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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Report on the third session
(Rome, 22 to 26 February 1993)

(prepared by the Unidroit Secretariat)

Rome, May 1993

1. The President of Unidroit, Mr Riccardo Monaco, opened the third session of the Unidroit committee of governmental experts on the international protection of cultural property on Monday, 22 February 1993 at 10 a.m. After welcoming the delegates and observers, and in particular those participating in the work of the committee for the first time, he expressed his gratification at the presence of a certain number of national delegations, from both member and non-member States, that had joined the committee at this stage of its work, which was further evidence of the lively interest aroused in the international community by the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (for the list of participants see APPENDIX I).

2. The Chairman of the committee, Mr Pierre Lalive (Switzerland), stressed the importance of the work still to be accomplished by the committee with a view to the effective struggle against the scourge of the illegal traffic in cultural objects, by reaching to the very heart of the problem which lay in the area of private law and more specifically in the law concerning the acquisition in good faith of cultural objects. He called upon the participants to show courage, realism and legal imagination throughout the session so as to permit the committee to complete its work.

3. The Secretary-General of Unidroit, Mr Malcolm Evans, likewise welcomed the participants, after which he stated that the Unidroit Governing Council had, at its June 1992 session, expressed satisfaction at the progress made by the committee of governmental experts on the international protection of cultural property, although voicing some concern at the large number of variants still to be found in the text (Study LXX - Doc. 31). The Secretary-General also referred to the high priority attached by the Governing Council to this important subject and to its conviction that the committee would, as soon as practicably possible, be in a position to complete its work on the basis of compromise solutions acceptable to the international community as a whole. In conclusion, he once again apologised for the postponement of the session from November 1992 to February 1993, recalling that this had been caused by the negotiations in Brussels leading up to the adoption of two EEC instruments concerning the return and the export of cultural objects.

4. The representative of Denmark, which currently held the presidency of the Council of the Communities, briefly presented the common position adopted by the Council of the European Communities on 9 December 1992 with a view to the adoption of a Directive on the return of cultural objects unlawfully removed from the territory of a Member State (cf. Study LXX - Doc. 34), the formal adoption of which without any amendments was expected towards the end of the first quarter of 1993. He offered a broad sketch of the main lines of the provisions of the Directive which indicated the manner in which the Twelve had dealt with the problem of the illegal removal of cultural objects, while reserving the possibility to come back on some questions in more detail in the course of the article by article consideration of the preliminary Unidroit draft.

5. He then drew attention to a number of features common to the Community Directive and the preliminary draft Unidroit Convention as well as to some potential differences, in particular as regards their scope of application, seeing that the Unidroit draft contained a chapter on the restitution of stolen objects whereas the Directive contained no specific rules on the matter. While emphasizing the universal vocation of Unidroit in comparison with the Directive, which was only of a regional character, the representative of Denmark invited the participants to draw upon the experience of the Community as the solutions adopted in the Community instruments constituted a compromise between different interests which were the same as those of the wider circle of States present at the Unidroit meeting.

6. The Unesco representative recalled that her organisation had requested Unidroit to draw up an instrument for the purpose of combatting the illegal traffic in cultural objects as the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property could not resolve all the problems at issue, one of the most important of which was that of the protection of good faith purchasers. In her opinion, the future Unidroit Convention would have the effect of modifying practices in the art trade by requiring purchasers to exercise much more caution in ascertaining the origin of objects.

Item 1 - Adoption of the agenda (G.E./C.P. - Ag. 3)

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

Item 2 - Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects
Study LXX - Docs. 24 to 36)

8. The committee was seized of the following documents:

Study LXX - Doc. 24: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Canada, China, France, Islamic Republic of Iran, Norway, Sweden and Turkey)

Study LXX - Doc. 25: Observations of international organisations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Unesco, Interpol)

Study LXX - Doc. 26: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Israel)

Study LXX - Doc. 27: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural

objects (Germany)

Study LXX - Doc. 28: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Thailand)

Study LXX - Doc. 29: Working papers submitted during the second session of the committee of governmental experts on the international protection of cultural property, held in Rome from 20 to 29 January 1992

Study LXX - Doc. 30: Report on the second session of the committee of governmental experts on the international protection of cultural property held in Rome from 20 to 29 January 1992 (prepared by the Secretariat)

Study LXX - Doc. 31: Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (revised text prepared by the Secretariat)

Study LXX - Doc. 31 Corr.: Correction of Article 4, paragraph 4 (Alternative I); reinstatement of the original version contained in document Study LXX - Doc. 29, Misc. 54

Study LXX - Doc. 32: Observations of governmental delegations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Finland, Sweden, Turkey and Venezuela)

Study LXX - Doc. 33: Observations of governmental delegations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Canada)

Study LXX - Doc. 34: Common position adopted by the Council of the European Communities on 9 December 1992 with a view to the adoption of a Directive on the return of cultural objects unlawfully removed from the territory of a Member State

Study LXX - Doc. 35: Observations of governmental delegations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Israel)

Study LXX - Doc. 36: Commentary on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects as revised in June 1992 (prepared by Ms Lyndel V. Prott, Chief of the International Standards Section, Division of Physical Heritage, Unesco) (English only).

9. It was agreed not to proceed to a general discussion, without however precluding delegations from raising any specific points at the

beginning of the session, but rather to conduct an article by article examination of the text of the preliminary draft Convention on stolen or illegally exported cultural objects[1], in the light *inter alia* of the written observations of Governments and of international organisations contained respectively in Study LXX - Docs. 32, 33, 35 and 36. The Chairman suggested that the committee consider only matters of substance, purely drafting proposals being referred to a drafting committee.

10. This report presents the various provisions of the preliminary draft Convention in numerical order, although the committee's discussion in fact began with Chapter III on the return of illegally exported cultural objects (Articles 5 to 8) since this was an area likewise covered by Community instruments, its provisions represented a sort of legal "revolution" when compared with the present state of the law in the large majority of legal systems, and a number of provisions on theft in Chapter II (proof, limitation of actions, ...) had their counterparts in Chapter III even though the solutions finally adopted might be different. The committee considered neither Chapter IV (Claims and actions) nor Chapter V (Final provisions), preferring to defer discussion of those chapters to its next and final session, although some written proposals were made in regard to those provisions.

11. The drafting committee, whose membership was deliberately restricted and composed of representatives of the delegations of Australia, Belgium, Finland, France, Iran, Mexico, Nigeria and Turkey, met on three occasions to draw up a new text which would take account of the written and oral proposals submitted during the meetings of the committee of experts. The fruits of the work of the drafting committee appear in documents G.E./C.P., 3rd session, Misc. 21 (Articles 3 to 7), Misc. 21 Add. (Article 8) and Misc. 21, Add. 2 (Articles 1 and 2) which are now grouped together in Study LXX - Doc. 38, Misc. 21 rev. It was this text which the committee examined on second reading, proceeding to indicative votes on questions of principle rather than on those of drafting.

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

12. At its second session, the committee of experts clearly indicated its wish, by a vote of 26 to none, that the Convention should cover

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(1) The committee worked on the text reproduced in document Study LXX - Doc. 31, although it often referred back to that approved by the Unidroit study group on the international protection of cultural property on 26 January 1990. For the sake of convenience, this latter text is contained in APPENDIX III hereto.

only international situations. This decision was not put in question. The committee had moreover decided that it should be reflected not only in the title of the Convention but also in Article 1 (25 votes to none). It was further recalled that this decision concerned in particular the provisions of Chapter II since it was evident that Chapter III, relating to illegally exported cultural objects, could by its very nature apply only to international situations.

13. The question then arose of how best to express this limitation, the choice being between a general formula (chosen by seven delegations) or a connecting factor (preferred by 16 delegations). Given however the very great difficulty, if not the impossibility, of clearly defining what is an international situation, a problem frequently encountered in the drawing up of international conventions, some representatives preferred a simple statement to the effect that "[t]his Convention applies in international situations" without any further clarification, thus leaving it to the caselaw to provide a uniform concept, a solution which had in fact already been adopted by the recent Swiss law on private international law.

14. Two drafting proposals had been included in square brackets in the text of **Article 1(a)** in respect of stolen cultural objects, the first of which would have had the effect of limiting the scope of application of the future Convention to claims for the restitution of cultural objects stolen on the territory of a Contracting State "and found on the territory of another Contracting State". Some representatives however believed that such a formulation would prejudice the effective implementation of the Convention as thieves would do all they could to ensure that the object would be removed to the territory of a non-Contracting State.

15. Another representative was of the opinion that the connecting factor ought not to be the location of an object illegally removed from a Contracting State, but rather that a person, whether the owner or possessor of the cultural object, should have a link with a Contracting State in the sense that it was resident or domiciled there. Yet another participant stated that he was opposed to the idea that it would not be possible to bring a claim for recovery because the location of the object was unknown.

16. The Chairman found it necessary to clear up a misunderstanding which seemed to have arisen with regard to the notion of a "Contracting" State, some representatives calling for its deletion while others were insisting on its maintenance. He stressed that the Convention would create no obligations for any non-Contracting State (while recalling that one delegation had at an earlier stage contemplated the possibility of the Convention's applying to situations involving non-Contracting States, a suggestion that had not been discussed in any detail), although the idea was now being raised in a different context, namely that of the definition of the necessary international element. The question of who was or was not bound by the Convention was not of relevance here.

17. Since only one representative favoured the first proposal in square brackets, believing that the location of the object should only be discussed in connection with Article 9, the committee turned to the second proposal, namely the introduction of the criterion of the international character of the situation as being the crossing of a frontier ("which have been moved across an international frontier"). Most representatives found this proposal to be more attractive, recalling that the purpose of the Convention was in part the return of illegally exported cultural objects and that therefore, by definition, if no frontier had been crossed, the question of return to the first country would not arise.

18. Some participants considered that there was no need to state this expressly and that a reference in the title to "international situations" - and not simply to "international return" - would be sufficient. Another representative pointed out that frontiers existed between states of the Union in the United States of America for the purposes of private international law and that there was now no longer any international frontier between the States of the European Community so that the words "international frontier" should perhaps be replaced by "the frontier of a State".

19. Some representatives sought to combine various connecting factors with a view to clarifying what was to be meant by "international situation" and submitted drafting proposals to that effect (cf. Study LXX - Doc. 38, Misc. 1 and Misc. 19).

20. A number of representatives suggested that the two proposals might not adequately deal with the case of the crossing of a frontier twice. In effect, as regards the first proposal "and found on the territory of another Contracting State", one representative called for the deletion of the word "another" on the ground that such wording would not permit the recovery of an object stolen in one country, exported to another, and then found once more in the country of origin. The same problem arose with regard to the second proposal ("which have been moved across an international frontier") for if the object were to cross the same frontier twice, then this would for some constitute an international situation while for others it was a purely national one. It was recalled that in the case of *Winkworth v. Christie*, where such a situation had arisen, the English judge had found this to be a typical international situation. One representative however suggested that such situations could be solved by permitting States to enter a reservation on this point to the effect that their domestic law and not the Convention would be applicable.

21. The committee preferred to defer discussion on the reference in sub-paragraph (a) to unlawful excavations and to the unlawful transfer of objects legally excavated to a later stage of its work. Although it had been decided at the second session to mention this question in Article 1 (19 delegations in favour and seven against), the committee wished to re-examine the problem with a view possibly to the drafting of a specific provision concerning it.

22. As regards the language in square brackets in sub-paragraph (b) "[applicable to the protection of cultural objects]", some representatives noted that they related to the provisions which prohibit the removal abroad of cultural objects so as to protect them or to preserve intact the national heritage but preferred to defer detailed discussion on the language until Article 5, where the same wording was to be found in the first three paragraphs. Another representative briefly drew attention to a written proposal to add to the present text of sub-paragraph (b) the following "...and to the disposal of property rights therein" (Study LXX - Doc. 38, Misc. 4).

23. The committee was, on second reading, seized of a new Article 1 submitted by the drafting committee (cf. Study LXX - Doc. 38, Misc. 21 rev.) which was to a certain extent based on a written proposal (Study LXX - Doc. 38, Misc. 1). The introductory language of the provision was rather vague, and it was pointed out that it might be necessary further to define the international situation. Sub-paragraph (a) provides that the cultural object must have been stolen and crossed a frontier ("removed from the territory of a State"). The question of objects crossing and re-crossing a frontier was not considered on this occasion. Sub-paragraph (b) underwent no modification.

24. The new text of Article 1 was not the subject of discussion by the committee of experts which deferred consideration of it to the next session.

Article 2

25. The various alternatives appearing in Article 2 (Study LXX - Doc. 31) were those submitted by the drafting committee at the second session of the committee of experts and which had not been the subject of an indicative vote because the implications of the various proposals had not been explored, in particular in relation to Chapter II. The committee had however been called upon to vote on the method to be followed and 19 delegations had expressed their support for a general definition which would in no way prejudge the regime subsequently to be established for Chapters II and III, while 15 had preferred a reference to the national law of the Contracting States.

