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

Report on the fourth session
(Rome, 29 September to 8 October 1993)

(prepared by the Unidroit Secretariat)

Rome, February 1994

1. The President of Unidroit, Mr Riccardo Monaco, opened the fourth session of the Unidroit committee of governmental experts on the international protection of cultural property on Wednesday, 29 September 1993 at 10 a.m. After welcoming the delegates and observers, 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). Mr Monaco briefly recalled the background to the work and, as this was the last session of the committee before the holding of the diplomatic Conference for the adoption of the future Convention, he stressed the importance of the present session during which it would be necessary to overcome subsisting differences of opinion so as to arrive at a text which would provide a sound basis for the Conference.

2. The Director-General of the Italian Ministry of Culture, Mr Francesco Sisinni, also welcomed the governmental delegations and underlined the heavy responsibility weighing on his country which was the holder of the most important cultural heritage in the world, a fact which explained the particular interest of Italy in Unidroit's work in this connection. He stated that because of its conviction that the cultural heritage of any one State belongs to the world heritage and that the loss of an object in one country constitutes a loss for the entire world, Italy's attitude was based on an internationalist approach calling for the respect of each country's national cultural identity. In particular, Italy followed a policy of international co-operation through exchanges, bilateral and multilateral agreements and exhibitions, and had thus secured the almost spontaneous restitution of many objects.

3. Mr Sisinni however insisted that while the results of that policy had on the whole been satisfactory, it was necessary to be ever more diligent in preserving the past for future generations. In his opinion, the present legal regulations, and in particular the recent EEC Directive, were the fruit of an unsatisfactory compromise and many matters had still to be settled. He therefore expressed the hope that the work of Unidroit would solve those questions which still remained unanswered and pledged his full support to the delegations in their task.

4. The Director-General of the Division of Cultural Relations of the Italian Ministry of Foreign Affairs, Mr Alessandro Vattani, stated that he had nothing further to say as regards the action of the Italian Government in connection with the protection of its cultural heritage. He added that the Minister of Foreign Affairs had indicated to the Italian delegation a certain line to be followed with a view to arriving at a positive outcome to the work of the committee which lay not in adopting a maximalist position, but rather one seeking to reconcile the different points of view.

5. Mr Pierre Lalive (Switzerland), Chairman of the committee of experts, thanked the previous speakers for their words of welcome and emphasised the special character of this last session which called for changes in the working methods and the rules of procedure (a limitation of the time during which speakers might take the floor and the setting up of working groups if necessary). He appealed to the participants to display courage as well as a sense of realism and legal imagination throughout the session so as to permit the committee to find an acceptable basis for discussion reflecting a compromise acceptable to all.

6. The Secretary-General of Unidroit, Mr Malcolm Evans, also extended his welcome to the participants. He recalled that the Governing Council of Unidroit had, at its June 1993 session, expressed its satisfaction at the progress accomplished by the committee of governmental experts on the international protection of cultural property, and in particular at the reduction in the large number of alternatives contained in the previous text (Study LXX - Doc. 40). The Secretary-General also recalled that in normal circumstances it would be the Governing Council that would decide whether a text was ready for submission to a diplomatic Conference but, if the suggested timetable were to be respected, it would not be possible to follow this procedure and the Council had therefore entrusted the President and the Secretary-General of Unidroit with the taking of that decision in its place.

Item 1 - Adoption of the agenda (G.E./C.P. - Ag. 4)

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. 37 to 46)

8. The committee was seized of the following documents:

Study LXX - Doc. 37 - Regulation (EEC) N° 3911/92 of the Council of the European Communities of 9 December 1992 on the export of cultural goods (February 1993)

Study LXX - Doc. 38 - Working papers submitted during the third session of the committee of governmental experts on the international protection of cultural property (Rome, 22 to 26 February 1993) (April 1993)

Study LXX - Doc. 39 - Report on the third session of the committee of governmental experts on the international protection of cultural property (Rome, 22 to 26 February 1993) (prepared by the Secretariat) (May 1993)

Study LXX - Doc. 40 - Preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (revised text prepared by the Unidroit Secretariat) (June 1993)

Study LXX - Doc. 41 - Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (May 1993)

Study LXX - Doc. 42 - Commentary on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects as revised in June 1993 (prepared by Ms Lyndel V. Prott, Chief of International Standards Section, Division of Physical Heritage, Unesco) (July 1993)

Study LXX - Doc. 43 - Observations of governmental delegations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Canada and France) (September 1993)

Study LXX - Doc. 44 - Observations of international organisations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (ICPO - Interpol) (September 1993)

Study LXX - Doc. 45 - Observations of governmental delegations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (India) (September 1993)

Study LXX - Doc. 46 - Observations of governmental delegations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Bulgaria) (September 1993)

9. It was agreed not to proceed to a general discussion, without however precluding delegations from raising any specific points, but rather to consider the text of the preliminary draft Convention on stolen or illegally exported cultural objects⁽¹⁾ in the light in particular of the written observations of Governments and of international organisations contained in Study LXX - Docs. 43 to 46. The Chairman suggested that the committee confine itself to matters of substance, purely drafting proposals being deferred for the time being.

10. So as to assist the reader, this report presents the various articles of the preliminary draft Convention in numerical order, although a different order was in fact followed by the committee of experts. The committee was in fact anxious to consider the principal questions outstanding so as better to see the relationship between the various

(1) Although the committee based its discussions on the text appearing in Study LXX - Doc. 40, it nevertheless made frequent reference to that approved by the Unidroit study group on the international protection of cultural objects on 26 January 1990. For the sake of convenience, that text is reproduced in APPENDIX III hereto.

articles (e.g. the international character of claims: Articles 1 and 9; or again the link between the definition of a cultural object and the limitation periods established for the bringing of a claim for restitution or return).

11. The Secretariat met on a number of occasions with four delegates selected for their experience in legislative drafting at international level for the purpose of drawing up a new text in conformity with the directives of the committee and with the proposals of working groups set up to deal with specific issues. The proposed texts are reproduced in documents Study LXX - Doc. 47, Misc. 5 (Articles 1 to 9), Misc. 17 (Article 6), Misc. 21 (Articles 1 to 4), Misc. 22 (Articles 5 to 9), Misc. 23 (Articles 5 to 7), Misc. 36 (Article 11), subsequently grouped together in Miscs. 39 corr., 40 and 41. After the session, the Unidroit Secretariat proceeded to a polishing of the text, the final version of which is to be found in APPENDIX IV hereto.

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

Title

12. At its second session, the committee of governmental experts clearly expressed a desire that the Convention should cover only international situations and that this should also be reflected in the title of the draft Convention. Considering that it was not yet in a position to take a final decision on the matter before defining the precise international connecting factors for the application of the future Convention, the committee had left open two possibilities which were represented by the square brackets in the title.

13. The committee therefore returned to this question after taking a decision on the connecting factors, and the Chairman suggested retaining the words in square brackets ("on [the international return of]") as this made the title clearer without in any way anticipating the definition of the international character of claims. One representative however was opposed to this solution since he believed that the title should give a clear idea of the content of the Convention which was in effect divided into two chapters, one concerning the restitution of stolen cultural objects and the other the return of illegally exported cultural objects. He therefore considered that it would be preferable to delete the words between square brackets.

14. The Chairman put this proposal to the vote: while four delegations favoured the deletion of the words between square brackets a large majority voted for their retention. The title of the draft Convention therefore reads as follows: "Draft Unidroit Convention on the international return of stolen or illegally exported cultural objects".

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

15. Pursuant to the decision taken at the second session of the committee of experts, the text of Article 1 of the preliminary draft provides that the Convention covers only international situations. The committee had decided to indicate this limitation by simply mentioning the international character of claims in the *chapeau* of the provision, although considering that it might perhaps be necessary to define more precisely the notion of an "international situation".

16. Some representatives were in effect in favour of a more precise definition and pointed out that the EEC Council Directive of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (hereafter referred to as the "EEC Directive") had chosen such a formulation in Article 1, paragraph 2 and they suggested that it would be advisable to follow that precedent. Another representative recalled that while it would be necessary to await the discussion on Article 9 so as to know which claims "of an international character" could be brought under the Convention, his delegation had already at the third session of the committee of experts proposed a definition of an international situation for the purposes of the Convention (cf. Study LXX - Doc. 38, Misc. 19).

17. A majority of the members of the committee of experts however preferred a simple reference to "international situations", thus leaving it to the case law to work out a uniform notion, a solution which had moreover already been adopted in the recent Swiss law on private international law. The arguments advanced were that it would thereby be possible to avoid problems of interpretation and that a detailed definition would limit the scope of application of the Convention since, as such a definition would be extremely difficult if not impossible to find, it would be necessary to provide a list of all the cases to which the Convention might apply.

18. One representative, who favoured a general reference, proposed however deleting the words "of an international character" in the *chapeau* since the claim might be brought on a national basis (for example when the owner of the stolen object was located on the same territory as the object itself) whereas the situation might be international with the consequence that the Convention ought to apply. (The international character would arise from sub-paragraphs (a) and (b)). Another representative was opposed to the deletion of the words in question as sub-paragraph (a) was capable of covering situations which would not necessarily be international, for example those where a stolen cultural object was removed from a country and brought back to it by the thief. That representative proposed retaining the words "of an international character" in the *chapeau* and instead to delete the words "removed from the territory of a State" in sub-paragraph (a) (cf. Study LXX - Doc. 47, Misc. 2).

19. The committee of experts then considered the two sub-paragraphs of Article 1 with a view to determining whether the international character was properly reflected by them. A majority of the committee believed this to be the case, but two representatives called for the addition of the word "Contracting" at the end of sub-paragraph (a) as it was important that a country which wished to take advantage of the benefits offered by the future Convention should ratify it. A consensus emerged within the committee to adopt that proposal.

20. As regards the words in square brackets in sub-paragraph (b), "[applicable to the protection of cultural objects]", one representative

considered that the language should be retained so as to make it clear that it was intended to refer only to the law concerning cultural objects and not the whole of the national law of each country. The committee of experts preferred to defer detailed discussion on the language in question to Article 5 where the same wording was to be found in paragraph 1. A special working group was set up to find a form of wording which would be acceptable to the committee as a whole (cf. Study LXX - Doc. 47, Misc. 15).

21. On second reading, the committee was seized of a revised Article 1 prepared by the Unidroit Secretariat (cf. Study LXX - Doc. 47, Misc. 5 and Misc. 21) following the discussions within the committee of experts. No changes had been made to the *chapeau* of the provision, while sub-paragraph (a) reflected the consensus that the object must have been removed from the territory of a Contracting State.

22. One representative suggested that the purpose of this addition to the original text was simply to restate a well-known principle of public international law to the effect that obligations undertaken in an international treaty can bind only those States which are parties thereto. What was important was that a requesting State which had an interest in the return of the object should be a Contracting State, as also should be the State addressed where the object was located. The fact that the State where a theft occurred was or was not a Contracting State was irrelevant. While agreeing with the interpretation that had been given of sub-paragraph (a), one representative however pointed out that the claim in question concerned private persons and not States.

23. Another representative was astonished at the notion that a claim in respect of a cultural object stolen anywhere and subsequently brought to a Contracting State could fall under the future Convention. His interpretation of the application of the preliminary draft was different, and it was essential that the object should have been stolen in a Contracting State and subsequently removed from the territory of that State (cf. Study LXX - Doc. 47, Misc. 27). A number of representatives opposed this solution on the ground that theft was an act which was condemned and punished under all national laws and that the adoption of such a solution would encourage theft of cultural objects on the territory of non-Contracting States.

24. The committee then voted on the question of the Contracting State to be taken into consideration: four delegations considered that the relevant State was that where the object was stolen, while 27 expressed a preference for the Contracting State from which the object had been removed. The text of sub-paragraph (a) as retained was therefore that appearing in document Study LXX - Doc. 47, Misc. 39 (a slightly amended version of that to be found in Misc. 21).

25. Sub-paragraph (b) as drafted by the special working group, the text of which is reproduced in Study LXX - Doc. 47, Miscs. 21 and 39, found general support within the committee of experts.

Article 2

26. The two alternatives for Article 2, proposed following the third session of the committee of experts (Study LXX - Doc. 40), reflected respectively the views of those delegations which preferred a general definition (Alternative I) and of those which favoured a more detailed definition taking over in part the wording of Article 1 (a) to (k) of the 1970 UNESCO Convention (Alternative II).

