 10⁽⁶⁸⁾

(1) This Convention shall apply only when a cultural object has been stolen or removed from the territory of a Contracting State contrary to its law [applicable to the protection of cultural objects], 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.⁽⁶⁹⁾

[(2) The provisions contained in the preceding paragraph are without prejudice to the right of a State to address a claim to another State outside the framework of this Convention, in respect of an object stolen or illegally exported before the entry into force of this Convention.]⁽⁷⁰⁾

[(3) This does not in any way preclude any future extension of the Convention so as to apply to objects stolen or illegally removed from the territory of a Contracting State by excavation or contrary to its legislation, before the entry of the Convention into force.]⁽⁷¹⁾

(68) As had been the case with Article 9, no text of Article 10 was submitted by the drafting committee to the committee's second session (for discussion on Article 10, cf. Study LXX - Doc. 30, paras. 192-199). The Secretariat has in consequence retained paragraph 1 of the study group text, amended to take account of the replacement of the words "export legislation" throughout the draft.

(69) In accordance with a United States proposal (cf. Study LXX - Doc. 22, p. 19) the Convention would only apply to claims in respect of a cultural object stolen or illegally exported after both Contracting States concerned had become Parties to the Convention.

(70) Nigerian proposal contained in Study LXX - Doc. 29, p. 70.

(71) Greek proposal contained in Study LXX - Doc. 29, p. 69.

ARTICLE 11⁽⁷²⁾

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) [;
- (iv) to apply its national law when this would require just compensation in the case where the possessor has title to the cultural object].⁽⁷³⁾

(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 [;
- (iii) to apply its national law when this would disallow the possessor's right to compensation contemplated by Article 8;
- (iv) to apply its national law when this would deny the possessor the options provided for in Article 8(2);⁽⁷⁴⁾
- (v) to require that the costs referred to in Article 8(3) be borne by other than the requesting State].⁽⁷⁵⁾

(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.

(72) The language of Article 11 reflects the text approved by the study group together with a number of additional clauses proposed by various delegations which have been included in square brackets as they were not the subject of detailed discussion by the committee at its second session (cf. Study LXX - Doc. 30, paras. 200-207). There was however general agreement within the committee that provision should be made in the final clauses for a system of notification at the time of ratification, or subsequent thereto, so as to indicate the options chosen by a State in application of Article 11 (Study LXX - Doc. 30, para. 200).

A complete redraft of Article 11 was proposed by the Hungarian delegation (Study LXX - Doc. 29, p. 39) whereby paragraph 1 would be retained, subject to the deletion of sub-paragraphs (a)(ii) and (b)(ii), which would be included in a new paragraph 2 worded as follows:

(2) Each Contracting State shall, in respect of claims brought before its courts or competent authorities:

- (a) for the restitution of a stolen cultural object, 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);
- (b) for the return of a cultural object removed from the territory of another Contracting State contrary to the [export] legislation of that State, apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7.

(73) Proposal by the United States delegation contained in Study LXX - Doc. 29, p. 62.

(74) Clauses (iii) and (iv) were proposed by the Australian delegation in Study LXX - Doc. 29, p. 26.

(75) Proposal by the delegations of Australia, Canada and the Netherlands in Study LXX - Doc. 29, p. 25, Article 11 (b)(iii).

[ARTICLE 12 (new)]

Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural objects removed, whatever the reason, from the territory of each State, before the entry into force of this Convention for the States concerned.

ARTICLE 13 (new)

States Parties shall impose no customs duties or other charges upon

- (a) claims pursuant to this Convention;
- (b) cultural objects returned pursuant to this Convention.]⁽⁷⁶⁾

(76) These articles were proposed by the Israeli delegation at the second session of the committee (Study LXX - Doc. 29, p. 76). For want of time the committee deferred consideration of them until its third session (Study LXX - Doc. 30, paras. 208-209).