26. After noting that some of the alternatives reflected above all differing drafting techniques and that a choice would have to be made in this respect, as well as differences as to substance regarding the definition and its implications, some representatives stated that they would prefer a definition which would permit each Contracting State to determine its cultural objects for the purpose of the Convention (Alternatives II and III), whereas others favoured a definition of cultural objects which would be of general application (Alternative I), and yet others a definition which would combine both elements (Alternative IV). Some representatives moreover lent their support to a new proposal contained in document Study LXX - Doc. 36 which combined the text approved by the study group in 1990

with the definition of cultural property to be found in the 1970 Unesco Convention.

27. Before proceeding to a more detailed examination of the various alternatives, the committee decided to put them to an indicative vote with a view to establishing the preferences of delegations, not so much as regards precise drafting but rather the method to be followed: 14 delegations favoured Alternative I, 15 Alternative II, one Alternative III, twelve Alternative IV, nine the text adopted in 1990 by the study group and eleven the new proposal.

28. Rather than considering each alternative separately, the committee preferred to discuss the principles on which they were based. The first of these was whether the scope of the definition, and in consequence the application of the Convention, should be limited only to cultural objects requiring special protection in view of their "outstanding" significance (language to be found in Alternative I). Some representatives supported this limitation as they considered the definition to be far too broad in respect of theft and feared that Governments would not be willing to alter their rules of private law governing the acquisition of movable property for such an ill-defined category of objects, or because they believed that it was necessary to pay more regard to commerce in cultural objects so as to permit the creation of a broad cultural community.

29. A large majority of the committee was however opposed to such a limitation on the sphere of application, principally because it ran counter to the most important principles of the Convention, one of which was to require purchasers of cultural objects to be diligent in inquiring into their origin. If therefore only certain objects were to be returned after a theft, there would be no change in the present practice in the art trade of deliberately ignoring the origin of cultural objects. Furthermore, some representatives suggested that such a limitation would exclude from the scope of the Convention less important cultural objects such as those stolen from small churches, local museums and private houses, which should on the contrary be included. Another representative drew attention to the difficulty which would naturally face any owner in identifying a cultural object which was not of "outstanding" significance; he also responded to the argument based on the need to encourage commerce in cultural objects by recalling the increasing number of thefts of such objects and that any measure facilitating their return would encourage collectors to make the necessary inquiries and thus promote the legal trade in such objects.

30. These were clearly policy questions which demonstrated the connection between the general definition given in Article 2 and the legal regime governing stolen or illegally exported objects laid down in Chapters II and III. Since these two regimes differed, some representatives once again asked whether it would not be desirable to provide a definition for each chapter rather than one common to both of them and a written proposal to this effect was submitted (cf. Study LXX - Doc. 33). Some representatives however believed that it was too late in the day to contemplate

two definitions as that would put into question the general structure of the future Convention. As most representatives were in agreement that the definition of a cultural object was subject to certain limitations in Article 5, paragraph 3, the crucial question was whether the definition in Article 2 was satisfactory for stolen cultural objects. While some participants were concerned as to the volume of cultural objects which would be caught by the definition and preferred to see it restricted in some way with regard to theft, others were opposed to any move in that direction for the reasons set out above.

31. A proposal had been made at the second session of the committee, the effect of which would have been to leave it to each State to decide what was of cultural significance for it, which constituted some sort of limitation on the objects subject to return (cf. Alternative II "designated by each Contracting State ..."). This proposal had been supported by a certain number of representatives in the name of the principle of the sovereignty of Contracting States, possibly coupled with a certification system which would prove that a cultural object designated as being significant for a Contracting State had been legally removed from its territory (cf. Study LXX - Doc. 38, Misc. 7).

32. While the committee was unanimous in agreeing that any Contracting State was entitled to designate in its national legislation what objects were of cultural significance for it, the question which arose in respect of the draft Convention was that of the effects which should be given to such a designation, or rather the obligations which a State addressed would be willing to undertake. If such a designation were to bind the State addressed without it being able to exercise any form of control, then many representatives found such a provision to be unacceptable. Others moreover drew attention to the ambiguous nature of the words "designated by each Contracting State": was this a designation by way of an inventory, a system of classification or a register, or did it amount to a simple declaration by a Contracting State? In addition was that State the State of origin, the State of the forum, or any Contracting State?

33. Some representatives considered that it was essential to know who should determine whether an object was a cultural object and that the concept of a cultural object should be decided by the law of the requesting State. They found support for their position in particular in a Resolution of 1991 of the Institute of International Law (12th Commission) on works of art, which was moreover substantially similar to that contained in Alternative II, together with a notion of additional international control: a "work of art is a work which is identified as belonging to the cultural heritage of a country by registration, classification or by any relevant internationally accepted method of publicity." Those representatives believed that even if there were an implicit reference to the State of origin in any general definition, there might be some who would prefer to state it expressly, and this could be done in a second paragraph (cf. Study LXX - Doc. 38, Misc. 1).

34. Some representatives, while in principle satisfied by the general formula, wondered whether human remains, archival material and other objects were covered by the present wording, and suggested the addition of certain adjectives such as "prehistoric" or "palaeontological". One representative believed that through such adjectives as "historical", "scientific", "artistic", "spiritual" and "religious" all objects would be covered in a general definition as they would encompass the three fundamental characteristics of works of art ("information", "emotion" and "religion"). Moreover, the text already contained the words "for example" which left open all other possibilities. Stress was also laid on the danger associated with the system of enumeration and with its interpretation since in some countries a system of *a contrario* reasoning was followed. One representative replied that there would be no difficulty if the list were to provide only examples, but pointed out that the present version of Alternative IV was exhaustive. The attention of the committee was in particular called to the words "natural heritage" to be found in Alternative II as the consequences of such an addition would be particularly significant for the scope of the future Convention so that a more detailed discussion would be necessary.

35. One of the elements in the definition of cultural object in Alternative IV was that the object should be "more than 100 years old", which seemed to be inappropriate to some representatives, for example in relation to ethnological objects, or too long if regard were had to the realities of the contemporary or modern art market. Preferences were expressed for a period of 50 years or for no period at all, as had been the case with the draft adopted by the study group in 1990 which had left a discretion in this matter to the court. One representative suggested that if any evaluation *in concreto* of the cultural interest of an object (above all with a view to its export) were to be founded on a general and abstract formula, then it went without saying that the older an object, the more likely that it would be regarded as being of cultural interest. A written proposal to this effect was submitted in document Study LXX - Doc. 38, Misc. 22.

36. The committee then turned its attention once again to objects originating from illegal excavations or which had been illegally transferred following their legal excavation, and to the question of how best to deal with this problem in the future Convention. One representative recalled that objects coming from excavations in the broad sense were already covered by the definition of cultural objects and that they fell within the scope of application of the Convention by virtue of the adjective "archaeological". If such objects were deemed to be stolen objects, which was the opinion of a number of representatives, then Chapter II would apply (cf. Study LXX - Doc. 38, Misc. 14). Article 5, paragraph 3, sub-paragraphs (a) to (c) moreover clearly referred to archaeological objects: the language "for example, a scientific or historical character" had been introduced precisely to take account of the problem of clandestine excavations in archaeological sites, so that objects from such excavations would *ipso facto* be considered as falling within the category described by

sub-paragraph (c). It was therefore unnecessary in the opinion of that representative to include a special article or chapter concerning the problem, although it should be referred to at length in the explanatory report on the text and a mention in the preamble would certainly be appropriate. Some representatives however recalled that a vote had already been held on this question at the preceding session and that it had been agreed to mention the question explicitly in the text.

37. During the second reading, the Secretary-General of Unidroit explained how the drafting committee had reached the two alternatives which now appeared in the text (cf. Study LXX - Doc. 38, Misc. 21 rev.). The first alternative took over a number of ideas from some of the preceding alternatives in the form of a general definition which indicated in square brackets the controversial points on which no decision had yet been taken. The second alternative on the other hand corresponded to the former Alternative IV, which was similar to the proposal contained in document Study LXX - Doc. 36, and here again the points which still had to be settled were indicated by the use of square brackets.

38. Since it was of the opinion that it was at this juncture difficult if not impossible to vote on the two different systems, the committee preferred to defer any decision until its next session.

Article 2 bis

39. One representative took up a proposal which had already been made at the second session of the committee for the establishment of a uniform international identity card which would accompany cultural objects, in the absence of which the sale, purchase, import and/or export of such objects would be prohibited by Contracting States (cf. Study LXX - Doc. 30, paragraphs 75 and 76; Study LXX - Doc. 38, Misc. 2). For the purpose of considering whether such a certificate would constitute an appropriate means of discouraging the illegal traffic in cultural objects, while at the same time paying due regard to the legitimate interests of international trade, a working group was set up in the course of the session. Its conclusions were submitted in document Study LXX - Doc. 38, Misc. 7, and one element of the proposed system was the addition of an Article 2 *bis*. One representative stated that there already existed in his country an extremely useful system concerning export permissions, but the idea of every single cultural object having its own certificate in a context other than that of its export seemed to go much too far. For lack of time the committee deferred until its next session discussion on the substance of the proposal and in particular that regarding the certificate.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

40. A written proposal was submitted calling for the deletion of the whole of Chapter II or, if other delegations were opposed to such deletion, for the possibility for a Contracting State to reserve the right to exclude the application of that Chapter (cf. Study LXX - Doc. 32, pp. 1 and 2, and a proposal for an Article 10 *bis* in Study LXX - Doc. 38, Misc. 1). In support of the proposal for the deletion of Chapter II as a whole, its author explained that there were scarcely any legal systems which, in purely domestic situations, distinguished, in respect of the restitution of stolen objects, whether they were to be considered cultural or not within the meaning of the Convention and it could therefore be difficult to accept such a distinction solely because the situation was international.

41. Conscious of the difficulties which could arise in the implementation of Chapter II, a member of the study group which had drafted the text adopted in 1990 expressed concern at such a proposal as Chapter II contained the most important provisions of the Convention. The fact that the future Convention might lead to changes in the domestic law of some countries ought not to prevent this "great step forward" which the Convention would permit in comparison with the present situation. There was in fact no other means of hindering the illicit traffic than that of establishing a special regime for cultural objects in regard to acquisition in good faith. Some other representatives shared this sentiment, while suggesting that it might be possible to improve the wording.

Article 3

42. Apart from proposals put forward by some representatives such as that for the deletion of Chapter II as a whole, or to allow Contracting States to exclude its application by way of a reservation, there was a broad consensus within the committee in favour of the principle laid down in Article 3, **paragraph 1**, namely the automatic restitution by the possessor of any stolen cultural object.

43. A number of representatives drew attention to the language featuring in square brackets in the text. At the first session of the committee, a proposal had been made to replace the word "possessor" by another, for example "holder", or to define it more precisely. It seemed that the English version which spoke of the "physical possessor" raised more problems than the French one, and some representatives favoured the deletion of the word "physical" on the ground that it could give rise to difficulty if the cultural object were in the hands of an institution rather than of a physical person. There was a general sentiment that the notion of possession should be a broad one which would coincide with the purpose of the future Convention of facilitating the restitution of cultural objects, without necessarily corresponding to the domestic law of each of the Contracting States. One representative recalled that the draft EEC Directive spoke both of the "possessor" and of the "holder" and that it

gave a precise definition of both terms.

44. A similar drafting problem was raised in connection with the suggestion made at the preceding session to identify the person to whom the stolen object should be returned, that is to say "to its owner". The committee of experts had also considered whether it might not be necessary to include in the draft a definition of such terms as "possessor" or "owner". Some members had suggested replacing the words "to its owner" by "to the requesting State" or "to the claimant", or again to come back to the original text which had provided no such clarification. The study group had been of the opinion that the object should be returned to the dispossessed person and that it would be for the court, which was accustomed to deciding questions of ownership and conflicts of legal interests, to decide who that person should be.

45. The same is true of the concept of "theft" and of "stolen" cultural objects and one representative again raised the question of who should determine the unlawful character of the act. It was by way of reply recalled that the study group had opted for the present language which would permit the court seized of the claim for restitution to determine the definition and the law to be applied. It would, in other words, be free to decide whether to apply its own law or its rules of private international law for the purpose of determining the applicable law (cf. Study LXX - Doc. 19, paragraph 37 and Study LXX - Doc. 23, paragraphs 54 and 55).

46. As to the concept of theft itself, the representative of Interpol congratulated the Unidroit committee on the limitation to theft, thus avoiding the problems of international criminal law, and found particularly felicitous the reference in Article 11 to other illegal acts which could result in the restitution of a cultural object. Other representatives believed that it was evident that the act should be one sanctionable under the law of both the requesting State and the State addressed, and that there should be an autonomous definition of theft which would cover similar illegal acts.