27. Some representatives suggested that what was at issue was to a large extent a choice of method reflecting a difference in traditions of legal drafting although the practical result would be the same. In effect, if a general definition were to be adopted (Alternative I), it could be interpreted in a more explicit manner when applied by those States which envisioned difficulties for their legal systems to adapt to that type of definition. On the other hand the effects of Alternative II were likewise similar to those of the original draft, as the detailed language of the UNESCO Convention probably included all cultural objects.

28. Some representatives recalled that the list set out in the 1970 Convention (Alternative II) was well-known internationally and that it had never caused problems of interpretation, while other representatives criticised the approach based on a list which might result in unforeseen and unforeseeable gaps. A number of participants for their part called for a broad definition (Alternative I), believing that the combination of a wide definition with the principle enunciated in Article 3, paragraph 1 according to which all stolen objects should be returned was in all probability the most important measure which could be taken against the illegal traffic in cultural objects, while others feared that it could give rise to arbitrary or differing interpretations. One representative proposed a combination of the two approaches by adding to a general definition the words "in particular those belonging to the following categories" followed by the list in Alternative II, which was that set out in Article 1 of the 1970 UNESCO Convention.

29. The committee decided to consider the principles underlying the two alternatives, the first of which was whether the scope of the definition, and thus the application of the Convention, ought to be limited to those cultural objects which deserved special protection by reason of their "outstanding" importance (Alternative I). Some representatives stated that while they preferred a general definition of cultural objects, they favoured a restriction of this very wide definition, especially in the case of theft, for fear that their Governments would not be prepared to change their rules of private law governing the acquisition of movables for too

broad a category of objects. Another representative suggested that the member States of the European Community would have difficulties if the scope of application of the future Convention were to be wider than that of the EEC Directive in relation to illegal export.

30. A large majority was however opposed to this restriction, precisely because the inclusion of the word "outstanding" would limit the application of Chapter II on stolen objects. The introduction of this word would undermine the most important principle of the Convention which was to require of all those acquiring cultural objects that they exercise diligence in ascertaining their provenance, and the present tendency in the art trade deliberately to abstain from making such inquiries would not be reversed. One representative moreover stressed the fact that too many objects of minor importance would be excluded from the application of the future Convention such as those forming part of private collections, or those belonging to small churches, local museums and private houses. The study group had indeed wished to see such objects covered by the instrument, especially in view of the ever greater number of thefts of such objects.

31. These were political questions which highlighted the link existing between the general definition in Article 2 and the legal regime governing stolen or illegally exported objects established by Chapters II and III. In view of the differing points of view expressed concerning the definition of what was to be understood as a cultural object and of the need of finding a definition applicable to both stolen and illegally exported cultural objects, one representative reintroduced a proposal to the effect that there should be a separate definition for each Chapter (cf. Study LXX - Doc. 43).

32. The representative who had at a previous session proposed the introduction of the adjective "outstanding" accepted its deletion in view of the problems which it posed for many delegations, above all in relation to stolen cultural objects. Another representative however drew attention to the fact that the definition applied both to Chapters II and III, and to the connection between the definition of cultural objects and Article 5, paragraph 3 which restricted the application of the Convention to certain illegally exported objects. He recalled that the purpose of the Convention was to achieve a consensus which would permit States, as far as possible, to have regard to the public law of the requesting State, and he could not therefore accept a wide application of the same definition to illegally exported objects. He had therefore to reserve his position until such time as a decision had been taken on Article 5, paragraph 3 (if this provision were to be deleted, then it would be necessary to retain the word "outstanding").

33. Another representative also reserved her position, insisting on the connection which existed between the definition of cultural objects and the limitation periods for the bringing of claims under the Convention. She

stated that the greater the discrepancy between those limitation periods and those under her national law, the more important it would be for the range of cultural objects covered by the Convention to be restricted.

34. A proposal had been made at the second session of the committee to the effect that it should be left to each State to decide what was in its opinion an object of cultural significance, which would have constituted a kind of restriction on the objects which might have to be returned ("including those designated as such by each Contracting State" (Alternative I)). Some representatives insisted on the retention of that language since each country had its own conception of the importance of the heritage to be protected and it was for the cultural authorities to decide what each State would designate as a cultural object under its own law. The idea that foreign lawyers might determine the cultural importance of an object for civilisation or for the culture of another country was not acceptable to them. Another argument advanced in favour of the retention of the wording was that it would permit the development of inventories at worldwide level.

35. One representative stated that he wished to see the maintenance of the words "including those designated as such by each Contracting State" for the same reasons as those which had led him to call for the deletion of the adjective "outstanding", namely that each country should decide for itself whether it wished to protect its cultural objects and, if so, which. He further stated that this argument applied only to illegally exported cultural objects and not to those which had been stolen, which provided further justification for a double definition.

36. A large number of representatives were however opposed to the retention of the language in question on the ground that it was restrictive in character as many cultural objects held by private persons were not so designated by a State which might in effect have a philosophical objection to so doing. Nor would that language cover objects belonging to a private collection or to a small church or a village, which were of local importance only. They insisted on the need for the definition to apply to both parts of the Convention and recalled that Article 5 already contained the restriction necessary in respect of illegally exported objects.

37. Some representatives who were satisfied with the general formula expressed concern that certain terms, which had appeared in earlier versions of the text, had been removed, for example "religious" or "spiritual". It was replied that the text contained the words "in particular" which left all other possibilities open and that the list was not exhaustive. One representative however remarked that there would be no problem if the list were given by way of example, but in the present version of Alternative II it was exhaustive. Another representative insisted on the retention of the reference to the "natural heritage".

38. In the definition of a cultural object in Alternative II, one of the elements was that the object should be "more than one hundred years old", which had seemed to be inappropriate to some representatives at the last session, as a consequence of which the figure had been placed in square brackets. One representative however believed that the hundred years limitation was not appropriate, for ethnological objects for example, and that it appeared in the UNESCO Convention only in relation to furniture and antiquities (cf. Study LXX - Doc. 42). Another representative suggested that the period was too long and that one of seventy-five years would be more suitable (cf. Study LXX - Doc. 45).

39. On a number of occasions at previous sessions of the committee some representatives had expressed a wish to see the text of the future Convention include additional definitions to that of a cultural object, thereby following the example of other instruments and in particular the recent EEC Directive (Article 1). One representative submitted a written proposal for three further definitions, namely those of "claimant", "possessor" and "stolen" (cf. Study LXX - Doc. 47, Misc. 34). He suggested that these definitions were broad enough to cover most cases and that in the absence of such definitions for the purposes of the Convention there was a risk that each State would give a detailed definition of the terms in question in its national legislation which would run counter to uniformity. One representative replied that the past experience of Unidroit showed that national interpretations were not always divergent because there was a tendency towards harmonisation in accordance with the aim of the treaty. Another representative proposed defining the terms "unlawful removal" and "law applicable to the protection of cultural objects" which could be placed either in a single definitions article at the beginning of the text, or in Chapter III (cf. Study LXX - Doc. 47, Misc. 3). Lack of time did not permit the committee to discuss these two proposals.

40. The committee of experts decided to set up a working group entrusted with the drafting of a new article which would define cultural objects for the purposes of the Convention in the light of the discussions and of the various proposals which had been put forward.

41. On second reading, the committee was seised of the results of the deliberations of the specially constituted working group (cf. Study LXX - Doc. 47, Misc. 14). One member of the group presented the text which reflected in part the compromise proposal seeking to combine the general definition with the list contained in the 1970 UNESCO Convention. The group had found the definition in the 1970 Convention to be very long and had believed that to include it in this instrument would have resulted in an article of disproportionate length when compared with the others, and for this reason the group had considered that a simple reference to the categories listed in Article 1 of the 1970 Convention would be sufficient. Some representatives however levelled criticism against such a simple reference on the ground that technically speaking it would create difficulties for the reader who did not have access to that text. Another

solution was therefore proposed to the effect that the list contained in the 1970 Convention should be annexed to the future Convention, a solution which proved to be acceptable to the committee as a whole.

42. Some representatives then requested that the words "religious or secular" should be inverted. The UNESCO representative replied that the formula proposed by the working group was that used in the 1970 Convention and if any change were to be made then the States Parties to the two instruments might wonder why there was such a difference. To settle the matter, the Chairman put to a vote the proposal to invert the order of the words: five delegations voted in favour of the proposal, nine against and 17 abstained. The text therefore remained unchanged.

43. One representative strongly insisted on the reintroduction in the definition of the words "outstanding significance" since the application of the future Convention should be much more restricted in respect of illegally exported than of stolen cultural objects. In reply to the argument advanced according to which Article 5, paragraph 3 provided the desired limitation in that it made express reference to the "outstanding cultural importance" of the object, the representative recalled that this criterion was at present an alternative to sub-paragraphs (a) to (d) and that it was his wish to see them become cumulative (cf. Study LXX - Doc. 47, Misc. 35). The discussion on this matter was deferred until consideration of Article 5, paragraph 3.

44. A number of representatives called for the reintroduction of the definition of the words "including those designated as such by each Contracting State", believing as they did that some important cultural objects were not covered by the present definition, and pointing out that the definition in the 1970 UNESCO Convention did contain such a reference. A large number of representatives opposed this proposal on the ground that it had been decided to establish an autonomous definition of cultural objects and to round it off by a reference to the categories of the 1970 Convention by way of illustration. The effect of the reintroduction of the language in question would be to sacrifice the autonomous definition. The UNESCO representative further recalled that the 1970 Convention dealt only with the question of illegal export (theft of certain objects only) and that the language in question had been intentionally omitted from the preliminary Unidroit draft, another provision of which limited its application to illegally exported cultural objects.

45. The matter was then put to the vote by the Chairman of the committee: eleven delegations voted in favour of the language "including those designated as such by each Contracting State", 17 against and five abstained.

46. The definition of Article 2 as it appeared in document Study LXX - Doc. 47, Misc. 21 obtained consensus support within the committee on the understanding that it was a general definition which would in no way

prejudge the substantive requirements which would be fixed in Chapters II and III.

Article 2 bis

47. The committee of experts decided not to embark upon a discussion of Article 2 bis at this stage, preferring to group together the different provisions concerning the export certificate (Articles 2 bis, 4, paragraph 4, 5 bis and 8, paragraph 1 bis in document Study LXX - Doc. 40), and to consider in the course of a general debate the desirability of dealing with this matter in the future instrument.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

48. A broad consensus emerged within the committee with regard to the principle laid down in paragraph 1 of the article, namely the automatic restitution by the possessor of any stolen cultural object.

49. The committee then turned its attention to paragraph 2 which assimilated unlawfully excavated objects to stolen objects. The committee as a whole believed that this paragraph should be retained, while accepting the idea that a claim for the restitution of an object unlawfully removed from an excavation could be brought under either Chapter II or Chapter III. The main difference lay in the stricter degree of diligence required under Chapter II. The draft had the merit of permitting the restitution of items originating from clandestine excavations whenever it could be proved that they had been stolen and of leaving other objects from clandestine excavations to be returned in conformity with the provisions of Chapter III when no interference with the right of ownership could be proved.

50. At the last session of the committee, a proposal had been made for the inclusion of a separate chapter dealing specifically with cultural objects unlawfully removed from excavations. This proposal had not received support on the ground that it could give rise to confusion: there were in effect many objects originating from clandestine excavations without this fact being known, for example items belonging to a tomb or a complex monument etc. One representative however proposed a new text on this matter, without suggesting where it might be located in the preliminary draft (cf. Study LXX - Doc. 47, Misc. 1). Since however this proposal was based on the language of Article 5, the committee agreed to defer discussion on it. Given the importance of this question however, it decided

to set up a special working group on the problem of excavations with a view to drafting one or more provisions.

51. In connection with paragraph 3 concerning the limitation periods for the bringing of actions for the recovery of stolen cultural objects, some representatives once again suggested that it might be desirable to have the same limitation periods for Chapters II and III and perhaps to deal with the matter in a single provision. Some of them believed that this would be absolutely essential if it were to be possible to claim recovery of objects unlawfully removed from excavations under either Chapter II or Chapter III, so that the decision as to which procedure should be followed would be taken solely on the basis of the proof of theft and not on that of the limitation period in respect of the claim for recovery. One representative further suggested that the relevant provision should be contained in Chapter IV - Claims and actions.

52. Another representative however believed that the problems dealt with in Chapter II were of a different legal character from those treated in Chapter III. In effect, all States were in agreement on the need to co-operate with a view to penalising theft committed abroad as theft was universally considered to be a criminal act, whereas only a few States would, in the present state of the law, be prepared to undertake an obligation to sanction customs offences committed abroad. Agreement could certainly be reached on the matter but this was a political question and in consequence a decision could only be taken by the diplomatic Conference and not at the level of a committee of experts.

53. In contrast to the procedure followed at previous sessions, some representatives expressed a wish to consider the provision as a whole and not only point by point, thereby emphasising on the one hand the links which existed between the articles and on the other the various outstanding issues indicated in the text by the use of square brackets. One representative recalled the connection which existed between the definition of cultural objects in Article 2 and the length of the limitation periods for the bringing of actions for recovery: he suggested that if the period chosen were to be longer than that provided for under his national legislation (three years in respect of stolen objects), it would be difficult politically to accept a broad definition of cultural objects.

54. One representative then emphasised the connection between the provision on the bringing of a claim for recovery and that concerning the authorities competent to decide upon claims under the preliminary draft Convention. It seemed in effect to be reasonable that the claimant should institute proceedings once it was in possession of all the relevant information, on condition that a suitable forum existed for the bringing of the claim. The possessor could be sued if he or she was in a country which was a Contracting State; so could the person in physical possession of the object (even if that person was not the *bona fide* acquirer but, e.g., a bailee (bank, insurance company, exhibiting museum etc.)). She recalled,

however, that whether both these avenues would be open would depend on decisions to be taken in respect of Article 9.

55. Attention was then turned to the relation between the alternative solutions in the text in square brackets, namely the length of the periods and the beginning of the shorter period ("or ought reasonably to have known" and the cumulative or alternative conditions ("and" or "or")). As regards the length of the periods, a division of opinion remained among the representatives, some preferring shorter periods, others longer ones and others again no limitation period at all. With a view to avoiding lengthy discussion, the Unidroit Secretariat recalled the decision already taken by the committee to defer a final decision on this matter to the diplomatic Conference, but so as to reduce as far as possible the number of square brackets in the text, it had proposed retaining only the longest and shortest periods, and this both for the shorter limitation period and for the absolute period.

56. The words "or ought reasonably to have known" were once again the object of the same criticism, namely that they were open to interpretation, ambiguous and contrary to the interests of developing countries from which cultural objects were most frequently stolen. One representative on the other hand suggested that the language in question to some extent facilitated the application of the provision as it would be very difficult to prove whether the claimant knew of certain facts and if so to what extent. This wording would leave it to the court of the State addressed to draw its own conclusions in relation to the exposure given to the acquisition and regard should naturally be had to whether the original owner was located in another country. Some representatives stated that the retention of this language was indispensable if their Governments were to contemplate ratifying the future Convention. As to the alleged ambiguity of the wording, it was recalled that the study group had had in mind a number of decisions handed down by American courts explaining this language. Another representative stated that if the form of wording were not retained, it was probable that judges in many States would in any event apply the general rules of their law in respect of an unreasonable delay on the part of a claimant in discovering the identity of the possessor or the location of the object.

57. All those representatives who took the floor on this question drew attention to the connection between the actual or presumed knowledge of the claimant and the cumulative or alternative conditions concerning the starting point of the shorter limitation period. Two differing positions emerged within the committee: one group of representatives wished to delete the words "or ought reasonably to have known" and suggested that the limitation period should begin to run on the date on which the claimant knew both the location of the object and the identity of the possessor. This position clearly favoured claimants as this limitation period would be as long as possible. The other group however preferred to retain the language in question and to provide that the limitation period should begin

to run as from the date on which the claimant had knowledge either of the location of the object or of the identity of the possessor. This solution favoured those acquiring cultural objects as the limitation period would be as short as possible.

58. In connection with the EEC Directive, one representative recalled that the Council of the European Communities had opted for a combination of actual knowledge with the cumulative requirements and a very short period of one year (cf. Article 7, paragraph 1). One representative explained this decision on the ground that if a State wished to secure the return of an important cultural object, it would manifest that desire as quickly as possible, even if it was not yet in possession of all of the facts of the case.

59. One representative suggested that those who favoured the inclusion of the word "or" could certainly accept the word "and" if a very short period were to be chosen, for example one year. A compromise proposal tabled by a large number of delegations was submitted in writing to this effect, the thrust of which was to retain the words "or ought reasonably to have known" together with an absolute limitation period of thirty or fifty years (cf. Study LXX - Doc. 47, Misc. 8).

60. While a majority of representatives favoured this proposal, some found it to be unrealistic at worldwide level and considered that it constituted a step backwards for many countries which presently had longer limitation periods. To this last argument it was replied that Article 11 of the preliminary draft would permit those countries to continue to apply longer limitation periods. Other representatives supported the retention of the earlier periods of three and five years, believing that one year was much too short as the time within which a private person, or even more so a State, could obtain all the necessary information. Another representative called for an amendment of the proposal to cover cases of the breaking off of diplomatic relations between countries which could prevent the bringing of claims. While fully appreciating the merit of this proposal, the Chairman of the committee recalled the existence of a general principle of law concerning the interruption of limitation periods and suggested that even if the text were to contain no specific reference to this question the result would be the same.

61. The Chairman put the compromise proposal (Misc. 8) to the vote: 19 delegations voted in favour, two against and nine abstained. This text therefore replaced the previous paragraph 3.

62. As to the absolute limitation period, some representatives criticised the minimum period contemplated in the initial text which was in their view far too short, while others raised the same objection as regards the maximum period provided. The compromise proposal adopted by the committee seemed to satisfy the representatives on this point also. Some of them however would have preferred the deletion of any reference to an

absolute period, believing that there should be no time bar whatsoever for the recovery of a stolen cultural object.

63. In this connection, some representatives recalled that the committee had at its last session included in the preliminary draft a new paragraph 4 providing for a longer absolute limitation period, or even for no limitation period at all, in regard to the recovery of cultural objects which constituted the hard core of the cultural heritage of each State and which were strictly related to the identity of a people, that is to say those cultural objects which belong to a public collection. Such a solution had already been adopted in Article 7 of the EEC Directive where those objects were subject to a longer limitation period than others (75 years). In all probability this represented the compromise which would permit the acceptance of a shorter absolute limitation period for most cultural objects.

64. The first question which arose however in this context was that of whether it would be necessary to define the notion of a "public collection". Most representatives insisted on the need for such a definition for the purposes of the Convention as there could be very wide differences between the concept of public collections in the internal law of States.

65. One representative recalled that the EEC Directive contained a definition of "public collections" in Article 1, paragraph 1 and he wondered whether this definition could not be applied on a worldwide basis. The criterion employed in the Directive was that the collections should be the property of a State, local or regional authority or an institution which was the property of, or significantly financed by, a State or such an authority. A number of representatives recalled the existence in their countries of many private collections which were open to the public or financed by a State, and it was in their view important to offer special protection to them, although the Directive had not included such collections in its definition of "public collections". The Chairman noted that paragraph 4 of the present text referred to a "public collection of a Contracting State" which was broader than the language "public collection belonging to a Contracting State" and it could therefore be assumed that private collections subsidised by a State or ecclesiastical objects were covered by the present language.

66. One representative submitted to the committee a proposal already made at the last session intended to cover cultural objects forming part of historical monuments without being a collection as such (e.g. palaces and churches) (cf. Study LXX - Doc. 38, Misc. 15): "cultural objects belonging to the requesting State or to a public body". A majority of the representatives believed this proposal to be more restrictive than the definition to be found in the Directive.

67. Another representative suggested introducing in the definition a reference to inventoried cultural objects. Such a reference would support the correct practice of those museums which keep track of the origins of the items they possess and which could therefore notify the theft to the international registers of stolen objects. Another representative suggested a specific mention of ecclesiastical objects. A majority of representatives considered it essential that the definition be restrictive as it was unthinkable to contemplate a special limitation regime for too broad a category of objects. One delegation submitted a written proposal for a definition which would include objects belonging to charitable or non-profit making organisations located on the territory of a Contracting State (cf. Study LXX - Doc. 47, Misc. 9 corr.).

68. In view of the difficulties which the drafting of a satisfactory definition seemed to pose, some representatives suggested that it might be preferable simply to refer for example to the definition contained in the EEC Directive, although a majority favoured the introduction of an autonomous definition in Article 3.

69. The second question which arose in connection with public collections was that of the length of the limitation period. A consensus had emerged at the previous session of the committee to the effect that the period should be longer than that for the other cultural objects covered by the Convention, although some had expressed a preference for there being no limit at all for the recovery of such objects. Once again some representatives insisted on the principle of there being no limitation period. They suggested that since those objects were *extra commercium*, they were in any event inalienable, and that their cultural importance was such that the idea of legal security should in those cases give way. Others were however strongly opposed to such an approach, basing their opposition on the notion of the legal security of international transactions, although stating that they could accept a maximum limitation period of 75 years, a solution which was already to be found in the EEC Directive (Article 7). One representative recalled that the negotiations on the Directive had risked breaking down on the question of imprescriptibility and it was unimaginable that agreement could be reached at universal level that had not been possible on a regional basis.

70. The committee decided to enlarge the terms of reference of the working group entrusted with the drawing up of a definition of cultural objects for the purposes of the Convention by asking it also to draft a definition of public collections on the basis of the discussions in plenary and of the proposals submitted. It was however decided to leave between square brackets the notion of imprescriptibility and that of a longer limitation period, thus deferring the final decision to the diplomatic Conference.

71. On second reading, the Secretary-General indicated that the text of the article as revised in the light of the discussions of the committee

and the proposals of the working group was to be found in document Misc. 21 (cf. Study LXX - Doc. 47) and that no changes had been made to paragraph 1 concerning which a consensus had been reached. One representative however insisted that in view of sub-paragraph (a) of Article 1, it was necessary to state clearly the place to which the object should be returned. By way of reply it was recalled that this question had often been discussed by the committee but rather in terms of the person "to whom" the object should be returned, and that it had been decided not to deal with the matter expressly as that person might not be the owner. The committee had decided that a cultural object should be returned to the person to whom a successful claimant would wish to see it handed over in the absence of any public law requirement in the State addressed.

72. The committee reaffirmed the consensus already existing in favour of assimilating in paragraph 2 cultural objects which had been unlawfully removed from excavations. A member of the working group which had been set up to draft one or more provisions concerning excavations stated that since the question had been dealt with in a satisfactory manner in Chapter II, there had been no need to alter the existing provision and the group had therefore sought to find a solution to the problem of excavated objects which had been illegally exported. One representative however recalled that the committee had decided to cover not only the case of objects originating in unlawful excavations but also that of objects unlawfully removed from a legal excavation, and he drew the attention of the committee to the fact that this decision was reflected only in the French version. The committee therefore amended the English version of paragraph 2 to that effect.

73. With regard to paragraph 3 concerning the limitation period for bringing an action for recovery, the committee had already reached a compromise which it had decided to submit to the diplomatic Conference (see paragraph 59 above).

74. One representative then submitted the conclusions of the working group entrusted with the preparation of a definition of "public collections" for the purposes of the future Convention (cf. Study LXX - Doc. 47, Misc. 18). He explained that the working group had approached its task on the basis of the definition to be found in the EEC Directive (Article 1) and of a written proposal submitted by one delegation (cf. Study LXX - Doc. 47, Misc. 9 corr.). The group had in particular sought to cover the collections of very important privately organised museums (cf. sub-paragraph (iii)).

75. A number of representatives, some of whom had been members of the working group, recalled that the purpose of the definition was to limit the application of Article 3, paragraph 4 to a specific category of cultural objects. The working group had not succeeded in this attempt, a consequence of which was that it would be impossible for certain States to ratify a Convention containing such a provision. They therefore proposed

deleting the paragraph as a whole and thus abandoning the special regime contemplated by it.

76. One representative who had also been a member of the working group recalled that her delegation had submitted a proposal seeking to grant greater protection by means of a longer limitation period to another category of objects, namely sacred or secret objects belonging to an indigenous community, since those objects were of the utmost importance for the cultural survival of such communities. The present definition of public collections did not cover them because those objects were not as a rule accessible to the public. A definition of an indigenous community, based on that of Article 1 of the 1989 ILO Convention No. 169 on Tribal and Indigenous Peoples, had been included as a new paragraph (cf. Study LXX - Doc. 47, Misc. 24). The representative in question believed that it would be discriminatory to omit such objects if public collections were being covered although she was willing to endorse the proposal to give up the idea of special protection being afforded to one or two categories of objects in view of the difficulties posed by their definition.