47. Always in connection with the notion of theft, a proposal was made in relation to paragraph 1 to the effect that objects originating from clandestine excavations or which were illegally transferred following their lawful excavation should be assimilated to stolen objects. Without questioning the specific reference to excavations which had been decided upon following a vote at the previous session of the committee, some representatives expressed a preference for a separate article or paragraph so as to clarify the matter. A drafting proposal to this effect was made (cf. Study LXX - Doc. 38, Misc. 14).

48. As regards **paragraph 2**, concerning the time limit within which an action for the restitution of stolen cultural objects should be brought, some representatives wondered whether the question of time bar ought not to be dealt with in a general provision common to both Chapters II and III rather than in separate articles. It was however agreed that it would be

preferable to retain for the time being two distinct provisions after which it would be possible to decide whether they could be combined in a single provision. One representative moreover called for the deletion of the paragraph as a whole for the reason that the very idea of a time bar created a problem of principle for his own legal system.

49. As to the length of the limitation periods, opinions were divided, some representatives preferring shorter periods, others longer, and some no period at all. One representative stated that his own legal system drew a distinction in this connection between good faith and bad faith and he proposed by way of compromise that a fairly short period be adopted in cases of good faith and a longer one for those of bad faith. It was by way of reply recalled that the structure of Article 3 was such that there would be restitution in all cases, irrespective of whether the possessor was in good or in bad faith, and that moreover it would be impossible to know before an action was brought whether the possessor was in good faith and that it would therefore not be appropriate to establish different limitation periods on this basis.

50. Generally speaking, no objections were raised within the committee as to the length of the shorter limitation period, although some participants would have preferred it to be lengthened. There was however some discussion concerning the starting point of the period since, following a proposal and a vote at the last session, the shorter period would begin to run from the discovery of the location of the object "[or,] [and] the identity of the possessor." The committee had been fairly evenly divided between those who favoured alternative requirements and those who considered that they should be cumulative. Some representatives believed that the conjunction "and" was essential, principally for the reason that the limitation period would begin to run at a later date. One representative moreover recalled that Article 7 of the draft EEC Directive contained the word "and", coupled with a very short period. Other representatives, while understanding the concern of those who wished to allow dispossessed owners to bring an action without being constrained by too short a limitation period, supported the maintenance of the original text which contained the alternative conditions. If indeed the dispossessed owner knew of the location of the object but not of the identity of the possessor or vice versa, then it must indeed act, thereby interrupting the limitation period. In response to the concern expressed by some participants in connection with the difficulty of establishing the identity of the possessor, one representative insisted upon the need for, and the advantages which would derive from, a definition of "possessor", above all when legal proceedings were contemplated.

51. One representative drew the attention of the committee to the question of whether the period should begin to run in cases where the situation was at that time a purely domestic one, and therefore not covered by the Convention, or only when it assumed international dimensions. The committee recognised the existence of this problem but preferred to leave it aside until such time as it had considered the chapter dealing with

illegal export, since it might be desirable to replace the two provisions by one common to both chapters.

52. Another representative suggested that a claim for restitution against the present possessor should be excluded if it were not possible to bring an action against the preceding possessor, and that Article 3 did not satisfactorily deal with this question. In this context he recalled a written proposal submitted by his delegation which was to be found in document Study LXX - Doc. 27 as paragraph 8 of Article 3.

53. Once again the language "or ought reasonably to have known" was the subject of considerable criticism. It was indeed seen as being one open to interpretation, ambiguous and contrary to the interests of developing countries in which cultural objects were most often stolen. One representative believed that such a provision had no place here, but if it were desired to have regard to these considerations, then a provision should be added according to which the court would be enabled to take into account the conduct of the claimant and of the possessor with a view to determining whether the claimant had been unreasonably slow in discovering the identity of the possessor and, at the same time, whether this delay had caused prejudice. Another representative was of the opinion that the language created a serious obstacle to the realisation of the aims of the future Convention, namely facilitating the return of a cultural object to its owner or to its country of origin and that, if the limitation periods were to be maintained, the language should be deleted.

54. In this context, the Unidroit Secretariat recalled that the reasons which had led the study group to include such language were set out in paragraph 63 of document Study LXX - Doc. 23. The purpose of the provision was above all to facilitate the bringing of evidence since it was often difficult if not impossible to prove actual knowledge. Other representatives stated that the retention of this language in the text was of fundamental importance if their Governments were to contemplate ratifying the future Convention. It was moreover recalled that a vote had taken place at the preceding session and that, on that occasion, 17 delegations had supported the retention of the wording, eleven had voted against and two had abstained.

55. At the request of the committee, the Chairman once again put to the vote the retention of the words "or ought reasonably to have known" and this time 15 delegations voted in favour, 14 against and eleven abstained. In these circumstances it was decided to retain the language in the text in square brackets.

56. As regards the absolute limitation period, a large majority of representatives considered the period of 30 years as from the time of the theft to be insufficient. Some even called for the deletion of any such period since they were of the opinion that it should be possible to recover a stolen cultural object without any limitation as to time. If the principle of acquisitive prescription were to be admitted, this would

perpetuate the practice whereby cultural objects were concealed for long periods after their theft. Other representatives however were unable to accept such a proposal, considering that some limitation for the bringing of claims for restitution was of fundamental importance.

57. In a spirit of compromise, one delegation submitted a written proposal to add a new paragraph to the effect that there should be no limitation period for the bringing of a claim for the restitution of those cultural objects which constituted the very heart of the cultural heritage of a State, those which were intimately related to the sense of identity of a people, that is to say cultural objects belonging to a State or to a public body in that State (cf. Study LXX - Doc. 38, Misc. 15). This proposal was supported by a number of representatives. Others however expressed strong opposition to the proposal in the name of the legal security of international transactions and because of their concern that the State addressed would have no power of supervision over what the requesting State declared to be objects belonging to its public collections. Moreover, the fact that each public institution might have a register of the objects belonging to it did not resolve the problem of objects originating from illegal excavations. Another representative believed that to establish the principle of imprescriptibility would be to go too far and recalled the existence in public international law of a degree of protection for the most important collections (for example the Treaty of Riga of 1921 which protected the collections of the Hermitage Museum in St Petersburg on account of their universal importance). By way of compromise he proposed the extension of the limitation period for collections of national and worldwide importance, for example 50 years. One representative recalled that this was the solution which had been retained in Article 7 of the draft EEC Directive where such objects were subject to a longer limitation period than others.

58. The committee was therefore called upon to vote on the addition of a new provision concerning objects belonging to public collections or enjoying a special status. 27 delegations voted in favour, 14 against and nine abstained. In consequence the committee instructed the drafting committee to prepare such a provision.

59. On second reading, the Secretary-General indicated the principal amendments made to the text by the drafting committee which were contained in document Misc. 21 rev. He stated that the drafting committee had deleted the word "physical" on the ground that it was for the time being at least sufficient to refer to the "possessor" without prejudice to whether it might be necessary later, and perhaps in a separate article, to define the term "possessor". The drafting committee had also deleted the words "to its owner", in particular in the light of the vote which had been held at the second session of the committee as those words added nothing and risked giving rise to problems. Moreover, the reference to excavations had been removed from the new paragraph 1 so as to render the drafting less heavy, and given the importance of this question it was dealt with in a separate provision (paragraph 2).

60. The committee as a whole recognised the marked superiority of the new paragraph 1 of Article 3, although some representatives insisted on the need to employ a broader notion than that of theft so as not to exclude certain acts similar to theft but not qualified as such. To this end some representatives would have preferred a definitions article and one of them proposed for the definition of theft the formula of the Institute of International Law "or otherwise taken away illegally from its owner or holder". It was recalled that regard should be had also to Article 11 which permitted the extension of the concept of theft to cover other illegal acts. Some representatives believed that no such article was necessary since the notion of theft, for the purpose of the Convention, was not the restrictive notion of certain national laws, but rather a broader, autonomous one which would of necessity encompass similar acts. Other representatives however believed that it would be necessary to state this in the explanatory report so as to avoid differing interpretations.

61. Another representative requested that the term "restitution" be more precisely defined, indicating that the possessor might be the third or fourth person in the chain, and he wondered to whom the object should be returned (the person from whom the object had been bought or the person from whom it had been stolen). Indeed the question of the meaning of "restitution" arose in particular in connection with the new paragraph 2 concerning excavated objects when the excavation had been carried out by the owner of the land himself. One representative replied that the most satisfactory solution, although it had not received unanimous support, would be to add the words "to the claimant". Here again some representatives called for a more detailed explanation in the explanatory report on the future Convention or for a definitions article.

62. In the absence of further observations, the general principle laid down in Article 3, paragraph 1 was voted upon, subject to the exact wording of the proposal. 44 delegations voted in favour of the paragraph, with none against and no abstentions.

63. The committee then turned its attention to the new paragraph 2 which sought to assimilate illegally excavated objects to stolen objects. One delegation stated that the courts of its country required proof of ownership before establishing theft, and it therefore insisted on the proposal it had already submitted at an earlier session to add the words "if it is proven to have been illegally excavated and to have been owned by a person or a State" (cf. Study LXX - Doc. 38, Misc. 14). Without prejudice to the precise wording of the provision, the committee endorsed paragraph 2 of Article 3 as prepared by the drafting committee by 42 votes to none, with five abstentions.

64. The new paragraph 3 corresponded to the former paragraph 2 with the same square bracketed language, either because the committee of experts had been unable to reach a clear decision ("or ought reasonably to have known" and "[or,] [and]"), or because the drafting committee had not been given instructions, as was the case with the length of the periods. The

Secretary-General further recalled that the committee had contemplated the possibility of a provision common to Chapters II and III for the limitation periods, but that it was impossible to take a decision on this question until such time as it was known whether the periods would be the same or not. This question, as well as the interruption of the periods in the event of war or the severance of diplomatic relations, would be considered by the committee later and the latter in particular on the occasion of a review of the final provisions, as had already been agreed.

65. The committee voted on the starting point for the shorter period, and more specifically on the question of whether it should begin to run from the discovery of the location of the cultural object "and" the identity of the possessor, or whether these two requirements ought not to be alternatives: 24 delegations favoured the word "and", 13 the word "or" and six abstained. In consequence the two alternatives remained in the text in square brackets, although it was noted that the outcome of this vote was precisely the opposite of that at the preceeding session when 21 delegations had supported the word "or" and twelve the word "and".

66. The committee then examined once again paragraph 4 which, without going so far, reflected the written proposal submitted in Study LXX - Doc. 38, Misc. 15 which made provision for a special regime for objects belonging to public collections. Following the instructions of those delegations which preferred a longer period, the drafting committee had suggested in square brackets two possibile solutions: the first more radical one was the imprescriptibility of claims for the recovery of such objects, and the second a more moderate one which contemplated a period of 75 years, as was the case in the draft EEC Directive. One representative recalled that no decision had been taken as regards the retention of the absolute period, and that if it were to be deleted then there would be no reason to make provision for different periods for cultural objects belonging to public collections or institutions.

67. The delegation which had submitted the written proposal feared that the words "public collection" chosen by the drafting committee might not cover ecclesiastical objects and it therefore proposed that the drafting committee re-examine its text. Another representative pointed out that if the paragraph were to be retained, then it would be necessary to define the term "public collection" in the text of the Convention itself and not in an explanatory report which would have no official status. Other representatives noted that if the paragraph were to reflect the discussions of the committee on first reading, they were unable to accept it as it implied a discrimination in terms of the protection of cultural objects by according greater protection to those belonging to a public collection than to others and they could admit no discrimination, whether positive or negative. Finally, one representative drew the attention of the committee to Article 11 (a)(ii) which allowed each Contracting State to apply its national law when this would permit an extension of the period within which a claim for restitution of the object must be brought under the Convention. The committee deferred any vote on this question until its next session.

Article 4

68. Two alternative versions of **Article 4** were submitted to the committee, the first following the original text and establishing the principle of the compensation of a possessor who could prove that it had exercised due diligence when acquiring the object, while the second laid down the opposite principle, with the exception of the reimbursement of the costs of protecting or restoring the object. One representative expressed strong opposition to any form of compensation of the possessor of a stolen cultural object, believing this to be a fundamental principle which must be reflected in the Convention if it were to have any impact on the trade in stolen goods. He was therefore in favour of paragraph 1 of Alternative II.

69. A member of the study group recalled why the article had been drafted as it had, and moreover indicated that the Common Law rule which excluded compensation was preserved by Article 11 (a)(iii) and that there was no intention to limit any existing right to restitution. Some countries however, among the most important importers of cultural objects, protected the good faith purchaser and if therefore the latter were to be deprived of a cultural object, provision must be made for compensation. The study group had not however relied on the traditional concept of good faith but rather on a special criterion of a particular degree of diligence to be exercised in the acquisition of cultural objects. He invited the delegations to approach the question in the spirit of comparative lawyers and not to overlook the fact that a State which is today a requesting State could tommorow be in the position of a State addressed. This was indeed one of the provisions which clearly demonstrated the sacrifices which would have to be made on both sides if a compromise were to be attained.