77. Independently of whether or not the proposed definition of a public collection was satisfactory, one representative believed that what had been intended to be an exception was beginning to become the rule as each delegation sought to introduce in the definition what was important for it. The aim of the definition had not however been to make up for the absence of a definition of public collections in domestic law and a very broad definition combined with a very long absolute limitation period would render the Convention unacceptable to a number of States.

78. Some representatives opposed the deletion of the paragraph for the sole reason that the definition was not satisfactory since the committee had as a whole agreed on the principle, an agreement which had moreover been evidenced by a very clear vote on the matter. Those who were against any absolute limitation period had already indicated that they were prepared to accept a limitation to one category of objects only and they insisted on retaining the whole of paragraph 4, subject to further attempts being made to come up with a definition acceptable to as many delegations as possible.

79. The definition of a public collection, which appeared as the second sub-paragraph of paragraph 4, was put to the vote: 14 delegations favoured its retention, 14 its deletion and four abstained. In these circumstances the committee decided to retain the definition in paragraph 4 while however placing it between square brackets (cf. Study LXX - Doc. 47, Misc. 39 corr.).

Article 4

80. The Secretary-General of Unidroit recalled that in paragraph 1 the principle of compensating a possessor required to return a cultural object who did not know that the object has been stolen and who could prove that it had exercised due diligence when acquiring the object had been accepted following a number of votes. The only issue which remained to be decided was that of the knowledge of the possessor of the provenance of the object ("nor ought reasonably to have known that the object was stolen").

81. Most representatives stated that they were in favour of such additional language since it would give further encouragement to purchasers to be vigilant. Moreover, the *raison d'être* of Article 4 was to penalise those who acquired cultural objects without making serious enquiries into their provenance. If the sanction were to be the risk of having to return the cultural object without compensation, potential acquirers would refrain from purchasing such objects in the absence of adequate information, which would discourage theft and at the same time alter the present practice of dealers and auction houses of not disclosing the names of sellers, and that of purchasers of not questioning the statements of sellers.

82. The committee was in general agreement that the weakening of the protection accorded to the good faith purchaser would constitute an important step forward in a number of countries which considered such protection as being one of the pillars of their legal systems. The idea of awarding compensation had only been contemplated because the fact of depriving a possessor of an object would be seen in some legal systems as introducing a very significant change and the reference to compensation would render the presentation of this change more acceptable both politically and philosophically.

83. One representative however found it abnormal that a person who had been unlawfully deprived of an object should have to pay compensation to obtain its restitution. It was replied that while the principle adopted constituted significant progress in this field the committee had understood that owners and those States which suffered most from thefts on their territory could consider this to be unjust. The number of cases in which compensation would have to be paid would however be limited. In practice there would be very few possessors who would be able to prove that they had satisfied all the requirements of due diligence when acquiring a stolen object. That representative added however that if the requirement of payment of compensation continued to pose problems to some representatives, it was possible to envisage the inclusion of a greater amount of detail in the provision concerning diligence.

84. While favourable to further encouraging purchasers to be vigilant, and therefore supporting the retention of the words "nor ought reasonably to have known", one representative was of the opinion that this

language was equivalent to "and can prove" and that the latter could therefore be deleted. Another representative however expressed a contrary opinion, pointing out that the following paragraphs described the elements to be taken into consideration for the purpose of demonstrating that due diligence had been exercised, and that it would therefore be preferable to retain both formulas. Yet another representative believed that there was no repetition and that the words "and can prove that" emphasised the "legal revolution" represented by the reversal of the burden of proof. So as to underline still further this change, one representative proposed substituting the word "unless" for "provided that" ("à moins que" in place of "sous réserve" in French).

85. The committee reiterated its consensus as to the principle laid down in paragraph 1 and the retention of the words "nor ought reasonably to have known".

86. Without wishing to reopen the question of the principle of compensating a possessor required to return a stolen object, one representative was nevertheless anxious to facilitate such return and to assist those who might have difficulty in meeting the obligation to pay compensation. He therefore proposed adding at the end of paragraph 1 another element of proof which would have to be brought, namely that the possessor had "exhausted all the remedies for compensation against the transferor of the object" (cf. Study LXX - Doc. 47, Misc. 37). The claimant would only be required to pay compensation once it was satisfied that no other person was obliged to do so under the applicable law. One representative expressed his fear that such a proposal could only run counter to the intended aim of the provision and that it would delay the settlement of claims.

87. The committee then recalled that the definition of due diligence contained in paragraph 2 had been approved unanimously at its last session and that it had been decided that the text as drafted should be submitted to the diplomatic Conference. Some representatives however thought it necessary to underline the fact that with a view to meeting the difficulties of those legal systems which would have problems in making provision for the compensation of the acquirer of a stolen object, it would be helpful further to clarify the degree of diligence required. To this end, one representative proposed adding to the elements already to be taken into consideration the consultation of any "reasonably accessible information as to whether the cultural object was excavated illegally" (cf. Study LXX - Doc. 47, Misc. 33). Another representative who believed that the criteria were not sufficiently strict, and that they would result in payment of compensation being made in too many cases, suggested that other elements should be added which would make proof of the exercise of the due diligence more difficult (cf. Study LXX - Doc. 47, Misc. 37).

88. Other representatives stressed the importance to be attached to the use of the word "including" in the present formulation of the text, as

it would in any event permit the court to have regard to other relevant circumstances such as the provenance of the object or any special circumstances concerning its acquisition by the transferor of which the possessor had knowledge. They saw no need to burden the text further when the result would be the same.

89. The Secretary-General then recalled that the wording of paragraph 3 was based on the corresponding provision of the EEC Directive (Article 9). The words in square brackets had not however been the subject of discussion in plenary. One representative who had sponsored the proposal stated that its purpose was to ensure that the Convention would not apply to a possessor who had received a stolen object before the entry into force of the Convention. His principal concern was the non-retroactivity of the Convention and he had believed that Article 10 was not sufficiently clear on that point, which had led his delegation to suggest the wording between square brackets in the two provisions (Article 4 and Article 8). In the light of the new version of Article 10, he recognised that the suggested clarification was no longer necessary. Other representatives suggested that the situation to which the proposal was addressed would arise only very rarely and that questions concerning the temporal application of a rule were in private international law traditionally decided by judges.

90. The committee decided however to retain the words provisionally in square brackets prior to a detailed examination of Article 10 and of the corresponding provision in Article 8.

91. The committee then proceeded to a preliminary discussion of the general principle of the requirement of an export certificate, beginning with paragraph 4 of Article 4 which provided that in the absence of such a certificate, which was mentioned for the first time in Article 2 bis (cf. Study LXX - Doc. 40), the bad faith of the possessor would be conclusively presumed.

92. At the second session of the committee, one representative had proposed the institution of a certificate for cultural objects of special significance which would indicate the particulars of the object, information as to the identity of the owner and the necessary information concerning the possibility of importing or exporting the object (cf. Study LXX - Doc. 38, Misc. 2). A working group had subsequently met during the third session of the committee with a view to ascertaining whether the certificate could constitute an appropriate means for discouraging the illicit traffic in cultural objects, while at the same time having regard to the legitimate interests of international trade. This group had proposed a system spread out over a number of articles (Articles 2 bis, 4, paragraph 4, 5 bis et 8 paragraph 1 bis) which had not as yet been the object of discussion in plenary.

93. The author of the initial proposal believed that such a certificate was essential to combat theft, the illegal export of, and the

black market in, cultural objects. Other representatives supported this proposal, while suggesting that the underlying idea should be limited to Chapter III on illegally exported objects since some stolen cultural objects might never have been subject to any export control. Furthermore, the presence or absence of a certificate within the framework of Article 4 was relevant only to the determination of the good or bad faith of the acquirer in connection with compensation and not to whether an object had been stolen.

94. As regards the principle of the certificate, some representatives believed the idea to be a good one but that it could not constitute conclusive proof of the bad faith of the possessor. Apart from the risk of fraud, the possessor could not always be sure of the provenance of the object and in such cases it might, although in good faith, never have asked for the certificate. The existence of the certificate should therefore only be one possible element in regard to the proof of good faith.

95. A majority of representatives were however opposed to the idea of instituting such a certificate; some because they considered it to be a matter of public law which had no place in a private law Convention but rather for example in an agreement between customs authorities, while the difficulty of others lay in the feasibility of establishing such a system and the burden which its implementation would create at universal level.

96. One representative suggested that Article 2 bis was superfluous as States had no need of an authorisation by Unidroit to create such a system. He added that the content of Articles 2 bis and 4, paragraph 4 was already to be found in Article 6 (a) of the 1970 Convention, which provided that "[t]he States Parties to the present Convention undertake: (a) to introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorised and that "the certificate should accompany all items of cultural property exported in accordance with the regulations". It was therefore unnecessary to introduce the concept in the present instrument. Another representative believed that the committee was in general in agreement that the certificate should only be optional and that if the problem was already dealt with in another Convention, it was not useful to mention it here as this was essentially a question of fact which a judge in the State addressed would determine in the light of the circumstances.

97. One representative then emphasised the connection between Articles 2 bis and 4, paragraph 4 as the latter referred back to the former, as well as the fact that the system simply would not work. A situation could indeed arise in which if one State chose not to introduce the export certificate provided for in Article 2 bis, the bad faith of the possessor would be conclusively presumed.

98. The attention of the committee was then drawn to a document submitted on this point by the Art Trade Liaison Committee (cf. Study LXX - Doc. 47, Misc. 11) which underlined the many practical problems raised by the administration of the proposed certificate scheme, for example the cost of administration and of control and the authority which would issue the certificate and copies thereof. The main concern of the Committee, which had studied the matter in connection with the recent EEC Regulation, was that the adoption of such a scheme would risk creating a still greater criminal element in the Art World by encouraging the falsification of certificates.

99. In summarising the discussion on this point the Chairman concluded that the clear wish of the committee was that the matter should not be dealt with in the context of Chapter II. It likewise emerged from the discussion that the scheme would pose difficulties even if it were only optional, in particular because of its effects on the burden of proof. He therefore suggested that the authors of the proposal should reconsider it in the light of the objections raised by a number of representatives and that the proposal be taken up again in connection with Articles 5 and 8 which contained provisions concerning the certificate. One representative called to the attention of the committee a text which was proposed in Study LXX - Doc. 42, p. 41.

CHAPTER III - RETURN OF ILLEGALLY [EXPORTED] CULTURAL OBJECTS

100. Both the Chairman and one observer representative felt that it was necessary, before proceeding to detailed discussion of the articles contained in this Chapter, to explain the philosophy underlying it as the problem it dealt with was very different from that of theft. Whereas the provisions of Chapter II were aimed at protecting the rights of the owners of cultural objects, those concerning illegal export might often not coincide with the wishes of owners.

101. As a matter of policy, a difference existed between those countries which wished to limit the movement of cultural objects from their territory and those which preferred a more open international commerce in such objects. The study group had believed that although both positions could be defended, neither of them was in the last analysis the correct one and that it would therefore be necessary to strike a compromise. In the present state of the law, the legislation of the requesting State had no standing in the State addressed which could reject a claim for the return of a cultural object even if it had been exported in contravention of the law of the requesting State, thus applying the principle of the independence and of the equality of States. International law recognised and gave effect to the reality that different States may legitimately follow different policies and it made no choice between them. A body of

opinion was however growing to the effect that a step forward would be taken if the State addressed were in certain circumstances to be required to order the return of a cultural object. Article 5, paragraph 3 listed those circumstances. In consequence Chapter III placed some limits upon the autonomy of the State addressed and accorded greater weight to the claims of requesting States.

102. One representative noted that the word "exported" ("exportés" in French) had been placed between square brackets because the committee had wished to cover other situations such as excavations and had believed that the word "removed" would be preferable as it was broader. The question of the language to be used in the French version remained to be decided.

Article 5

103. Two alternatives were submitted for Article 5, the main difference between them being paragraph 2 of Alternative II concerning the prohibition of the import of cultural objects in the absence of a permit issued by the State of origin. The committee decided that it would in the first instance consider only Alternative I.

104. Given the extremely innovative character of this provision which laid down the principle according to which a State on whose territory a cultural object was located that had been exported in contravention of the law of another State should return it, that is to say that a State which ratified the future Convention would undertake to respect foreign rules of law concerning illegal export, some representatives once again stressed the necessity of clearly defining in paragraph 1 the notion of illegal export.