70. Another representative suggested, with a view to facilitating the discussion on the question of whether compensation ought or ought not to be paid, starting out from the assumption that the law applicable to the transfer of ownership under the choice of law rules of the State addressed was that of a Contracting State. In this connection he had already proposed a formula which was to be found in the text that had emerged from the second session of the committee as paragraph 5 of the article.

71. One representative raised a point of order and appealed to the committee not to put into question the principle of compensation which had been accepted following a vote at its preceeding session in which 20 delegations had supported the principle, ten had voted against it and six had abstained. A large number of representatives supported this point of order.

72. Without in any way questioning the principle of compensation, one representative expressed his concern at the possible amount of the compensation and proposed using the term "reimbursement" rather than "compensation", and providing that the possessor who had exercised the necessary diligence should be entitled to reimbursement of the price paid for the stolen cultural object as well as for any expenses incurred in the

conservation or restoration of that object. Another representative opposed this proposal, considering that a court could always decide to that effect, but that it would be dangerous to make express provision for such a solution as possessors could take advantage of a provision of that nature by incurring expenses which could indeed be prejudicial to the object itself. The committee decided that it would be preferable for the text to remain silent on this question and therefore deleted the provision.

73. On second reading, the Secretary-General stated that Article 4 still appeared in the form of two alternatives, paragraph 1 of which, in the first alternative, reflected the principle of the compensation of a possessor required to return a cultural object if it had exercised due diligence, and in the second alternative the principle that no compensation was due. In the absence of a clear decision by the committee of experts, the drafting committee, itself divided on this point, had been unable to come up with a solution. Once again, some representatives protested against the reopening of discussion on a principle which had already been accepted and called for the deletion of the second alternative so as to avoid the risk of minority opinions continuing to be reflected in the text. Another vote was held, this time on the retention of Alternative II. 25 delegations favoured its deletion, eleven its retention and ten abstained. The committee therefore proceeded to its consideration of Article 4 on the basis of Alternative I alone.

74. The Secretary-General then drew attention to the principal changes in paragraph 1 that had been made by the drafting committee. The alternative form of wording had been deleted since its essential purpose had been to protect the good faith purchaser in the event of the principle of compensation not being accepted. The drafting committee had then introduced the language "that the possessor neither knew [nor ought reasonably to have known] that the object was stolen", a formulation which was completely neutral in respect of the burden of proof, unlike the following phrase, "and can prove". Moreover in the English version the words "necessary diligence" had been replaced by "due diligence".

75. The committee considered this paragraph, which reflected one of the basic principles of the Convention, to be drafted in a satisfactory manner. One representative however suggested deleting the words "and can prove" on the ground that they were superfluous, believing that if the possessor had exercised a degree of diligence, it would be able to prove that fact.

76. The Secretary-General stated that paragraph 2 corresponded to the same paragraph of the former Alternative I, and that the drafting committee had taken as its basis a written proposal submitted in document Study LXX - Doc. 33. The principal changes to the basic text were the introduction of the word "reasonably" in connection with access to a register, and of the reference to "other relevant information and documentation". The specific reference to legislation which had been contained in the written proposal had not been retained as the drafting

committee considered this to be covered by the more general formula adopted. Finally, the words "consulted" and "obtained" appeared in square brackets as the drafting committee had been of the opinion that information could only be "obtained", although the word suggested more passive conduct on the part of the possessor than did the word "consulted", whereas what was called for was proof of the exercise of a certain degree of diligence which implied more active conduct.

77. One representative insisted on a reference in the text to consultation of the legislation of the State of origin which would enable the acquirer to establish whether or not authorisation was required for the export of the object. Some representatives however believed that the proper place for such a provision was not in this article, which dealt only with stolen cultural objects, but rather in a definitions article. Another representative asked whether the language covered the problem of objects which had been illegally removed from excavations in respect of which no register existed. One member of the study group replied that the question was dealt with by other aspects of the diligence required in this respect: for example the character of the parties (had the object been sold in a shop or in a backroom?), the price paid (that would vary considerably according to whether or not the object was of legitimate origin) or various documentation.

78. One representative expressed some perplexity as regards the words "obtained" and "consulted" for while it was true that if something were obtained, it would be following consultation, the converse was not necessarily the case. The committee agreed to retain the word "obtained".

79. Paragraph 2 as so drafted was put to the vote: 41 delegations voted in favour with none against and one abstention.

80. The Secretary-General then stated that paragraph 3 corresponded precisely to the text as amended at the second session and that it was moreover based on an earlier version of the draft EEC Directive. The drafting committee had not considered the words in square brackets as they had not been discussed in plenary.

81. The delegation which had submitted the proposal contained in square brackets (cf. Study LXX - Doc. 29, p. 19) indicated that it was not opposed to the inclusion of a provision in the final clauses establishing the principle of the non-retroactive character of the future Convention, but it wished to recall that its acceptance of certain articles would be entirely dependent upon the acceptance of that principle. Another representative recalled that his delegation had already made a proposal providing for two separate provisions to deal with the problem, one at the end of Chapter II and the other at the end of Chapter III, for since the situations were different the solutions should be also (cf. Study LXX - Doc. 38, Misc. 1). The committee decided to defer discussion on this matter until such time as it considered other provisions of a temporal character, and for the time being to leave the square brackets in paragraph 3 or

alternatively to add a footnote.

82. The committee then turned to paragraph 4 which reflected a proposal made at the preceding session which would permit a third party to guarantee payment of the compensation in place of an owner who would be financially incapable of so doing. This paragraph had not been discussed by the committee and had therefore been reproduced as submitted. The author of the proposal suggested deferring consideration of it until the next session but some representatives believed that it fell outside the scope of the future Convention and that it was of no practical utility, if only because it had no normative substance. The committee decided to delete this paragraph, 27 votes being cast in favour of deletion, with two against and 15 abstentions. While it was clear that the vote reflected the desire of the committee that the paragraph should not appear expressly in the text, there was nevertheless a consensus that the Convention did not require the owner itself to pay compensation, and that in no way was it intended to exclude a system of sponsorship or any other method of paying the compensation.

83. The Secretary-General recalled that paragraph 5 of Article 4 had its origins in a proposal by the working group on the certificate. The drafting committee had been entrusted with the task of considering the report of that working group but had no authority to make any amendments to it and for this reason the paragraph contained, for example, the words "bad faith" which appeared no where else in the draft. The committee decided to defer discussion on this paragraph until it had had an opportunity to consider as a whole the certification system contemplated by the working group.

CHAPTER III - RETURN OF ILLEGALLY [EXPORTED] CULTURAL OBJECTS

84. The drafting committee placed the word "exported" in the title of Chapter III between square brackets in view of the decision taken at the preceding session of the committee of experts to replace the word "exported" by "removed" in the English version throughout the whole of Chapter III. With regard to the title, and more particularly the French version, a difficulty appeared, namely that if such language as "ayant quitté "or" "sortis" were to be employed ("removed" in English), it would be necessary to say from where. For this reason the words "removed" in English and "exportés" in French had been placed in square brackets for further discussion by the committee.

Article 5

85. The innovatory character of Chapter III in general was recalled on many occasions, namely that what was at issue was not only the application of foreign public law but, more generally, that of foreign rules of a mandatory character. Although this principle was rarely affirmed

in rules of positive law, the innovation was, in the present context, necessary at international level since it constituted the expression of a greater awareness of international solidarity. The principle established was therefore that a State on whose territory an illegally exported cultural object was found must return it, that is to say that a State which ratified the Convention would undertake to respect foreign rules concerning illegal export.

86. In view of this innovation, some representatives insisted on the need clearly to define the notion of illegal export in **paragraph 1**. At present the text, which was the same in both alternatives submitted to the committee of experts, contained a reference to the law of the requesting State. It was recalled that the original text had included the words "export legislation", which had created difficulties for certain delegations. Moreover, legislation existed in some countries relating specifically to cultural objects in which were to be found provisions prohibiting their removal from the territory of the country in question, which was not strictly speaking export legislation. The committee had therefore decided to amend the text since, to the extent that the State addressed would be called upon to take into account the law of the requesting State, it would be important to circumscribe the applicable provisions of that law, without which a number of States would have difficulty in ratifying the future Convention.

87. One representative suggested that if the law in question were to be that "applicable to the protection of cultural objects", this could be considered to be a special regime which excluded the application of other rules of civil law such as for example those relating to the transfer of ownership of cultural objects which could be identified as such, and the validity of the contract in question. He therefore proposed a compromise formula "contrary to its law", which would go beyond the sole protection of cultural objects by having regard to the rules of civil law which lay down the grounds for the illegal character of the export. The proposed text would read as follows: "contrary to its law applicable to the protection of cultural objects and to the disposal of property rights therein" (cf. Study LXX - Doc. 38, Misc. 4).

88. Another compromise solution between the broader approach ("contrary to its law") and the narrower one ("applicable to the protection of cultural objects") was proposed as follows: "contrary to the mandatory rules of law of the State in question". Another representative drew the attention of the committee to Article 1, paragraph 2 of the draft EEC Directive which defined the illegal removal of an object from the territory of a member State as a removal "from the territory of a Member State in breach of its rules on the protection of national treasures".

89. As regards the nature of the "other competent authority" one representative, recalling the discussions at the preceding session and the need further to clarify the notion, once again suggested the introduction of a system of Central Authorities for the purpose of centralising claims,

transmitting them and communicating information: such an authority would be designated by each State at the time of its ratification of the Convention. Recalling the wish expressed by the committee at its last session to distinguish the obligation of the State addressed to return the object from questions of procedure, possibly by means of the proposed system of Central Authorities, and since such cooperation would be of importance in the context both of illegal export and of theft, he wished to bring up the idea once more and proposed a new text for insertion in the future Convention (cf. Study LXX - Doc. 32, pp. 4 and 5).

90. He stressed however that the system of Central Authorities was not intended to be exclusive in the sense that all requests and applications should necessarily be made through Central Authorities. On the contrary, it was to be understood that applications and requests under the Convention might also be made directly to the judicial or other competent authority in the State addressed and also that the Convention would not exclude direct cooperation between the competent authorities of the Contracting States. In conclusion, he recalled that a similar mechanism was to be found in Articles 3 and 4 of the draft EEC Directive.

91. Alternative II of Article 5 contained a provision according to which Contracting States would forbid the import of cultural objects in the absence of an authorisation issued by the State of origin of such objects (paragraph 2). The delegation which had made this proposal recalled its suggestion that a uniform identity card be introduced by the Contracting States so as to prevent illegal traffic in cultural objects and to halt the growth of the black market in them (cf. Study LXX - Doc. 38, Misc. 2). The committee was also informed that France had recently established new rules for the control of the export of cultural objects through a system of certification (cf. Decree no. 93-124 of 29 January 1993) and that Article 2, paragraph 1 of EEC Regulation no. 3911/92 on the export of cultural goods provided that "[t]he export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export licence". The committee decided to refer the question to the working group set up to consider the possibility of a certification system which would submit the results of its work to the committee at a later stage.

92. The committee then considered **paragraph 2** of Alternative I. At the previous session, eleven delegations had voted for its deletion, nine for its retention, subject to some minor amendments, and seven had abstained. On that occasion, the committee had deferred any decision on the words "[t]o be admissible" which at this session now appeared in the text in square brackets. Paragraph 2 of Alternative II was not considered on first reading since it was bound up with the certification system which the committee preferred to deal with as a whole.

93. One representative believed that this was a question of procedure which should be left to each Contracting State and which had no place in an instrument such as that under consideration. He recalled the outcome of the vote at the preceding session and called for the deletion of

paragraph 2. Some representatives noted that the procedure to be followed would be that of the State addressed, which could risk losing a certain degree of uniformity and for this reason they were opposed to the proposal. Other representatives preferred a less radical approach consisting in the amendment of the text, in particular by deleting the words "[t]o be admissible". For her part, one representative expressed concern at the fact that the present wording suggested that the furnishing of particulars was a pre-condition to starting an action for the return of a cultural object and she proposed a new form of wording according to which the furnishing of particulars would be required but not a *sine qua non* for the bringing of a claim (cf. Study LXX - Doc. 33, p. 2). Another representative drew attention to the importance of this question in connection with Article 7(b) concerning the limitation periods for the bringing of claims. If those periods were to be short, it could be very difficult, if not impossible, for a Government to furnish all those particulars. If the provision of such information were to become a pre-condition, and moreover be coupled with a limitation period of, for example, one, two or five years, then Governments would find themselves in an extremely difficult situation.

94. This idea of the admissibility of an action was also to be found in Article 5 of the draft EEC Directive which provided that "[p]roceedings may be brought only where the document initiating them is accompanied by: a document ..., a declaration". One representative however pointed out that the requirement of admissibility in the preliminary draft Unidroit Convention was for the time being founded on something very vague ("particulars necessary ... to evaluate") whereas admissibility in the draft Directive was subject to two precise conditions (the presentation of a document describing the object covered by the request and stating that it is a cultural object, and of a declaration by the competent authorities of the requesting Member State that the cultural object had been removed from its territory). He believed that inadmissibility could be an appropriate sanction when precise requirements were not met but, if it were to be left to the State addressed to determine what was necessary, this vague obligation could not be subject to the sanction of inadmissibility. Another representative considered that the present wording confused matters of substance with the requirements for admissibility and that, if the character of the particulars to be furnished were not to be distinguished from what was mentioned in paragraph 3, each court would be confronted with the delicate question of how to determine whether these requirements had been met. It was important to distinguish control of the right to initiate proceedings from that of the importance of the object and what was stated in paragraph 3, and in consequence therefore to specify the nature of the particulars to be furnished by the requesting State.

95. Without taking a stand on one form of wording or another, one representative was of the opinion that a provision of this type should be included in the future Convention, perhaps in another paragraph, as it was important that two elements should be retained: procedural evidentiary requirements should be left to the State addressed and those procedures should be distinguished from those contemplated when a Government initiated

proceedings on behalf of one of its nationals in another country, a practice well known in public international law.

96. The committee was as a whole in agreement that if no reference were to be made to requirements for admissibility, this did not mean that they would be dispensed with, although the upshot could be that in certain systems the competent authority of the State addressed would apply its normal law governing admissibility. This would certainly not constitute a step forward and the committee decided to set up a working group on Article 5, paragraph 2 with a view to seeking a compromise solution providing a uniform rule on the question.

97. Some representatives insisted on the connection between paragraph 3 of Article 5 and Article 2 which defined cultural objects for the purpose of the future Convention. Before the committee considered the various alternatives for the paragraph, a member of the study group explained the way in which the group had arrived at the wording of the two provisions. There had been a consensus to the effect that while most States might be willing to contemplate the restitution of stolen cultural objects, this would not be the case for illegally exported cultural objects. The question had therefore arisen of how to restrict the range of objects covered by Chapter III, and the group had opted for the solution contained in paragraph 3 after concluding that the categories of objects which certain States might be willing to return could be grouped under sub-paragraphs (a) to (e). This list comprised interests which were considered to be worthy of protection by defining those categories of cultural objects which all States might deem to merit protection irrespective of any other consideration. Some members of the study group had pleaded in favour of the affirmation of the principle of the respect of the law of the State of origin, but the relationship of that law to cultural objects would have to be assessed by the court in the State addressed since no State would be prepared to recognise or to take into account the rules of public law of another State without exercising some degree of control.

98. The question which the committee was now called upon to decide was whether it wished all illegally exported cultural objects to be returned, in which case paragraphs 2 and 3 could be deleted, but if this was not the case then it would be necessary to determine which illegally exported cultural objects should be returned. One representative was of the opinion that it would first have to be decided what was legal or illegal and that illegal export provided a justification for the obligation to return a cultural object, in which connection it was useful to recall the mechanism established by the draft EEC Directive.

99. The representative of the Commission of the EEC restated the principles governing the return of cultural objects under the draft EEC Directive, recalling that the unlawful removal of an object from the territory of a State was not a sufficient ground for its return since Article 1 defined those objects which could be the subject of proceedings for return, namely those classified as national treasures within the

meaning of Article 36 of the Treaty of Rome and which belonged to one of the categories listed in the Annex. There was therefore no automatic return. Another representative stated that he was in favour of a wide degree of automaticity but an absolute application of the principle seemed to be unrealistic, all the more so in view of the proposed EEC system under which the principle was limited by Article 36 and also perhaps by the case law of the Court of Justice of the European Communities.

100. The principle of automatic return was however strongly supported by one representative who, on the basis of Article 2 of the EEC Regulation on the export of cultural goods, proposed a new wording that read as follows: "The possessor of a cultural object illegally exported from a State shall return it to that State. A cultural object is deemed to have been illegally exported when it is not accompanied by an export licence issued by the competent authorities of the requesting State".

101. With regard to this proposal to transpose the EEC Regulation onto the worldwide level of Unidroit, the representative of the Commission of the EEC recalled that the background to the two instruments was very different. In an area without frontiers, it had been necessary to adopt a system of licences so as to compensate the loss of the possibility to control the exit of cultural objects at internal frontiers. The Regulation and the Directive were the response to that loss of control, introducing a mechanism for cooperation between the member States which, as from 1 January 1993, would no longer protect only their own national heritage but also that of the other eleven member States at the external frontiers. A proposal to introduce a system of licences for movement within the Community itself had been rejected while the Regulation required an authorisation for the export of a cultural object towards a country outside the Community. It was for each member State to decide whether it wished to establish a system of licences, as the Commission had never intended to require the member States to introduce accompanying documentation for an object circulating within the Community; neither had it wished to regulate the protection of each national heritage which remained the responsibility of each member State.

102. Some representatives insisted on the fundamental importance of this provision for their Governments and, with regard to the recognition of national rules governing export, they were not prepared to accept the principle of automatic return in any shape or form, being able to go no further than to take account of certain rules of foreign law of mandatory application.

103. Another representative believed that the approach presently reflected in paragraph 3 would render ineffective all of that part of the Convention concerning illegally exported objects and proposed a different approach under which there would be no absolute obligation to return an object, but rather a number of exceptional cases in which the State addressed could refuse to order the return (cf. Study LXX - Doc. 38, Misc. 1, Article 6). He suggested that another possibility for refusing the

return of an object could be through the reservation appearing in Article 10 *ter* (b) of his proposal (cf. Study LXX - Doc. 38, Misc. 1). This proposal was criticised by one representative on the ground that the State addressed would practically be obliged to endorse the rules of a foreign State on the export of cultural objects and could only refuse the return in the cases mentioned in Article 6. The same representative recalled that the alternative criteria contained in Article 5, paragraph 3 had been adopted by the study group so as to provide elements which could assist a judge in reaching a decision when seized of a claim for the return of an illegally exported object. The study group had found it perfectly normal that it should be the requesting State which must prove the well-foundedness of its request and it was difficult to see how it would be practicably possible to reverse the burden of proof and to require a State addressed to justify its refusal of a request for return.

104. As to the question of proof, one representative suggested that there was a basic element lacking in paragraph 3, namely that it must first be proved that the export had taken place contrary to law, for otherwise there would be no justification for the return. He recalled that each time that the Convention established a condition it had to be proved that the condition had been satisfied if the Convention were to apply. A written proposal was submitted to this effect which would add the following language to paragraph 3: "[if that State proves] that the object was removed from its territory contrary to its law [and]" (cf. Study LXX - Doc. 38, Misc. 3).

105. The list of interests mentioned in paragraph 3 continued to give rise to discussion within the committee of experts. One representative proposed changing the order in which the interests were listed by placing sub-paragraph (e) first as it was the most important one; another was concerned that objects from dead cultures were not covered because of the presence of sub-paragraph (d) relating to the use of an object by a living culture. Yet another suggested that sub-paragraph (a) be drafted more clearly since he had understood that at present it would permit a State to decide in an arbitrary manner whether or not to retain and conserve an object whereas it had been explained to him that the underlying concern of the study group had been the risk of damage to the object caused by its removal from its context.

106. One representative suggested that there be a reference in this paragraph to clandestine excavations in view of the importance of this scourge for certain countries, in particular for those sites which belonged to the heritage of mankind. A member of the study group replied that the problem had been dealt with in the initial text in sub-paragraphs (a), (b) and, above all, (c). In point of fact, the words "for example, a scientific or historical character" had been introduced to take account of the problem of the clandestine excavation of archaeological sites so that objects originating from such excavations would be considered *ipso facto* as belonging to the category described in that sub-paragraph. The question of objects illegally removed from legal excavations was on the other hand

dealt with in Chapter II on stolen objects. A different approach was proposed to the effect that objects from clandestine excavations should not be subject to criteria (a) to (e) on account of the gravity and frequency of the phenomenon, and that provision should rather be made for their automatic return, which would have a greater deterrent effect. Another representative recalled that the committee had, while deferring any decision until later, contemplated drafting a provision, or even a separate chapter, in respect of such objects so as not to raise more problems than could be solved in a provision in Chapters II or III.

107. The committee then considered more closely the three alternatives proposed for paragraph 3, the most important distinguishing feature between them being the level of proof to be adduced by the requesting State. Some representatives favoured Alternative B which had however been withdrawn by its authors in favour of Alternative A, subject to certain amendments, and in the absence of support for Alternative C, the committee took Alternative A as a basis for discussion.

108. Alternative A contained in square brackets language the effect of which would be to remove the need for any proof whatsoever since it would be sufficient that the requesting State certify that an object had particular cultural importance for it, for the State addressed to have to return the object. It was precisely this possibility for a simple declaration by requesting States to suffice that was the object of serious criticism by certain representatives who believed it to be of the utmost importance that the requesting State prove the loss suffered as a result of the export. These representatives explained that the use of the word "certifies" amounted to the adoption of the principle of automatic acceptance of export practices of other countries which many representatives had rejected during earlier discussions.

109. For other representatives however, the mere declaration of the cultural significance of the object by the requesting State was a condition for the acceptance of paragraph 3, in particular for those States which had enacted legislation protecting cultural objects. Another representative believed that if the requesting State were required to prove loss, the decision of the State addressed whether or not to order the return would be highly subjective. He considered however that some element of proof would be necessary if there were to be an independent tribunal, external both to the requesting State and to the State addressed, which would determine whether or not an object should be returned. He further stated that since the "other competent authority" of the State addressed could be a political department and reach its decision on the basis of considerations other than legal considerations, provision should be made for an appeal to a neutral body, the possibility of recourse to arbitration provided for in Article 9 being, in his view, insufficient (cf. Study LXX - Doc. 38, Misc. 6).

110. In reply to this argument, according to which the State addressed would not make an objective determination, one member of the study group recalled the intention of the group when drawing up this

provision. At present, most legal systems did not recognise and did not enforce the laws of other countries regarding the export of cultural objects. The group had perfectly well understood why States had introduced export prohibitions and why they wished them to be enforced abroad. It had however also appreciated the position of those States which did not recognise such prohibitions, namely that those States sometimes had constitutional provisions which did not permit them to deprive an owner of his property. Others were attached to the free movement of goods, on which principle their economic prosperity was founded, and in particular that of cultural objects as this stimulated artistic creativity and cultural development. The study group had reached the conclusion that the most that could be achieved was to ask States at least to recognise some export prohibitions, and there had seemed to be a consensus in regard to cultural objects of real significance for the cultural history of another country: this accounted for the wording of paragraph 3 which constituted a very big step forward, beyond which it would probably be impossible to go.

111. At this stage, the committee was called upon to vote on the question of whether it wished to adopt the principle of the automatic return of illegally exported cultural objects or whether it preferred to maintain the present system. 14 delegations voted in favour of the principle of automaticity, 20 against and eight abstained.

112. The Chairman noted that there now seemed to be some inconsistency between the text of Alternative A which made provision for an option between a declaration of the cultural importance of an object and proof of the impairment caused by the export ("certifies ...; or proves"), and the committee's vote rejecting the principle of automaticity which was reflected by the word "or". One representative considered that the words in square brackets in Alternative A could be removed from the text since such a declaration would in any event be made at the time of the initial request. The drafting committee was asked to take account of these observations.

113. The committee then considered the proposed new **paragraph 4** (cf. Study LXX - Doc. 31, p. 10 as modified by Study LXX - Doc. 38, Misc. 16) which sought to safeguard the cultural interests of another State threatened by a contravention of its national export legislation or legislation protecting cultural objects, or by successive exports contrary to regional agreements governing the movement of cultural objects. The aim of the proposal was therefore that in place of a State directly affected by the violation of its legislation which brought no action for recovery of the object, another interested State might do so under the conditions laid down by the Convention.

114. Since this was in some way an enlargement of the concept of a requesting State, one representative wondered whether it might not be simpler to reach the same result by defining a requesting State as that which brings an action for the return of a cultural object illegally exported either from its own territory or from that of a regional grouping

of which it forms a part. Another representative suggested that the same objective could be achieved by a broadening of the notion of illegal export: a legal export followed by an illegal one to a third State would be considered as illegal *ab initio*.

115. The representative of the EEC Commission explained the mechanism put in place by the EEC Regulation on the export of cultural goods, distinguishing two separate cases. The first of these was that of a cultural object temporarily exported from one member State to another member State of the EEC and in such cases the authorities competent to issue a licence, if that were necessary, would be those of the first member State. If subsequently the object were to be moved to a State outside the Community without a licence, the exit would be illegal; if the licence were to be issued by a State other than the State of origin, this would constitute a violation of the conditions for the temporary transfer of the object from the first to the second member State. The second case was that of a definitive and legal transfer from one member State to another and under Article 2, paragraph 2 of the Regulation the authorities of the latter State would become competent to decide whether or not to deliver an export licence for removal of the object to a non-Community country. In such situations, the first State could no longer claim the return of the object because the licence had been issued by the authorities of the State competent to do so. In cases of this kind, the system established by the EEC Regulation would be put in question by the proposed paragraph 4.