105. The present text contained a reference to the law of the requesting State and limited the law in question to that "applicable to the protection of cultural objects". This language appeared in the text in square brackets as the committee had been unable to reach agreement at previous sessions, and had also deferred discussion of it when considering Article 1 (cf. paragraph 20 above). Proposals had been submitted which favoured a broader approach ("contrary to its law") while intermediate compromise solutions had been put forward ("contrary to the mandatory rules of law of the State in question" or "contrary to its law applicable to the protection of cultural objects and to the disposal of property rights therein"). One representative suggested including in Chapter III a precise definition of such terms as "unlawful removal" and "applicable ..." (cf. Study LXX - Doc. 47, Misc. 3).

106. One representative noted however that there was no necessary connection between the protection of cultural objects and their export (very often cultural objects would be better protected if they were exported) and therefore suggested deleting the word "protection" from the definition since this was not the question with which the Convention was

concerned, and since any confusion with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict would thus be avoided. Likewise, some representatives proposed deleting the word "protection", which could limit the application of the provision, and to retain only the words "contrary to its law" or "contrary to its law applicable to cultural objects", wording which would be interpreted by the judge in accordance with the purposes of the Convention. Another representative noted that in some countries the law applicable to the protection of cultural objects contained provisions concerning State ownership of such objects, and that these situations should be dealt with in Chapter II. Since he did not wish the choice to be left to the requesting State, he called for a clear statement in the text that the regime contemplated by Chapter III should apply only to those cultural objects which were not covered by Chapter II. Yet other representatives expressed a preference for a still wider scope of application of the law of the State of origin of a cultural object.

107. A number of representatives on the other hand believed that, with a view to securing the greatest number of ratifications of the future Convention, it would be necessary to limit as far as possible the foreign law which was to be recognised. One solution put forward was to speak of the general protection of rights of ownership in the framework of an export regime. This proposal, which reflected a broad approach, was not considered adequate to the purpose since it would make it possible to seek recovery of a cultural object under the Convention in cases where the law which had been contravened was that governing succession or divorce, whereas what the text had to make clear was that the legislation in question was directed to keeping a cultural object on the territory of a State. Another representative stressed that his authorities were only willing to give effect to foreign public law so as to permit the return of a cultural object if there had been a violation of the rules concerning export (and not, as had been suggested, to extend the provision to cover such questions as the transfer of ownership). He therefore proposed returning to the study group text which had used the language "contrary to its export legislation" (cf. Study LXX - Doc. 39, APPENDIX III). Another representative suggested that if the text were to contain the words "law applicable ...", this would signify that the export must have infringed a specific provision of that law which might only have been introduced much later.

108. In conclusion, the Chairman noted that the committee was unanimous that Article 5 should combine the notion of illegal export with the objective of the Convention and that the notion should not be distorted for purposes which had nothing to do with the character of a cultural object. The difficulty lay in finding a way in which to express this and the committee remained divided on the formulation. A working group was therefore set up with the task of finding language which would satisfy the committee as a whole.

109. During its consideration of Article 3 the committee had decided to set up a working group on the problem of excavations whose mandate was to draft one or more provisions on the matter (cf. paragraph 50 above). The group had endeavoured to come up with a solution regarding objects originating from excavations and then illegally exported. The proposed solution appeared in document Study LXX - Doc. 47, Misc. 6 rev. and would find its place in sub-paragraph (b) of Article 5, paragraph 1. The new provision sought to secure the return of objects that had been excavated contrary to a law applicable to the excavation of cultural objects. The provision likewise reflected the view that one of the criteria listed in paragraph 3 ("the use of the object by a living culture") was too broad for objects originating in excavations and that it should be replaced by another, namely "the continued traditional use of the cultural object by an identifiable cultural group" although one member of the working group had suggested that this question could be settled elsewhere in the text and that the final words of the provision could be deleted.

110. Some representatives stated in the first place that there was a source of confusion in the fact that paragraph 2 of Article 3 assimilated cultural objects unlawfully removed from excavations to stolen objects and that this new sub-paragraph assimilated them to illegally exported objects. The question therefore arose of determining to which category those cultural objects belonged. Another representative recalled that at the last session of the committee some delegations had preferred not to accord to a requesting State the possibility of bringing a claim under either Chapter II or Chapter III and to require it, in the case of unlawful excavations, to bring a claim under Chapter II since the conditions for the application of the principle of return were more favourable. This new sub-paragraph called into question that solution and risked creating confusion rather than removing difficulties.

111. One member of the working group on excavations noted that the group had based itself on the text in document Study LXX - Doc. 47, Misc. 1 and that the sub-paragraph reflected the concern of those States which had no legislation limiting exports that would permit the application of the Convention. He pointed out that the sub-paragraph made no change to the earlier text and sought only to cover excavations in Chapter III.

112. Some representatives, who believed that the future Convention should be as restrictive as possible in respect of the determination of those rules of foreign law to which effect should be given by a judge of the State addressed, were opposed to such an enlargement of the scope of application of Article 5 as it would require a judge to give effect not only to national rules governing export but also to those concerning archaeological sites. They reaffirmed that while they were prepared to give effect to the provisions of the export laws of those States which believed that there were on their territory cultural objects representative of their heritage and that these should be protected, then a contrario if those States had no legislation regulating the export of cultural objects, it was

because they believed that their cultural heritage had no need of protection or that they followed a liberal policy by making no provision for export control. One representative considered that the formulation of the new sub-paragraph was not adequate because, in most cases, legislation governing excavations dealt with questions regarding authorisation and not the removal from the territory of objects which had been excavated.

113. Some representatives believed that what was being proposed was not strictly speaking an enlargement of the scope of application of Article 5, but rather a change in the aim of the Convention to meet a special situation, namely to permit those States that had no export legislation, and which could not therefore bring a claim under sub-paragraph (a)), to secure the return of an excavated cultural object and thereby to fill a gap in the text. Other representatives believed that if the word "removed" were to be used in sub-paragraph (a), this would be sufficient to meet their concern, although it would not be sufficient before a court. Another representative suggested that all that was being done was to clarify the concept of illegal export.

114. As a matter of drafting, some representatives wondered whether it might not be useful to define the word "excavation", one of them fearing that it did not cover the underwater heritage. One representative drew the attention of the committee to the definition contained in the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations of 5 December 1956 (Article I.1) which had received wide acceptance. She suggested however that the inclusion of the words in brackets ("including surface removal") would risk giving rise to an a contrario interpretation to the effect that underwater excavations were not covered. It would therefore be preferable either simply to retain the word "excavations" or to give a precise definition of it. Another representative suggested deleting the words "including surface removal" and to replace them by "monuments and open sites, whether or not protected by the State".

115. In view of the new drafting of this sub-paragraph, one representative raised the question of the connection between the two existing sub-paragraphs of paragraph 1. He suggested that the text could be read in the following way: if a State had rules governing both export and excavations, sub-paragraph (b) could be seen as laying down a special rule for illegal excavations for the purpose of Chapter III which would mean that the Chapter could only be relied upon by States which had specific rules governing excavations limiting the export of cultural objects, whereas those States with general export restrictions (also covering excavations) could rely only on Chapter II. The Secretary-General of Unidroit pointed out in this respect that the wording of document Misc. 6 did not correspond entirely with the decision taken by the working group which had been to the effect that: "Return shall also be ordered in cases involving a cultural object that has been excavated (including surface removal) contrary to the

laws of a Contracting State applicable to the excavation of cultural objects and removed from the territory of that State" (Study LXX - Doc. 47, Misc. 6 rev.).

116. The committee then turned to paragraph 2 of Alternative I concerning the information to be submitted at the time of the bringing of a claim for return. At its previous session, a working group had drafted such a provision, which had then been amended by the drafting committee, but the committee itself had deferred any further discussion to its fourth session without formally approving the provision.

117. The Chairman invited the committee to choose between the two sets of language in square brackets and those representatives who took the floor expressed their preference for the wording "and accompanied by such information of a factual or legal nature as may". They also wished to maintain the language appearing in square brackets at the end of the provision, although slightly altering the drafting. One representative suggested that it would be necessary to examine the reference to paragraphs 1 to 3 at the end of the text as in his opinion paragraph 2 need not be mentioned.

118. The committee then considered paragraph 3 of Article 5 which was of fundamental importance as States would only give effect to the rules of foreign public law insofar as they were convinced that the interests in question justified it. The study group had very carefully examined those areas where the need for international co-operation was most urgently called for and had reached agreement on a list of interests which were deemed worthy of protection by specifying those categories of cultural objects which all States believed it to be necessary to protect above any other consideration, namely physical damage to monuments and archaeological sites (sub-paragraph (a)): dismemberment of complex objects (e.g. the beheading of sculptures, dispersion of frescos, division of triptyches) (sub-paragraph (b)); loss of information by removal of objects from their context and irreversible damage to the context (e.g. disturbance of stratigraphy), by the break-up of a collection or the loss of documentation (sub-paragraph (c)); removal of objects still in use by a traditional community (sub-paragraph (d)). This had therefore appeared to be the minimum content of an agreement to recognise and enforce the export controls of a foreign State.

119. At previous sessions, the committee had rejected the principle of the automatic return of illegally exported cultural objects and in consequence there was no question of coming back on that decision. While many representatives considered it indispensable not to alter the substance of the provision since it permitted the avoidance of claims which were without foundation, they considered it necessary to review the drafting of the provision. They drew the attention of the committee to a proposal for a new form of wording which was to be found in the written comments on the

text of the future Convention (cf. Study LXX - Doc. 42, p. 30) which was in their view more balanced.

120. The author of the proposal explained that sub-paragraph (e) had been introduced as an alternative criterion to the four others so as to cover the unusual case of objects of outstanding significance which did not fall within the preceding categories (e.g. the Taranki sculptures in the case of *Attorney General of New Zealand v. Ortiz*). These were indeed very rare cases but the study group had considered that the nature of cultural objects was such that it seemed wise to include them within the scope of the draft Convention. From a drafting standpoint however, sub-paragraph (e) did not fit in with sub-paragraphs (a) to (d) which were governed by the words "impairs one or more of the following interests" which were not appropriate for sub-paragraph (e). The new wording proposed for paragraph 3 therefore read as follows: "(3) The court or other competent authority of the State addressed shall order the return of the cultural object if the requesting State proves that the object is of outstanding cultural importance for the requesting State or that its removal significantly impairs one or more of the following interests: (a) to (d) unchanged".

121. While some representatives preferred this formulation to the original one on the ground that it was more balanced, others saw it not only as a grammatical change but also as one of substance since the removal of sub-paragraph (e) to the chapeau of the paragraph gave it an importance which had not been intended by the study group (this sub-paragraph had in effect been added so as to avoid a judge in the State addressed interpreting the other interests in too restrictive a manner).

122. The committee then turned to the question of whether the requesting State should have to prove that the export of an object from its territory impaired one or another of the interests mentioned or whether it was sufficient merely to allege that impairment. Opinions within the committee had been divided on this matter at the preceding session and the alternative language had been placed in square brackets. A majority of representatives now believed that it was difficult to prove the impairment of the interests referred to in sub-paragraphs (a) to (e) and in consequence the verb "establishes" would be preferable as a court could always request proof at a later stage of the proceedings. Another representative recalled that the principle of the automatic return of illegally exported cultural objects had been rejected only by a very small majority and that in the light of the outcome of the vote it was necessary to find a compromise which could be reflected by the use of the word "establishes".

123. The word "significantly" had been placed in square brackets without however the committee of experts having taken any decision on it at its preceding session. A large number of representatives favoured the deletion of the word as its retention would add a further value judgment and would leave too much freedom to a judge of the State addressed, with a consequential risk of diverse interpretations. Without taking a stand on

the deletion or the maintenance of the word in question, one representative suggested that it would be surprising if not astonishing to find this word here when similar language had been deleted in Article 2 ("outstanding"). Another representative on the contrary stated that he had not insisted on the use of the word "prove" on condition that the word "significantly" was retained so as to ensure a balanced text.

124. Following the proposal to modify the text which had been submitted in document Study LXX - Doc. 42 (cf. paragraph 119 above) and to the subsequent discussions, two representatives stated that they were anxious to retain the present order of paragraph 3 and to that end submitted a compromise proposal: the paragraph would remain unchanged until sub-paragraph (d), after which sub-paragraph (e) would be replaced by the following: "or establishes that the object is of outstanding cultural importance for the requesting State" (cf. Study LXX - Doc. 47, Misc. 13). One representative entered a reservation to the maintenance of the adjective "outstanding" in the text notwithstanding the opposition of most members of the committee. The Chairman suggested that this point should be left on one side until such time as the committee had taken a decision on the new formulation as this was a question touching upon the balance of the text and of the interdependence of the different elements of which it was composed. He found that there was a consensus on this new text while taking note of the reservations that had been expressed.