116. Another representative indicated that regard must be had, in any regional agreement, to the position of the good faith purchaser for value and no one would want to see such a purchaser involved in a dispute between two or more States Parties to a regional agreement regarding the illegal removal of an object from one member State to another. He saw merit in the proposal but found it to be too complicated for the instrument under preparation. Another representative considered that the paragraph had no justification since it accorded protection to States which were not entitled to it under Article 5. Moreover, if the State in question had a separate interest, it could take action on a basis other than the Convention.

117. On second reading, the Secretary-General stated that the drafting committee had maintained two alternatives for Article 5, the difference between which lay in the inclusion of paragraph 2 of Alternative II which was related to the certification system. Paragraph 1 of Alternative I essentially corresponded to the text initially submitted to the committee (Study LXX - Doc. 31). The words "applicable to the protection of cultural objects" had been retained in square brackets since the other proposed formulations had not been the subject of discussion on first reading. The words "to the requesting State" at the end of the paragraph had been deleted by the drafting committee in the same way as had been the reference to "the owner" in Article 3, since that seemed to be implied.

118. As regards the qualification of the law, one representative believed that it might subsequently be necessary to define it, but for the time being he could accept the retention of the present language in square brackets, a suggestion which received support from other representatives. The committee decided therefore to follow this path, although one representative stressed that Article 5, for the first time in private international law at multilateral level, imposed obligations on the community of States to take account of foreign laws regarding the export of cultural objects. In consequence, a certain number of importing States would be assuming new obligations and it would therefore be absurd not to have regard to the interests of those States when a contravention of foreign law justified this novel approach.

119. Two representatives drew the attention of the committee to the risk of confusion between Chapters II and III by reason of the use of the words "applicable to the protection of cultural objects" as some States might not have legislation prohibiting the export of those objects. Some States had, in effect, enacted legislation regarding cultural objects which provided that they belonged to the State and that removal was equivalent to theft and since the provisions of Chapter II were more stringent than those of Chapter III, the question arose of which provisions would apply to the transfer of a cultural object. They believed that it should be clearly stated that Chapter III did not apply to cultural objects when Chapter II was applicable and that a coordination between the two chapters was necessary so as to determine precisely which regime would govern objects which were both stolen and illegally exported.

120. One representative stated that the word "export" was no longer in use within the European Community and that it might therefore be preferable to use another word in this instrument.

121. The Secretary-General recalled that paragraph 2 of Alternative I had been considered by a working group set up to study the desirability of including such a provision and perhaps a new wording of it. The group had decided that it would be better to maintain the paragraph but the committee deemed it preferable not to vote on it at this stage but rather to defer discussion until the next session without this being understood as a formal approval of the text proposed by the working group (cf. Study LXX - Doc. 38, Misc. 8). One representative found the wording to be too vague and proposed adding language to the effect that the request "must contain the particulars necessary to assist the court in determining whether the requirements of paragraphs 1 to 3 have been met".

122. The Secretary-General noted in connection with paragraph 3 that the committee had voted against the principle of automatic return but that the word "certifies..." in square brackets was in effect another way of stating the same principle. The drafting committee had not deleted the phrase in view of a different interpretation of the vote, which seemed to reintroduce the principle of automaticity. The committee had also included the word "significantly" in square brackets, which had permitted the

deletion of the former Alternative C of paragraph 3. Finally, a number of suggestions had been made to change the order of the criteria, but the drafting committee had been of the belief that this was not the time to introduce a kind of hierarchy between them.

123. In a desire to respect the outcome of the vote which had rejected the principle of automaticity, one representative proposed, with a view to avoiding the word "certifies", which had a highly subjective connotation, and "proves"" which emphasized a very rigorous notion in the law of evidence of some systems, using the word "establishes". He suggested that this verb could govern each successive phrase ("establishes that the object ... and that the removal ..."), in which case sub-paragraph (e) could be deleted, or alternatively deleting completely the language in square brackets and simply saying that the requesting State must establish "that the removal ... impairs", while retaining sub-paragraph (e). This latter suggestion received support from a number of representatives and the committee decided that the text should now read as follows: "The court or ... if the requesting State [proves] [establishes] that the removal ...". It took no decision on the word "significantly" which had been retained in square brackets.

124. As to paragraph 4, which had not been the subject of detailed discussion, the Secretary-General noted that it had emerged unchanged from the drafting committee. The committee decided not to engage upon a lengthy debate at this juncture and to maintain the paragraph in square brackets notwithstanding the objections of some representatives, as it was an important provision of substance rather than of form.

125. Finally, the Secretary-General stated that some paragraphs were common to Alternatives I and II. He drew specific attention however to paragraph 2 of Alterantive II which imposed on importing States an obligation of control. One member of the study group recalled that this provision had not appeared in the text adopted by that group in 1990 as it had been of the opinion that it should be left to States to decide how they would discharge their obligation to return illegally exported cultural objects. For some, the easiest way would be to forbid the import of certain cultural objects while other States might wish to follow a different procedure, and it was for this reason that it had been judged preferable to leave a certain flexibility to States with regard to the measures to be taken under their implementing legislation. The author of this paragraph requested that Alternative II be retained so that further thought might be given to it with a view to a discussion and vote at the next session. Since it was not possible to insert paragraph 2 in Alternative I on account of the differing philosophies, the committee decided to proceed to an immediate vote with a view to avoiding wherever possible a text containing too many alternatives. 18 delegations having voted in favour of the idea reflected in Alternative II and 16 against, with seven abstentions, the committee decided to retain Alternative II, notwithstanding the concern of some representatives at the inclusion of public law provisions.

Article 5 bis

126. This article being one of those proposed by the working group on the certification system, it was placed in square brackets (cf. Study LXX - Doc. 38, Misc. 7). One representative drew the attention of the committee to the connection between this provision and Article 8, suggesting that the introduction of the export certificate would permit the satisfactory solution of a number of problems, in particular that of the good faith of the possessor. In the absence of such a certificate, an unlawful transfer would be presumed and the good faith of the possessor excluded. For lack of time, these provisions were not considered in detail so that their implications will be analysed at the next session.

Article 6

127. The possibility to refuse the return of a cultural object on the ground that it has as close, or a closer, connection with the culture of the State addressed or with that of another State than with that of the requesting State once again aroused widely differing reactions among the members of the committee of experts, especially as regards the reference to another State.

128. One member of the study group considered it useful and necessary to recall the thinking of the group underlying this article. Conscious of the fact that it is always possible under the rules of private international law to refuse the return of an object on grounds of public policy, ("ordre public") the study group had wished to avoid a broad interpretation of that notion which would permit a State to deprive the Convention of any effect and it had therefore preferred to restrict it by establishing very restrictive grounds of refusal, that is to say when there was as close or a closer connection with the State addressed than with that of the requesting State.

129. Notwithstanding a consensus to the effect that one and the same object could belong to the cultural heritage of several States, which was moreover expressly recognised by Article 4 of the 1970 Unesco Convention, some representatives believed that Article 6 offered security to illegal exporters of cultural objects from countries sharing common cultural features and moreover that it was incompatible with the 1970 Unesco Convention and with Chapter II of the present draft on the restitution of stolen objects. In consequence they supported a call for the deletion of the provision as a whole. One representative suggested that while it might be the case for some countries that whether the Convention mentioned public policy or not would not prevent them from invoking it, in others, including his own, it would not be possible to rely on that notion if the Convention did not expressly refer to it. Some representatives were critical of the absence of the need for proof to be brought so as to permit a court of the State addressed to take a decision while others saw a risk of incompatibility between the provision and the procedural systems of certain countries.

130. A majority of members of the committee of experts believed however that while it might be necessary to review the wording of the article, it was important to retain it in the text so as to limit the degree of discretion left to national courts when having recourse to the notion of public policy, which had emotional as well as legal components, and which would in any event be invoked (at least in a large majority of countries). It was also recalled that the study group had been concerned to subject political and cultural factors to as tight a control as possible. One representative further noted that the article constituted a genuine guarantee for requesting States for while it did not perhaps limit the exercise by courts of public policy, it presented the obvious advantages of leaving to courts in the State addressed only one possible ground for refusing to return an object.

131. Although the committee reached a consensus as to the need to limit the grounds for refusal of return, agreement could not be reached on the way to express it. Many representatives in fact believed that the words "as close a, or a closer, connection" which provided the criterion for refusal, were either too vague and imprecise, or inappropriate. One representative feared that with that criteria the return of many cultural objects to communities in his country would be refused on the ground that those communities were larger in the State addressed, thus provoking a kind of anarchy in international relations. Another representative suggested that this single criterion was not sufficient to allow the Convention to attain its objective and that it would be possible to invoke public policy even in cases where the law of the State addressed contained no limitation or prohibition on the export of the object in question, simply on the ground of the closest connection.

132. Some representatives proposed qualifying the "connection" as being "manifestly closer" by reason of the very broad concept of culture. Another representative believed that mention should be made of the factors to be taken into consideration by a court with a view to establishing the connection so as to avoid the risk of arbitrary decisions. A certain number of representatives however were of the view that the sole criterion, for refusing return, of the close connection would be too vague if it was thereby intended to create a "limited" public policy. One of those representatives suggested adding a reference to the fundamental principles on the protection of the cultural heritage of the State addressed and to offer it the possibility of refusing the return of a cultural object when that object has a manifestly closer connection with its culture and when its return would be manifestly contrary to the fundamental principles on the protection of the cultural heritage of that State (cf. Study LXX - Doc. 38, Misc. 1, Article 10 *ter*).

133. The Secretary-General of the Hague Conference on Private International Law supported such a proposal which would be much more effective than a mere reference to the close connection. He further recalled the 1980 Hague Convention on Civil Aspects of International Child Abduction and the safeguard which it contained on account of the absence of any mention of

public policy (Article 20), adding that such a provision would in no way impede the application of the Convention. He could therefore support any proposal which followed the same approach.

134. Another compromise proposal was made which involved adding to the criterion of the closest connection the idea of the moral obligation of the State addresed to protect its cultural heritage (Study LXX - Doc. 29, Misc. 43). Aware of the fact that the notion of culture is not necessarily linked to territory, but wishing that this aspect of the question should not be overlooked, some representatives proposed adding to the criterion of the closest connection that of territorial origin as found in Alternative II of Article 6 (cf. Study LXX - Doc. 31).

135. The committee then considered the possible taking into consideration of the interests of third States as a ground for the refusal of return as well as the practical implications of the application of such a solution. One representative stated his opposition for the reason that this would entitle a court or national authority to return a cultural object to a third State on the sole ground that it had refused to return it to the requesting State. Another representative believed that such a solution was alien to the purpose of the future Convention which was to bring about the return to a State of a cultural object illegally exported from its territory to another State and that the situation would only be further complicated by allowing for intervention by another State which claimed close links with the object. He was therefore in favour of excluding the notion of third State intervention already at the stage of refusal. Yet another representative suggested that allowing intervention by a third State would be tantamount to inviting the courts of States addressed to engage in a kind of jousting tournament, the prize for which would be the cultural object.

136. One member of the study group moreover recalled that sight ought not be lost of the fact that a request made under Article 5 was one relating to the violation of export legislation. If therefore the law of a third State had been contravened, that State could bring an action independently, but if there had been no such contravention, it would be difficult within the context of Chapter III to envisage how a court could decide to take into consideration the interests of a third State in the preservation of its cultural heritage: the opportunity could not be offered to a third State to bring an action on the basis of the violation of the legislation of another State. Finally, it was pointed out that it would moreover be asking a court to take a very delicate decision as it might have no knowledge of the culture of the third State which, if it were not a party to the proceedings, would have provided no information on the question.

137. While most representatives were opposed to taking into account the interests of third State, and even more so to its intervening in the proceedings for return, in particular on account of the practical difficulties to which that could give rise, others supported the retention of

the reference. They considered that while it was understandable that a cultural object which had a closer connection with the State addressed should remain in that State, there was no justification, be it moral, political or legal, for a State addressed to retain an object which had a closer connection with the culture of a third State.

138. The committee examined the various proposals made at its preceding session with a view to taking account of the interest of third States and sometimes going further. Thus, one proposal provided that the court of the State addressed should be able to inform the third State so as to permit it to bring a claim (cf. paragraph 2 (between square brackets) of Alternative I). This would meet the situation in which, if the court knew that the requesting State had a closer connection with the object but that there was a still closer connection with the culture of a third State, the court could be embarrassed at having to return the object to the requesting State for the sole reason that its law had been contravened, or at its being retained, even though it had no particular connection with the State addressed. Another representative proposed providing that when there is as close a, or a closer, connection with the culture of a third State, "the State addressed has an obligation to give notice regarding the return of the object without undue delay to the third State". Opinions were divided on the question of whether the consequence of giving notice to the third State would be the bringing of a claim by it under the Convention or independently of it.

139. Another delegation drew the attention of the committee to a proposal in Alternative II which would permit return to be refused whenever the object had a manifestly closer connection with the culture of, or that its territorial origin was in, the State addressed or a third State. In the latter case, the third State would be given notice so that it could bring a claim for return in accordance with Article 5, paragraph 3. Another representative believed that it should be clearly stated that a third State should only be allowed to intervene when it could bring an action independently of the Convention.

140. With a view to giving instructions to the drafting committee for the drawing up of a new text of Article 6, the committee of experts voted first on the reference to the third State as certain delegations made its deletion a condition for their acceptance of the article. Seven delegations voted in favour of the maintenance of the reference, 23 against and four abstained. The committee therefore deleted the words "or a State other than the requesting State" in square brackets in paragraph 1 of Alternative I. The committee then voted on the idea expressed by Article 6. 19 delegations voted to maintain it, 16 in favour of its deletion and eight abstained. Article 6 was therefore retained in the preliminary draft Convention but in view of the closeness of the vote on the criterion "as close a, or a closer, connection with the culture of the State addressed", between maintaining it with or without another criterion or deleting it, the committee voted once again. This time, 15 delegations supported its deletion, 18 favoured its retention and six abstained.

141. On second reading, the committee was faced with a new version of Article 6 prepared by the drafting committee, which contained three alternatives. The Secretary-General noted in the first instance that the whole of the article was surrounded by square brackets in view of the slight majority which had existed in favour of its retention. Moreover, following the vote at the end of the first reading, the drafting committee had deleted the reference to third States. He stated that Alternative I corresponded essentially to the original text, without that reference, and with some language in square brackets, for example, "as close" which one representative had proposed deleting on account of the difficulties of judicial technique which it created. Alternative II contained the formulation proposed by one delegation in document Study LXX - Doc. 38, Misc. 1, Article 6, while finally Alternative III reflected the former Alternative II (without a reference to third States) as the drafting committee had been unwilling to ignore a proposal put forward by six delegations, unless they themselves believed that the absence of sub-paragraph (b) in their original text deprived the alternative of any interest. The Chairman suggested that the committee should choose between Alternative I, Alternative III and sub-paragraph (c) of Alternative II.

142. Despite the vote on first reading, the committee proceeded to another vote on account of the scepticism expressed by some delegations in relation to the various proposals submitted: this time, 15 delegations favoured the deletion of Article 6, 22 its retention and five abstained. The retention of Article 6 was thus confirmed by a slightly larger majority than on the previous vote.

143. The committee then considered the various alternatives and voted on them in turn. Four delegations voted in favour of Alternative I, 13 for sub-paragraph (c) of Alternative II and ten for Alternative III. Proceeding by elimination, the committee voted on the two latter alternatives. As regards sub-paragraph (c) of Alternative II, 18 delegations voted in favour, nine against and eleven abstained. Eleven delegations voted in favour of Alternative III, 19 against and eight abstained. The committee decided therefore to retain Alternative II but since there had been no real discussion concerning sub-paragraphs (a) and (b), those sub-paragraphs were retained in the text in square brackets.

Article 7

144. Although the committee had reached a consensus from the outset of its work on the principle of excluding from the scope of application of the future Convention cultural objects exported during the lifetime of the author and during a certain period after his or her death (**sub-paragraph (a)**), one representative drew the attention of the committee to the question of ethnographic objects whose author was unknown, either because there was no way of determining who was the author or because there was none. It was suggested that in such cases the test should rather be the age of the object than the life or death of the author and a number of representatives supported a proposal, the effect of which was that the period of

50 years should begin to run as from the creation of the object.

145. Another representative suggested that a separate provision should be drawn up for this category of objects, and more particularly for those created in the context of community or tribal customs. He proposed that a text to this effect be inserted at the end of sub-paragraph (a) (see Study LXX - Doc. 38, Misc. 5).

146. This proposal did not however find unanimous support within the committee. One representative expressed disagreement with the proposal, believing that while it was possible to contemplate a special provision for ethnographic objects, the concept underlying sub-paragraph (a) was different, namely an encouragement to creativity which was to be found in the 1980 Unesco Recommendation on the condition of artists. His delegation wished, as a matter of cultural policy, to give both to living artists, and eventually to their heirs, the possibility of facilitating the sale, and spreading knowledge, of their work. He reiterated moreover his attachment to the 50 year period, chosen by analogy with copyright, which was also to be found in the draft EEC Directive.

147. With regard to the 50 year period as from the death of the person who created the object, which some deemed to be too long and others too short, one representative emphasized the need to avoid a conflict in the application of two international Conventions, namely the Unidroit Convention and 1886 Bern Convention on copyright and its subsequent revisions, and any clash between the interests of descendants of artists and those of private or public possessors of cultural objects.

148. The committee believed that a compromise could be achieved between these different positions and entrusted a working group with the preparation of a new draft, which is contained in Study LXX - Doc. 38, Misc. 9 rev. One representative recalled in this connection the suggestion to replace the word "exported" by "removed" in the English version, a change which could also be made in the French text, although a periphrasis would be necessary.

149. The committee then considered **sub-paragraph (b)** of Article 7 which provided that effect would not be given to an export prohibition concerning cultural objects if the claim for return were not brought within certain fixed periods. One representative suggested that this question merited a special article in Chapter I (General provisions) which would apply both to stolen and to illegally exported cultural objects. This would permit regard to be had also to those special cases in which a claimant could not appear before a court of the State addressed because of hostilities or the breaking off of diplomatic relations (cf. Study LXX - Doc. 29, p. 38 and Study LXX - Doc. 31, note 54). If such a suggestion were not to meet with the agreement of other representatives, then Article 7(b) might be split up and a provision at the end of the article cover all the situations contemplated. Other representatives agreed that these special situations ought to be dealt with but that the appropriate place would be

the final provisions. Another representative recalled that all legal systems allowed for the suspension of limitation periods, especially in time of war, and wondered whether a specific provision on the question was necessary. Yet another representative proposed adding to the text a rider that the limitation of actions could be governed by the rules of suspension in accordance with the law of the courts or authorities competent under Article 9 (reference to the *lex fori*).

150. One representative wondered whether it would be wise to provide that the Convention should no longer apply as from the expiry of the limitation period or rather that the action should be brought within a certain time. Each State could implement that provision in such a way that the limitation period might be longer than that established by the Convention. He submitted a proposal in this sense, the effect of which was to permit Contracting States to reject, to declare inadmissible or even to admit, in certain circumstances, a claim brought outside the limitation periods (Study LXX - Doc. 38, Misc. 1, Article 5 *bis*).

151. The working group on Article 5, paragraph 2 had noted a difference in the English version between that provision and Article 7(b) in connection with the words "claim" and "request" which could bring about a situation in which a request initially made to the competent authority of a State might no longer be brought before a court of that State because the period elapsing prior to the bringing of a claim before the court might be too long. A member of the working group suggested that this danger could be avoided if consistency between the two provisions were achieved.

152. Most representatives were favourable to the retention of a shorter period without however agreeing as to its length. The words "or ought to have known" were subjected to the same criticism as they had been in the context of Article 3, paragraph 2 and calls for their deletion were once again made. As to the starting point of the period, one representative suggested that this should be the discovery of the location of the object as well as the identity of the possessor. Another representative believed that it was sufficient for the provision to deal only with the discovery of the location of the object, which was relatively easy. He did not however wish to exclude the identity of the possessor as the basis for the bringing of a separate claim, as was already the position in some countries.

153. In connection with the absolute limitation period, some representatives expressed the same reservations as they had in respect of the analogous provision concerning stolen cultural objects. As had been the case with Chapter II, one representative requested that special regard be had to cultural objects associated with the identity of a people and its collective consciousness and that claims concerning such objects should be imprescriptible. No limitation period, whatever its length, could confer legality and morality on an illegal and immoral act. The objects in question should be those considered as belonging to the public domain and hence inalienable and subject to no limitation period for their recovery. Another representative supported this proposal and suggested that it should

also embrace ecclesiastical objects.

154. **Sub-paragraph (c)** was not the subject of lengthy discussion as the committee had reached a consensus to the effect that, since the purpose of Chapter III was to combat illegal exports, the relevant export legislation must be that in force both at the time when the object was removed from the territory of the requesting State and when the proceedings were initiated. It was in fact difficult to conceive a claim for return being brought at a time when the export was no longer illegal. One representative considered however that the time in question should be specified and that the text should clearly state that what was contemplated was the date on which the claim was brought before the court or competent authority. Another representative thought this to be a matter of detail which could be dealt with in the explanatory report on the Convention rather than in the text itself.

155. As the committee had already agreed that the question of the precise time limits should be left for decision by the diplomatic Conference, they were not discussed in any detail, although one representative suggested that as there had been a change in the situation subsequent to the last session of the committee in view of the fact that the EEC Directive had now been virtually finalised, the latter should be taken into consideration with a view to avoiding possible discrepancies since there existed within the EEC the same differences in culture and interests as among the States participating in the work of Unidroit.

156. On second reading, the Secretary-General stated that the drafting committee had restructured Article 7, dividing it into two paragraphs. Paragraph 1(a) took over the text of the working group which had added a rule for cases where the creator of a cultural object was unknown. Sub-paragraph (b) corresponded exactly to the former sub-paragraph (c).

157. Paragraph 2 presented in an amended form the contents of the former sub-paragraph (b) although its location had to be seen as provisional. The drafting committee had indeed been conscious of the fact that the provision might be better placed elsewhere, but was unwilling to decide where to locate it pending consideration of Article 8. One possibility might be the introduction of a new Article 7 *bis* so as to track the structure of Chapter II, that is to say to place it before the provision concerning compensation.

158. The committee did not proceed to detailed discussion of the new text of paragraph 2 (cf. Study LXX - Doc. 38, Misc. 21 rev.) which it preferred to defer until its next session.

Article 8

159. Following the second session of the committee, **paragraph 1** established the principle that a possessor who knew that the object had

been illegally exported was not entitled to compensation, whereas **paragraph** 2 laid down a first exception, namely compensation for a possessor who had not known of the illegal character of the export. A large majority of the committee favoured the possibility of compensating the "good faith" possessor, although one of them criticised the negative form of wording employed, believing that the Convention should embody positive principles, and in this case specify the conditions on which a possessor would be entitled to compensation, after which any possible exceptions could be stated. It was also suggested that only the principle should be spelt out in the text and that questions concerning the entity or the person who was to pay the compensation or the manner in which it was to be paid etc. should be left to the domestic law of the State addressed, since it was not the philosophy of the Convention to lay down binding rules in this respect.

160. On the very principle itself of compensation, one member of the study group reminded those representatives who wished the provision to be deleted that it was a crucial one, although it had been the subject of controversy within the study group. Many developing countries were of the opinion that it would prevent the return of illegally exported cultural objects, while some States that might be willing to change the fundamental rules of their legal systems regarding ownership would do so only if the Convention made provision for compensation. She suggested however that there would be relatively few cases in which a diligent person would have acquired an illegally exported object, so that the number of cases in which compensation would have to be paid would be limited. The principle was aimed at reversing the present tendency in the art market for potential acquirers not to enquire into the origins of cultural objects.

161. One representative however believed that the proposed solution would lead to a result which was not very satisfactory for in effect those States which were victims of illegal traffic would be required to pay compensation to the "good faith" possessor so as to recover the object, when they were in fact most often States with meagre financial resources. He therefore proposed that the principle of compensation be maintained, but that it be provided that the possessor should be able to have recourse to the law which governed its relations with its predecessor and that the possessor would be entitled to compensation if the law in question recognised such entitlement.

162. Without wishing to put into question the principle of compensation, one representative believed that the option should be left to each Contracting State to make provision in its law whether or not compensation should be paid to a "good faith" possessor. If such a proposal were not acceptable to the other delegations, he proposed that Contracting States should be entitled by way of reservation not to allow for compensation, even for a "good faith" possessor, subject possibly to certain conditions which would be stated in the reservation.

163. Another compromise proposal was made to the effect that the principle of compensation, which was considered to be essential by a

majority of members of the committee of experts, should be maintained but that the wording of the provision should be brought closer to that of Article 4, in particular by establishing the criteria for the determination of "good faith", which would reduce the number of situations in which the possessor would be entitled to compensation (cf. Study LXX - Doc. 33). A member of the study group stated that the difference in wording between Article 4, paragraph 2 and Article 8 was due to the fact that some delegations had suggested that there could be constitutional difficulties in their countries in ordering the return of an illegally exported cultural object, which was much less likely as regards stolen objects.