125. The committee then considered paragraph 4 which sought to safeguard the cultural interests of a State which had been compromised by successive exports of an object from the territory of one State to another in contravention of a law or of a regional agreement which placed limitations upon the movement of cultural objects. It was important that States which were able to accept the export of their cultural objects only on a temporary basis or to a specified location could rely upon the respect of such conditions or requirements. The purpose of this paragraph was that if a State directly affected by the contravention of its law did not bring a claim for recovery, then this could be done by the other interested State under the terms of the Convention. A member of the delegation which had submitted the proposal drew the attention of the members of the committee to a new form of wording which was contained in Study LXX - Doc. 47, Misc. 10.

126. Another representative, who had co-sponsored the proposal, explained that the new text sought to deal with questions of priority or of preference whenever two or more States might be involved. In fact, if a right of intervention on the part of the State of origin were to be recognised, the latter should be required to notify the second State of its intentions, and it would be the national law of the former State which would determine whether notification should be given before or after the bringing of the claim.

127. While sharing the concern underlying the proposal, one representative stated that, according to the customs authorities of his country, such a system would be unworkable as it was not possible to expect a third State (State C) to be aware of the conditions attached by State A to the exit of a cultural object to State B. He supported the idea of covering temporary exports, for example by means of a new definition of an international situation, but believed that the proposal that had been made could apply to many other situations. Another representative on the other hand believed that it was essential to cover successive exports and replied to the objection that had been raised by suggesting that it was the duty of the seller and the acquirer of a cultural object to be diligent and therefore to know that the object in question was subject to a temporary export authorisation issued by State A. That State must moreover always be in a position to bring a claim before a court in State C to secure the return of the object and if the purchaser were in good faith it would be entitled to compensation.

128. Many representatives recognised the legitimate interest which the proposal sought to safeguard and expressed their support for it. They were of the opinion that the starting point should be that the illegal export had taken place from the territory of the requesting State and that in consequence it was only this illegal act which would be of concern to a judge in the State addressed; such a solution would however render still more difficult exchanges of cultural objects, a result which would be contrary to the aim of the Convention. It could also be argued on the other hand that even if there had in the first instance been a legal export subject to conditions, followed by an export from State B to State C which was illegal under the law of State A, it would be necessary to avoid the unfortunate consequence of the first solution as exporting States would, after the entry into force of Convention, be reluctant to allow the temporary export of their cultural objects. It was therefore essential that the export from State B to State C should be considered to be illegal for the purposes of the law of State A, even though the object had lawfully left its territory.

129. While a large majority of representatives were in favour of the retention of such a provision in the text of the future Convention, opinions differed as to how best to express the idea. One representative proposed resolving the question by a slight amendment of paragraph 1 of Article 5 which read as follows: "(1) When a cultural object has been removed from or is otherwise outside the territory of a Contracting State (the requesting State) contrary to its law ...". It would thus be open to States to provide in their domestic legislation that it was illegal to breach the provisions of an export permit and if the object were to be outside the territory of the requesting State contrary to its law then that State would be able to request the return of the object (cf. Study LXX - Doc. 43, p. 2).

130. Other representatives considered that this solution did not deal adequately with the problem and favoured the proposal appearing in Study LXX - Doc. 47, Misc. 3 for sub-paragraph (b) which had sought to clarify the concept of unlawful export (or removal). One representative believed that this solution would cover the problem but wondered whether it might not be preferable to find a formula which would not assume the character of a definition as such.

131. The Chairman found that there was a consensus within the committee in favour of the principle set out in paragraph 4 and, in view of the different proposals which had been made, suggested that one of the working groups which had already been set up should draft a provision which would commend itself to the greatest possible number of delegations.

132. Finally, in connection with this article, the committee considered paragraph 2 of Alternative II which imposed on importing States a duty to introduce a control mechanism in regard to cultural objects which were to be accompanied by an authorisation issued by the State of origin. Some representatives believed that such a provision would be pointless as a State which wished to introduce such a system had no need of the Convention to do so while others considered that it had no place in a private law instrument. Another representative stated his opposition to the principle on the ground that it would hinder international trade and that in any event the existence of a certificate did not amount to proof. The study group had been of the belief that it should be left to States to decide how to implement their undertaking to return illegally exported objects, and one representative opposed the idea of prohibiting the import of certain objects through a public law provision. He recalled a criticism that had already been made regarding States which, either failing or not wishing to control the export of their cultural objects, requested others to do so on their behalf by controlling imports to their territory.

133. The Chairman noted that there was a consensus to the effect that this question could be settled neither in Article 5 nor in Article 5 bis but rather in the Chapter containing the final provisions.

134. On second reading, the Secretary-General submitted the document containing the text of Article 5 which reflected the discussions of the committee and the proposals of the different working groups (cf. Study LXX - Doc. 47, Misc. 22). He likewise drew the attention of the committee to another proposal submitted by the Unidroit Secretariat which was intended to simplify the presentation and drafting (cf. Study LXX - Doc. 47, Misc. 23). This text consisted of a single paragraph divided into three sub-paragraphs setting out the three grounds on which a State could request another State to order the return of a cultural object. In view of the fact that the simplified text concerned only matters of presentation the committee decided to take it as a basis for discussion.

135. Sub-paragraph (a) of paragraph 1 corresponded to the text of paragraph 1 as originally submitted to the committee (Study LXX - Doc. 40) with the new description of the law of the requesting State as proposed by the working group which had been set up for that purpose. The language proposed to the committee, which was the same as that suggested for Article 1, was the following: "law regulating the export of cultural objects because of their cultural significance" (cf. Study LXX - Doc. 47, Misc. 15). Since no objections were raised or reservations expressed with regard to the amended paragraph it was adopted.

136. The committee then considered sub-paragraph (b) concerning what had been termed "successive exports", the drafting of which had been entrusted to a working group. One of the authors of the original proposal suggested that the new draft failed to reflect an important aspect of what they had had in mind, namely conditions regarding the destination of the object (and not just the temporal factor) which had been specified in the export permit. One representative believed that this oversight could easily be rectified by replacing the adverb "temporarily" by the words "subject to conditions". Another representative was however opposed to such a change since he had not understood the original proposal as covering the geographical aspect and believed that further consideration of its implications was necessary. While some representatives reserved their position on this question until the diplomatic Conference, a consensus was reached within the committee for the time being on the text of sub-paragraph (b) as it stood.

137. Sub-paragraph (c) reflected a proposal of the working group which had been set up to draft a formula in respect of objects which had been excavated and illegally exported contrary to legislation governing excavations (cf. Study LXX - Doc. 47, Misc. 6 rev.). The last sentence of the text proposed by the working group had been deleted in the course of a first examination by the committee of experts. One representative called for assurances that the word "site" which had been included in the text extended to underwater excavations, to which another representative replied that in her country the term was specifically used for underwater archaeology as well as the preservation of wrecks and that this must certainly be the case in other jurisdictions.

138. While understanding the reasons which had led some representatives to support the proposal, others were opposed to the inclusion of such a provision. They found the sub-paragraph to be superfluous given that Article 3, paragraph 2 already provided that cultural objects which were unlawfully removed from excavations were to be assimilated to stolen objects and therefore governed by the regime established under Chapter II. The text would in other words contain an unnecessary repetition. Some representatives renewed their criticism that it was not for the Convention to fill in gaps in provisions of foreign public law but rather to recognise those provisions and, if some countries had no legislation in a particular area, there were doubtless good reasons.

Yet others called for the deletion of sub-paragraph (c) on the ground that it caused confusion.

139. The delegation which had sponsored the proposal stated that it would not always be possible to rely on Article 3, paragraph 2 and that it was essential to take measures to put an end to illegal excavations. There were in its country laws which protected archaeological objects through the control of the excavations from which they came but which did not necessarily regulate their export. The purpose of the provision was therefore to ensure that if such cultural objects were subsequently exported they would be covered by the Convention and their return could be requested.

140. After noting a clear division of opinion on the matter, the Chairman put sub-paragraph (c) to the vote: eight delegations voted for its deletion, eight for its retention and 13 abstained. The committee therefore decided to retain sub-paragraph (c) in square brackets.

141. The Secretary-General then indicated that paragraph 2, as reproduced in document Study LXX - Doc. 47, Misc. 22, precisely reflected the original wording (Study LXX - Doc. 40) with the changes that had been made in the course of the discussions, namely the choice between the different terms placed in square brackets (the words "be accompanied by such information of a factual or legal nature" had been preferred) and the reference at the end of the paragraph.

142. As to paragraph 3, this had been drafted on the basis of document Study LXX - Doc. 47, Misc. 13 in respect both of its substance and of its presentation, sub-paragraph (e) having been placed at the end of the provision after the word "or". One representative suggested replacing the word "or" by "and" so as to make clearer the connection between the provision and Article 2 providing the definition of cultural objects for the purposes of the Convention (cf. Study LXX - Doc. 47, Misc. 35). In fact, his authorities had difficulty in accepting the scope of application provided for in Article 2 with regard to illegally exported objects (which they believed to be far too broad), and wished to see it limited by the use of the word "and", since sub-paragraphs (a) to (d) were not in their view sufficiently restrictive. The same representative stated moreover that it should be made clear that the list of examples given in Article 2 implied that the cultural objects should be of outstanding cultural importance.

143. A number of representatives considered that this was an important change which did not reflect the intentions of the study group. The latter had in effect drawn up a provision under which it was necessary to establish an impairment of one or another of the five interests mentioned, whereas the new proposal introduced a double condition, namely the impairment of one or another of the four interests plus the outstanding

cultural importance of the object. This question had moreover been discussed on a number of occasions and had been the subject of a vote which they did not wish to reopen.

144. Notwithstanding the opposition of some representatives, the authors of the proposal insisted that the Chairman put it to the vote; four delegations supported the introduction of the word "and", at least in square brackets, while 19 voted against and seven abstained. In consequence the text of Misc. 22 remained unchanged (cf. Study LXX - Doc. 47, Misc. 39 corr.), although the order of paragraphs 2 and 3 was subsequently inverted by the Unidroit Secretariat so as to offer a more logical presentation.

Article 6

145. Once again, the committee felt the need to recall the approach followed by the study group in regard to this article which had already been the subject of lengthy discussion and been included for reasons of legal technique. In the private international law of most national systems the courts had traditionally reserved wide powers to reject claims on the ground of public policy ("*ordre public*"). This could be invoked to prevent the return of cultural objects in cases clearly covered by the Convention (e.g. because public policy would prevent a purchaser, presumed to be in good faith under a domestic rule of that system, being deprived of a cultural object, even though the purchaser had not met the strict rules of diligence under the Unidroit draft). This would clearly negate the purpose of the Convention. All kinds of grounds of "public policy" might be adduced by judges - such as "close connection with the culture of the State addressed", "better care" in the requesting State, some historical link however remote of the object with the State addressed, disapproval of the cultural policy of the requesting State and so forth. The intention of Article 6 was to prevent this by stating (in its original form) that the "only" possible reason for refusing the return would be the close connection with the culture of the State addressed, which must be as strong as, or stronger than, the connection with the culture of the requesting State. Subsequently, other exceptions had been added. One representative suggested that the formula adopted was open to criticism, but that if there were to be no provision of this kind then it would be impossible to achieve the desired aim.

146. While admitting that an object might belong to the cultural heritage of more than one State, which was moreover recognised in Article 4 of the 1970 UNESCO Convention, some representatives stated that they had a different approach to the concept of public policy. They found fears as regards its possible abuse to be groundless, having regard in particular to actual practice, and considered that a provision such as Article 6 would give too much discretionary power to an authority. It would be sufficient to remove the object to a country where the notion of public policy was more broadly applied to be sure that the return of the object would not be

ordered. One representative further added that Article 6 ran counter to the spirit of the Convention and expressed the hope that it would be possible to enter a reservation regarding it.

147. A majority of members of the committee was on the other hand of the belief that it was extremely important to retain this article so as to avoid recourse to public policy for the purpose of refusing the return of an illegally exported cultural object which would nullify the effects of the provisions of the future Convention. Some of them however considered that the present drafting of the provision did not fully reflect the desire to limit to a minimum the grounds for refusal to return an object.

148. One representative stated in the first place that it would be desirable to indicate clearly in the text that what was contemplated was an exception to the principle laid down in Article 5 and to state expressly, even if it were already implicit, who it was that could refuse the return of an object. In this connection one representative believed that a court or an administrative authority would not be an appropriate body to take such a decision which was a political one.