164. This proposal also provided that the burden of proof lay on the possessor, whereas the text submitted to the committee had been neutral on this point. This representative believed that, as was the case with theft, the possessor should be required to prove its diligence so as to encourage potential acquirers to exercise caution in respect of the provenance of cultural objects. While some representatives shared this point of view, others stated that it could be difficult for them to accept a more radical solution than that to be found in the draft EEC Directive which, in this connection, referred to the law of the State addressed (cf. Article 9). Other representatives were unable to share this view as they considered the contexts of the two instruments to be different.

165. The committee believed it to be necessary to vote on this question so as to assist the drafting committee in preparing a new provision. 33 delegations voted in favour of a uniform rule on the burden of proof while three supported a reference to the domestic law of the State addressed and six abstained.

166. The working group on the certificate proposed adding to paragraph 1 of Article 8 wording according to which the absence of a certificate would raise an irrebuttable presumption of the bad faith of the possessor (cf. Study LXX - Doc. 38, Misc. 7). As was the case with the other proposals of this working group, this proposal was not the subject of discussion and was referred to the drafting committee.

167. One representative suggested that the retention of paragraph 2 of Article 8, which established a first exception to the principle that the possessor should not be entitled to compensation, was dependent upon the acceptance of that principle. In fact, if the principle of the right to compensation subject to certain conditions was adopted, it was evident that if those conditions were not met, then the possessor would not be entitled to compensation and in that case paragraph 1 could be deleted. If, on the other hand, the principle were to be adopted that the possessor was not entitled to compensation, then paragraph 2 would have to be maintained. Another representative suggested preparing a separate article in the chapter on the final provisions that would deal with the question of compensation for the "good faith" possessor of a stolen or illegally exported object. Another representative proposed adding to the present paragraph 1 language to the effect that the "bad faith" possessor should bear the cost

of returning the object (cf. Study LXX - Doc. 38, Misc. 17).

168. The committee then voted on the principle of compensation. 32 delegations voted in favour, one against and seven abstained. Some delegations were puzzled at this vote since paragraph 1 laid down the principle that the possessor was not entitled to compensation and not the general principle of the compensation of a "good faith" possessor.

169. One representative considered the words "[applicable to the protection of cultural objects]", which appeared in the first three paragraphs of Article 8, to be essential for a broad acceptance of the Convention since its deletion would mean that States would directly apply foreign laws governing export which might have no connection whatsoever with cultural objects.

170. The committee then examined **paragraph 3**, which made provision for the reimbursement of expenses incurred by the possessor in the protection and restoring of an object, and appeared in the text in square brackets as a result of a very close vote on this question. Some representatives were opposed to such a provision since they feared that it might encourage possessors of cultural objects to embark on restoration work so as to delay their return and to increase the amount of the compensation, while there was always the additional risk that the object would be irremediably damaged by poor restoration. In the vote which followed, 20 delegations favoured the deletion of paragraph 3, ten its retention and eleven abstained. In consequence the committee decided to delete the provision.

171. **Paragraph 4** of Article 8 contemplated other possibilities than the payment of compensation to a possessor obliged to return a cultural object to the requesting State when it was not established that it knew or ought to have known of the illegal character of the export. The paragraph was submitted in the form of two alternatives, the first corresponding to a large extent to paragraph 2 of the study group text with some new elements added, while the second was a new presentation of the text submitted to the committee. This paragraph was based on the assumption that the notion of compensation would be retained, and offered other possibilities to the possessor. The group did not however take a stand on the two alternatives.

172. One representative noted that whichever alternative were to be adopted, this paragraph laid stress on the exclusive choice of the possessor without any reference being made to the interests of the requesting State and there could indeed be a conflict between their interests, above all those mentioned in Article 5, paragraph 3. He therefore proposed that if the committee wished to retain this provision then the text should be amended so as to take account of the interests not only of the possessor but also of the requesting State by adding the words: "...it may either, if the requesting State so agrees:..."

173. One member of the study group replied that while there was no express reference to the interests of the requesting State, these were impliedly taken into account in the sense that it was in its interest to obtain the return of the illegally exported object to its own territory and this without necessarily having to pay compensation. Another representative suggested moreover that the whole procedure would be conducted under the supervision of a judicial authority by virtue of Article 5 which would ensure that the interests of the requesting State were not neglected.

174. Some delegations however tabled a written proposal, the effect of which would be to subject the choice of the possessor to the agreement of the requesting State (cf. Study LXX - Doc. 38, Misc. 11), which was put to a vote. 16 delegations supported the proposal, three voted against and 23 abstained. The committee therefore decided to submit to the drafting committee the principle reflected in the proposal.

175. The committee then considered **paragraph 5** which had been the subject of controversy at earlier sessions. Some representatives suggested that the court should decide who should bear the cost of the return of the object, or alternatively that a distinction should be drawn according to whether the possessor had been in good or bad faith, considering that the requesting State should be responsible for this kind of expense only in respect of a good faith purchaser. Two written proposals were submitted along these lines, one of which would have added at the end of the provision the words "only in cases where the object is to be returned by a possessor in good faith" (cf. Study LXX - Doc. 38, Misc. 17) and the second the words "which shall have a right of recovering [the cost of returning the cultural object] from the possessor who is not in good faith" (cf. Study LXX - Doc. 38, Misc. 13). One member of the study group explained that the good faith of the possessor was of relevance only to the question of compensation, and not to the cost of returning the object which did not form part of the compensation. The study group had been of the opinion that a State which requested the return of a cultural object which it considered as being of extreme importance for its cultural heritage would be prepared to pay all that was necessary to obtain the return, subject naturally to the possibility for it to seek recovery from the person who knew that the object had been illegally exported. This was moreover the solution which had been adopted in Articles 10 and 11 of the draft EEC Directive.

176. Another representative proposed following a different approach with regard to this provision by providing that the State addressed was not bound to assume any costs resulting from the return of an illegally removed cultural object (cf. Study LXX - Doc. 38, Misc. 1, Article 8 *bis*). This proposal was however criticised on the ground that it contained an error of legislative technique, in the sense that it ought to provide for who should do what, and not to provide that someone had no obligation to do something.

177. The committee voted on whether or not to retain this provision. No delegation favoured its deletion while 24 supported its maintenance and 14 abstained. The committee decided in consequence to retain the paragraph.

178. At the previous session, one delegation had proposed the text of **paragraph 6** by analogy with Article 4, the aim being to permit a third person to pay the compensation in the place of the requesting State by undertaking to do two things, namely to render the object accessible to the public and to pay the cost of insurance and of conservation of the object. There was no detailed discussion of this paragraph although a similar provision proposed in relation to Article 4 had been deleted following a vote (see paragraph 82 above).

179. Finally, the committee reiterated its agreement in principle on the need to take account of the situation envisaged in **paragraph 7**. One representative suggested deleting the words "by inheritance or otherwise gratuitously", considering that the conduct of the predecessor of the possessor, even if the object had been acquired for value, should be imputed to the possessor.

180. On second reading, the Secretary-General stated that the drafting committee had sought to express in one paragraph, paragraph 1, what had formerly been contained in the first two paragraphs, thereby following the same presentation as that in Chapter II. It had also to be noted that the words "applicable to the protection of cultural objects", "nor ought to have known" and "would be, or" had been retained in square brackets.

181. Paragraph 1 *bis* contained a proposal of the working group on the certificate, consideration of which had been deferred to the next session of the committee when it would examine the proposed system as whole.

182. Some representatives were astonished to see no proposal providing for the inclusion of criteria for determining whether the possessor had acted diligently or for one concerning the burden of proof, as was the case with Article 4. It was replied that while there might be a need for a greater degree of harmony between Chapter II and Chapter III, it was necessary also to take account of the objective differences between the two situations and that the degree of diligence called for was greater in the case of theft, which was a well known concept, than in relation to illegal export. If the achievement of uniformity were the sole objective of the Convention, then it would then be necessary to reduce the degree of diligence required in Chapter II, which would be regrettable as it represented substantial progress over the existing situation.

183. Paragraph 2 reflected a written proposal tabled by a number of delegations whereby the possessor, no longer solely on its own initiative but in agreement with the requesting State, could choose a solution other than compensation.

184. Paragraph 3 corresponded to paragraph 5 of the text submitted to the committee, with the addition of language called for by some delegations to the effect that a requesting State which had to bear the cost of the return of the cultural object could seek reimbursement of those costs from

any other person.

185. Paragraph 4 was, in effect, the former paragraph 6 and, as it were, in a spirit of promoting culture contemplated a mechanism of sponsorship for the payment of compensation due to a "good faith" possessor.

186. Finally, paragraph 5 corresponded to the former paragraph 7 with the same language in square brackets, which had not been the subject of any real discussion as the committee had considered this to be one of those provisions relating to temporal application to which it would return in connection with Article 10.

187. The committee proceeded to no further votes and took no further decisions concerning the new wording of Article 8, deciding to resume consideration of it at its next session.

Article 8 bis

188. This article, which appeared in the text submitted to the committee after its second session, was the object of no discussion by the committee and was therefore placed in square brackets for consideration at the next session.

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

189. The committee did not consider Article 9 during this session, preferring to reserve detailed discussion for the other substantive provisions of the future Convention before establishing rules regarding jurisdiction with respect to claims for the restitution and return of cultural objects.

190. At the second session of the committee however one delegation had tabled a written proposal which dealt not only with the question of jurisdiction but also with that of the enforcement of judgments, which had been introduced into the text as Alternative IV (cf. Study LXX - Doc. 31, Article 9, Alternative IV and Articles 9 *bis* to *quinques*). One representative wished to add an Article 9 *sexties* worded as follows: "The State addressed shall prevent, by the necessary interim measures, any action to evade the return procedure" (cf. Study LXX - Doc. 38, Misc. 12).

191. Another delegation had recalled at previous sessions that the purpose of Article 9 was not only to establish the grounds of jurisdiction but also to define more particularly which were the international claims admissible and it had submitted a proposal to identify the parties who would be entitled to bring a claim, in which circumstances they could do so and in which States. Its concern was the same as that which it had expressed in connection with Article 1 of limiting the scope of application

of the proposed Convention to international situations only. This delegation reminded the committee of its proposal (cf. Study LXX - Doc. 38, Misc. 20).

CHAPTER V - FINAL PROVISIONS

Article 10

192. This article was not the subject of specific discussion by the committee during the session. The principle of non-retroactivity of the future Convention was however recalled on a number of occasions by some representatives who stated that their acceptance of certain articles would depend entirely upon the inclusion of this principle. One delegation insisted on this point, calling for the inclusion of language between square brackets in those provisions where this matter was of primordial importance (cf. Article 4, paragraph 3 and Article 8, paragraph 5).

193. The committee decided to maintain that square bracketed language, pending detailed consideration of Article 10 and a decision on the question of whether this principle should be stated in a single provision in a chapter on general provisions or by various references in the text.

194. Another delegation submitted a proposal for the inclusion of the rule of non-retroactivity applicable to illegal export in Chapter III (cf. Study LXX - Doc. 38, Misc. 1, Article 8 *ter*).

Article 11

195. Reference was made on a number of occasions during the work of the committee to Article 11, in respect of which a member of the study group considered it useful briefly to recall its purpose. The study group had been conscious of the fact that many provisions of the draft Convention did not always reflect the differing practices of different countries and that some of those practices went further than the system contemplated under the Convention (for example the absence of compensation for "good faith" possessors). The study group had been of the belief that those countries should retain such provisions as were more favourabale to return, as the draft Convention laid down only minimum standards. It had never been the intention of the study group to oblige States to reduce that protection and, to avoid any misunderstanding on this point, a proposal had been made at the second session of the committee to render obligatory, and not optional, the application of the domestic law of a State addressed when that was more favourable to the restitution or return of stolen or illegally exported cultural objects (cf. Study LXX - Doc. 31, note 72). Another proposal along the same lines was to be found in document Study LXX - Doc. 36, pp. 49A and 49B.

196. Finally, one representative proposed following a different approach, that is to say of deleting Article 11 and replacing it by a general formula worded as follows: "Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable towards the restitution or the return of a stolen or an unlawfully removed cultural object than provided for by this Convention" (cf. Study LXX - Doc. 38, Misc. 1, paragraph 2 of Article 1).

197. The committee did not examine these proposals, discussion on which was deferred to its fourth session.

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198. The Chairman thanked all the participants for their contributions to the discussions during the session which he declared closed at 6 p.m. on 26 February 1993.

ANNEXE I
APPENDIX I

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LIST OF PARTICIPANTS

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APPENDIX II

AGENDA

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

2. Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Study LXX - Docs. 24 to 36)

3. Other business

APPENDIX III

PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

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

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

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

Article 2

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

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

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

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

Article 4

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

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

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

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

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

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

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

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

(b) the integrity of a complex object,

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

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

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

Article 6

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

Article 7

The provisions of Article 5 shall not apply when:

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

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

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

Article 8

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

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

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

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

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

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

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

CHAPTER V - FINAL PROVISIONS

Article 10

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

Article 11

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

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

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

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

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

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

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

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

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