149. As to the substance of the provision, one representative suggested that with a view to limiting the discretion granted to a judge, the term "may" should be replaced by "shall" ("doit" in place of "peut" in French). Another expressed regret that the text was silent on the question of proof and requested the addition of the words "when the State addressed establishes that". Finally, many representatives noted that throughout the discussions further exceptions had been added to the text, the effect of which had been to weaken the original intention to restrict the grounds of refusal for the return of an illegally exported cultural object. A number of them suggested coming back to the text as approved by the study group in which the sole ground for refusal had been the close connection with the culture of the State addressed (this criterion now having been replaced by another one: cf. sub-paragraph (c)).

150. The committee then considered the three sub-paragraphs of the article as presently drafted, each of which constituted a ground to refuse the return of an object. The first two were included in the text in square brackets as the committee of experts had not had sufficient time to examine them at its previous session. Sub-paragraph (a), which provided that return would be refused if it would "significantly impair the physical preservation of the object", was subject to severe criticism and serious doubts were expressed as to the desirability of including it in Article 6. One representative remarked that it would put a judge in a most uncomfortable position if he or she had to suggest that a State which had taken the trouble to bring a claim for the recovery of an object was unable to ensure its proper conservation. Other representatives believed that it would be unfair for the State addressed to take a decision on that ground since it was not up to it to pass judgment on such questions.

151. The Chairman having put sub-paragraph (a) to the vote, 28 delegations supported its deletion, one its retention and two abstained. Sub-paragraph (a) was consequently deleted from Article 6.

152. Sub-paragraph (b), which provided that return could be refused if a cultural object had been illegally exported from the State addressed before being unlawfully removed from the requesting State, seemed superfluous to some representatives who believed that the situation was already covered by sub-paragraph (c), although a majority of members of the committee found it to be acceptable. In fact, 20 delegations voted in favour of its retention, six against and six abstained.

153. Some representatives expressed a wish to return to the study group text which in their opinion had the clear advantage of leaving to the judge of the State addressed only one ground to refuse return, namely that the object had as close a, or a closer, connection with the culture of the State addressed. This criterion had subsequently been replaced by a reference to the outstanding cultural importance of the object for the State addressed and to the fundamental principles on the protection of the cultural heritage of that State (cf. sub-paragraph (c)).

154. No consensus was reached at this session on the question of whether the return of an illegally exported cultural object ought not to be ordered if such return were manifestly contrary to the fundamental principles on the protection of the cultural heritage of the State addressed. One representative vigorously supported sub-paragraph (c) as drafted (cf. Study LXX - Doc. 40) on the ground that it further limited recourse to public policy and that it did not have the same discretionary overtones as did the criterion of the "closer connection". Another representative criticised the first part of sub-paragraph (c), referring to the "outstanding cultural importance" of the object, and suggested deleting those words (cf. Study LXX - Doc. 47, Misc. 12). Some representatives having endorsed that proposal, the Chairman put it to the vote: ten delegations expressed support for the provision, 14 voted against and twelve abstained.

155. Finally, a large number of representatives expressed a wish to reconsider the initial criterion of the "closer connection" which more faithfully reflected the idea that a cultural object could belong to the cultural heritage of more than one State. Opinion had been divided as to whether the link should only be "closer" or whether it was sufficient that it be "as close", as had been the case with the text proposed by the study group. A vote on this question showed twelve delegations to be in favour of the criterion "closer", four to prefer the connection being "as close, or closer" and 18 abstained.

156. Those representatives who wished to include the concept of "connection" were themselves divided as to the formulation to be adopted: that is to say either a general formula of the type approved by the study

group, or rather one closer to the present text (cf. Study LXX - Doc. - 40). The Chairman having put the matter to the vote, 15 delegations supported the general formula (under which the only ground for refusal would be a closer connection with the culture of the State addressed), 14 voted against and five abstained.

157. So as to find an acceptable compromise from among the different versions, one representative proposed retaining the *chapeau* of the article as it appeared in document Misc. 12 (which corresponded to the general formula submitted by the study group), followed by two sub-paragraphs, the first corresponding to sub-paragraph (a) of document Misc. 12 and the second reflecting the criterion of the "closer connection". The members of the committee of experts as a whole accepted this proposal which the Secretariat reflected in document Study LXX - Doc. 47, Misc. 17.

158. On second reading, the Secretary-General presented the text which had emerged from the discussions of the committee on first reading (Study LXX - Doc. 47, Misc. 17) and which was contained in the consolidated document Study LXX - Doc. 47, Misc. 22). He further drew the attention of the committee to a proposal in paragraph 2 which had been submitted by the Secretariat with a view to avoiding the strange result which seemed to appear from a combined reading of Article 5, paragraph 1 (b) (concerning cultural objects temporarily exported, for example for an exhibition) and Article 6 (cf. Study LXX - Doc. 47, Misc. 23) that if a cultural object were lent by State A for a limited period to State B but not returned at the expiry of that period, State B could invoke a "closer connection" with its own culture under Article 6, sub-paragraph (a) and not return the object.

159. The Secretariat proposal met with a favourable reception from the committee of experts, in particular from those representatives who feared abuse of the use of Article 6, sub-paragraph (a), especially because it was discriminatory towards those countries which had a long history of different civilisations. Two representatives expressed their agreement with the principle underlying the proposal but believed that its effect ran counter to the wishes of the committee in that the wording suggested that, in the case of a temporary loan, the judge of the State addressed could rely upon any ground whatsoever to refuse the return. The Secretary-General recalled however that the word "only" appeared in the *chapeau* of the article (which would become the beginning of paragraph 1) and that if an exception were to be introduced, one would come back to the principle laid down in Article 5, paragraph 1. The committee decided to retain the text as it appeared in Miscs. 22 and 23 (cf. Study LXX - Doc. 47, Misc. 39 corr.).

Article 7

160. Although the committee had from the outset of its work reached a compromise on the principle of certain exclusions from the scope of

application of the future Convention, one representative pointed out that it was not necessary to exclude in their totality the provisions of Article 5 but simply to say that a request for the return of a cultural object was inadmissible. The wording of the *chapeau* was not therefore quite exact and he suggested that it would be sufficient either to refer only to paragraph 1 of Article 5 or to amend the *chapeau* which would read as follows: "A request shall not be admissible where ... ". The committee agreed to take account of this observation during the final drafting.

161. The first exclusion from the scope of application of the future Convention which had been contemplated from the beginning was that of cultural objects which had been exported during the lifetime of the person who created them or within a certain period after that person's death, a principle which was laid down in paragraph 1 (a). At the preceding session however, some representatives had drawn the attention of the committee to ethnographic objects of which the creator was unknown and for which the criterion should be the age of the object rather than the life or the death of its creator, following which sub-paragraph (a) had been amended to that effect (cf. Study LXX - Doc. 40, Article 7, paragraph 1 (a): "or when the object is less than 50 years old").

162. One representative suggested however that the new language did not seem adequately to cover the case of ethnographic objects. She suggested that a tribal community from which objects of ritual or worship had been removed contrary to the wishes of that community should be able to recover them under the future Convention, even though they were less than 50 years old, because those objects were usually made out of organic materials. The theft of such objects was not always easy to prove but this was a kind of illicit trade which could have very severe repercussions not only on the cultural life of the societies concerned, but also on their cohesion. The creators of such objects might be known, but these objects were made for the community and were considered as belonging to it. That representative therefore proposed amending sub-paragraph (a) so as to take account of these considerations. The proposed text read as follows: "(a) ... except where the object was made for a use of a traditional community by a member of that community; or" (cf. Study LXX - Doc. 42, p. 38).

163. Another representative supported this proposal and stressed that the return of cultural objects belonging to indigenous communities was a matter of growing concern for very many countries. There were in fact some three million people belonging to indigenous communities throughout the world, not only in Canada, Australia and the United States of America, but also in Europe and Africa. She believed that it was necessary to protect the cultural objects created by an indigenous community for a sacred purpose, even if a person who had created such an object was still alive and the object was less than 50 years old. This additional protection would furthermore concern only a minority of cultural objects, namely those considered by such communities as being vital for the survival of their

culture and traditions. Other representatives supported the idea underlying the proposal, insisting on its importance for multi-cultural societies.

164. The proposal was not however enthusiastically received by all representatives, some of whom raised the question of the definition of the term "indigenous" which was perhaps clear in a country such as Australia, but much less so in a State with a homogeneous population that had never been the victim of invasion by another country to the detriment of the original inhabitants. One representative recalled that there were indigenous communities in her own country but was opposed to the idea that all cultural objects belonging to them should be covered by Article 7, paragraph 1 (a), and she called for clarification of what was meant by the word "use".

165. The Chairman found that there was a consensus in favour of the idea, but that there was a measure of concern that the language of the proposal was too broad. One way of circumscribing the cultural objects for which special protection would be necessary could be to speak only of cultural objects created "for ritual purposes", as some had proposed. Others found that language to be too restrictive since there were cultural objects that might not have been created solely to that end, but also for historical or cultural purposes. An example was given of objects belonging to a community as a whole that had been sold by a member of that community who had no right to do so, and which deserved special protection on account of their importance for a traditional culture. Another representative also believed that one should not, by employing the word "use", restrict the protection to one or two categories of cultural objects only.

166. As regards the word "indigenous", one representative suggested that it should replace the term "traditional community" as it had a very precise meaning which had been widely accepted following the conclusion of the 1989 ILO Convention No. 169 on Tribal and Indigenous Peoples (Article 1). A number of representatives indicated their support for that proposal.

167. One representative pointed out that the present wording of sub-paragraph (a) limited the application of the provision to the life of the person who had created a cultural object, without paying any regard to changes in ownership (by testamentary disposition or otherwise) whereas it was necessary to protect rather than to override the rights of successors in title. He recalled that the study group text had contained a formula which gave him full satisfaction ("within a period of 50 years following the death of that person") and he suggested reinserting it in the text.

168. The Chairman drew the attention of the committee to the fact that some confusion seemed to have arisen in respect of two distinct situations: the first was that where the creator of an object was unknown, which was in particular the case with ethnographic objects, in respect of which the text had been amended so as to refer to the age of the object. The second situation was that where the person who created the object was

known, and this was a problem which was well known in the field of intellectual property law. He further recalled that the study group had wished to avoid a conflict between two international Conventions, namely the future Unidroit Convention and the 1886 Berne Convention on copyright and its successive revisions, and to avoid the interests of successors coming into conflict with those of private or public possessors; for this reason the period of 50 years from the death of the creator of the object had been taken and not that of the creation of the object itself. It was therefore necessary to distinguish the two questions, although there was no reason why they should not both be dealt with. A working group was set up for the purpose of reviewing the language of Article 7, paragraph 1 (a).

169. Sub-paragraph (b) was not discussed by the committee as it had, at previous sessions, reached a consensus that since the purpose of Chapter III was to combat illegal export, it was necessary that the legislation governing export should be the same at the time the object left the territory of the requesting State as it was at the time when proceedings commenced. It was indeed difficult to conceive of a request for return being brought at a time when the export was no longer illegal.

170. The committee then turned to paragraph 2 which laid down the principle that no effect would be given abroad to export prohibitions concerning cultural objects if the request for return was not brought within certain time limits. This paragraph raised exactly the same questions as did the parallel provision in Chapter II (Article 3, paragraph 3) and the Chairman inquired whether the committee wished to transpose the solution contained in Article 3, paragraph 3 to Article 7, paragraph 2 or whether there were differences between the two situations which justified a different solution.

171. One representative considered that since the two provisions were structured in the same way, it would be logical to group them together in a single general provision on time limits for the bringing of claims which could be placed in Chapter IV on Claims and actions. Another representative suggested that the language of paragraph 2 should be aligned completely on that of Article 3, paragraph 3, leaving it to the diplomatic Conference to decide whether the periods should be the same and therefore whether there should be one single provision only. The question of the special rule for public collections in Chapter II was raised in the context of Chapter III and one representative considered that it would not be advisable to seek too great a degree of harmonisation since public collections were more exposed to the risk of theft than to that of illegal export and that there was no connection between public access to an object and illegal export. Another representative suggested that if the committee were to decide against one single provision in respect of time limits, then, with a view to seeking conformity with the drafting in Chapter II, paragraph 2 of Article 5 should be relocated, for example as a new paragraph 4.

172. The question of the length of the periods was not considered in detail since it had been decided that the decision should be left until the diplomatic Conference, although one representative insisted that the shorter period of one year which was contemplated was much too brief to permit the gathering of the necessary information, and that this would create even more difficulties for Governments than for private individuals.

173. On second reading, a member of the working group that had been entrusted with the task of redrafting Article 7, paragraph 1 (a) submitted to the committee the results of its work (cf. Study LXX - Doc. 47, Misc. 20). He also indicated that document Misc. 22 contained the full text of Article 7 and drew the attention of the committee to document Misc. 23, submitted by the Secretariat, which proposed a restructuring of paragraph 1. The *chapeau* of paragraph 1, as it appeared in document Misc. 20, had been amended so as to refer only to paragraph 1 of Article 5 and not to the whole of the article. The working group had then distinguished those cases where the creator of an object was known from those in which he or she was unknown. In the first situation, mentioned in sub-paragraph (a), return of the object could not be requested when it had been exported during the lifetime of the person who had created it and the working group had reintroduced, between square brackets, the reference to the period after the death of that person, reducing it however to five years (and not 50 as had been the case with the study group text). One member of the working group explained this change on the ground that it was necessary to safeguard the rights of heirs and to permit the proceedings for the winding up of an estate to be completed, and that the five year period should be sufficient to do that in most cases. He suggested another solution that would consist in following the EEC Directive which, in its Annex, provided for a period of 50 years as from the time of the creation of the object. Another member explained that this criterion appeared in the text in square brackets because while it was true that a consensus had emerged within the working group to the effect that persons who had created an object should be able to export their work during their lifetime, since that would encourage creativity, some members of the group had been opposed to prolonging that period after the creator's death.

174. One representative believed that this proposal enlarged too much the scope of the provision. Hitherto, in effect, the Convention could only have applied to cultural objects which were at least 50 years old, whereas it was now capable of application to objects that had been created very recently.

175. The Chairman put to the vote sub-paragraph (a) of paragraph 1 as amended by the working group (Misc. 20), including the words in square brackets: 13 delegations voted in favour of the text, 14 against and five abstained. The Chairman deemed the text to have been rejected and then inquired of the committee whether it wished to reintroduce the words between square brackets.

176. Some representatives thought it important to reintroduce the reference to the period following the death of a person who had created a cultural object which was to be found both in the EEC Directive and in the study group text. Another representative stated that he was not sure that each State could, in its domestic law governing export, deal with this question as it wished. If a State made no provision for a limitation in respect of cultural objects after 100 years as from the death of the creator, Chapter III would not be applicable, and he was therefore opposed to the reintroduction of the words in square brackets.

177. The Chairman then put to the vote sub-paragraph (a) of paragraph 1 of Article 7 as contained in document Study LXX - Doc. 47, Misc. 22, which reproduced precisely Misc. 20 of the working group: 20 delegations voted in favour of the proposal as it stood (that is to say with a part of it in square brackets) while ten voted against and five abstained. The text in question therefore remained unchanged with the words "or within a period of five years following the death of that person" between square brackets.

178. The committee then considered paragraph 1 (b) as proposed by the working group which dealt with cases where the creator of a cultural object was unknown. It was here above all necessary to have regard to ethnographic objects and the criterion chosen had been the age of the object at the time of the export. The working group had reached a consensus on a figure of 20 years, as against that of 50 which had previously appeared in the text. One representative believed the 20 year period to be too short and suggested coming back to that of 50, which had been chosen in the EEC Directive. Another representative proposed placing the length of the period between square brackets and to leave the final decision to the diplomatic Conference.

179. One representative expressed astonishment at the change in approach from that which had characterised the text submitted to the committee (Study LXX - Doc. 40) in which the age of the object had not been related to the question of whether the creator was or was not known. One member of the working group replied that the text which had previously been considered had not seemed satisfactory to the committee of experts since some States would have problems in determining the age of an object and the working group had therefore decided that the principal factor to be taken into account should be the life of the creator (sub-paragraph (a)), but that it was also necessary to cover situations where the creator would not be known (sub-paragraph (b)).

180. The Chairman then put sub-paragraph (b) to the vote, without prejudice to the age of the object which would in any event appear between square brackets: 19 delegations supported the retention of this sub-paragraph while seven voted against and nine abstained. Some representatives wished also to vote on sub-paragraph (a) of paragraph 1 of the initial text (Study LXX - Doc. 40) on account of the change in approach now contemplated: nine delegations voted in favour of that text, five

against and 15 abstained. Faced with a situation in which two alternative texts would be submitted the diplomatic Conference on this point and in view of the outcome of the two votes, in particular the high number of abstentions on the second which showed that the committee had not had sufficient time to study the provisions in depth, it decided to submit one text only. It expressed this preference by way of a vote (23 delegations in favour of one text only, five in favour of alternatives and two abstentions). The Chairman stated that only sub-paragraph (b) as proposed by the working group would be included in the text that would be submitted to the diplomatic Conference, although regard should be had to the views of those who preferred a system in which the criterion of the age of the cultural object would be of general application and not limited solely to situations where the creator was unknown.

181. Finally, the committee considered the last part of paragraph 1 dealing with the question of indigenous communities. Some representatives considered that lack of time had not permitted the committee to consider either the definition of an "indigenous community" or its use of cultural objects in sufficient depth to permit the provision to be included in the text, unless it were to appear between square brackets. The committee as a whole, including the authors of the proposal, agreed to this suggestion.

182. One representative believed it to be necessary, with a view to facilitating comprehension of paragraph 1, to draw to the attention of the different national authorities the fact that nothing in the text prevented any Contracting State from providing in its national law on the export of cultural objects that the objects referred to in sub-paragraphs (a) and (b) could be exported from their territory without any restriction, from lengthening the periods mentioned or from prohibiting completely the export of the cultural objects in question. He also stressed the connection with Article 11.

183. The committee then considered paragraph 2 as it appeared in document Study LXX - Doc. 47, Misc. 22 which took over sub-paragraph (b) of the text submitted to the committee and provided that the return of a cultural object could not be requested when the export was no longer illegal at the time the return was requested. This text having already been agreed by the committee of experts, one representative simply noted that it would be more logical to relocate the paragraph in the *chapeau* of paragraph 1.

184. Lastly, the committee considered paragraph 3 concerning the periods within which a request for return must be brought. The committee reaffirmed its preference for the time being not to group together the two provisions on limitation periods (in Article 3 and Article 7) in a single provision, but agreed to harmonise the wording and to place paragraph 3 at the end of Article 5 so as to follow the presentation in Chapter II.

185. One representative however wished to introduce in the paragraph the notion of imprescriptibility in respect of the return of illegally exported cultural objects. It was replied that the notion did not appear in the text because a large number of representatives had stated that they could never accept a Convention without an absolute limitation period. Nothing however would prevent the representative in question raising the matter once again at the diplomatic Conference.

186. One representative alluded once more to the question of the interruption of limitation periods and of the desirability of introducing a provision on that matter in the draft. Views were divided within the committee, some believing that such a provision should be included as there was no established practice in connection with the breaking off of diplomatic relations for example, whereas others suggested that the intention of the study group had been to lay down minimum rules to combat abuses resulting from the illegal circulation of cultural objects and not to cover all procedural issues which might arise under private international law. A consensus finally emerged within the committee to the effect that since the question of the interruption of limitation periods was closely related to that of the length of those periods, it too should be settled at the diplomatic Conference.

187. In connection with Article 7, which appeared in document Study LXX - Doc. 47, Misc. 39 corr. and reflected the outcome of the discussions of the committee, one representative drew attention to the fact that the provision concerning indigenous communities had been included as sub-paragraph (c) of paragraph 1 so as to avoid creating an exception to an exception. The result of this relocation of the provision would however now be that it would never be possible to return such objects, which ran precisely counter to the intention of the committee. It was therefore necessary to come back to the former wording. One representative proposed adding at the beginning of Article 7 the words "except where the cultural object was created by a member of an indigenous community ..., the provisions of paragraph 1 of Article 5 shall not apply where ...". The Chairman suggested that since there was agreement on this idea, it should be left to the Unidroit Secretariat to find an appropriate formulation.

Article 8

188. There was no desire within the committee as a whole to reopen the question of the principle of compensation for a possessor who did not know that a cultural object had been illegally exported from the territory of a Contracting State, which was laid down in paragraph 1 and which had been the subject of a consensus at the preceding session. One representative however drew attention to two differences between this provision and the corresponding paragraph in Chapter II (Article 4, paragraph 1), the first being the absence of any reference to the requirement that the

possessor should prove that it had exercised the necessary diligence. One member of the study group replied that while there had within that group been general agreement that theft called for a higher standard of diligence than that presently required by the rules governing good faith, this was not the case with regard to illegal export. The group had therefore been of the view that it would not be possible to go beyond the content of paragraph 1 without running the risk of a number of States not ratifying the future Convention.

189. One representative nevertheless proposed a redraft of the beginning of Article 8 with a view to ensuring a greater degree of consistency with Article 4 (cf. Study LXX - Doc. 43, p. 3). As the paragraph was presently drafted, the burden of proof lay on the requesting State to establish the bad faith of the possessor, whereas under Article 4 the possessor had to prove that it had exercised due diligence when acquiring the object, a notion which was then defined in paragraph 2. With the support of a member of another delegation, that representative drafted two paragraphs for Article 8 which would reflect this approach, namely that it would be stated clearly that the burden of establishing good faith lay on the possessor of an illegally exported cultural object, the effect of which would be to oblige potential purchasers to make closer inquiries into the provenance of such objects so that they would run the risk of having to return them, thus losing the object and the purchase price paid (cf. Study LXX - Doc. 47, Misc. 30 rev.). A second paragraph would set out the factors that would permit a determination of whether the possessor had exercised due diligence.

190. Although this proposal was submitted at too late a stage for the committee to take a decision upon it, it nevertheless gave rise to an exchange of views. One representative stated that it was, in situations involving illegal export, above all for the seller and not for the purchaser to seek information regarding the origin of cultural objects, all the more so when the seller was a dealer. At present there were in many countries no ways to sanction the seller of an illegally exported cultural object. The representative believed that it was in the first place for national law to require, especially of dealers, the exercise of a degree of diligence. In this connection another representative suggested that legislators should enact rules which were clearer and more easily understandable by sellers and purchasers.

191. The Chairman then recalled the desirability of eliminating as far as possible square brackets in the text which would be submitted to the diplomatic Conference. The first of these concerned the words "law applicable to the protection of cultural objects" which had been replaced by "law regulating the export of cultural objects because of their cultural significance" that had been proposed by a working group and accepted by the committee.

192. The second language in square brackets related to the actual knowledge of the possessor of the illegal export of an object or whether he or she "ought reasonably to have known of it". The committee considered that the same language should be employed as that in Article 4 with a view to encouraging possessors to be more diligent. One representative drew attention to the fact that the word "reasonably" did not appear in the French text of this paragraph and on the assumption that this was an oversight suggested that it should be included, as in Article 4. The committee registered its assent on both points.

193. One representative then explained that the words "would be, or", which were likewise placed between square brackets because the committee had wished to give further consideration to the temporal factor, were intended to cover the situation where a person deliberately went to a State with export controls and purchased a cultural object in full knowledge that it could not be exported. Another representative suggested that this language should be deleted on the ground that compensation should only be paid when the acquisition of the object in good faith had taken place after the illegal export. There should then be no protection, and therefore no compensation, for a purchaser who acquired a cultural object on the territory of the State of origin. Other representatives believed that the Chapter on illegal export should not apply until such time as the cultural object had in fact been illegally exported. In these circumstances the committee decided to delete the language in question.

194. The committee then turned to paragraph 1 bis which provided that in the absence of an export certificate accompanying a cultural object the bad faith of the possessor should be conclusively presumed. When considering other provisions concerning the certificate, in the absence of which the sale, purchase, import and/or export of a cultural object would be prohibited by Contracting States, the committee had expressed the view that such a certificate could only be of an optional character and its absence not a ground for presuming bad faith. Most members of the committee were in general opposed to the introduction of provisions regarding such a certificate, either because a public law provision had no place in a private law instrument, or because they could not accept the idea of an irrebuttable presumption.

195. Although a suggestion had been made that any provisions on the certificate should appear in the final clauses of the future Convention, one representative believed that the time had come to refer to such certificates and proposed a new form of wording that would avoid a specific reference to "bad faith" which appeared nowhere else in the draft: "Where a State Party to this Convention has instituted a system of export certificates, the absence of an export certificate for an object for which it is required shall put the purchaser on notice that the object has been unlawfully exported" (cf. Study LXX - Doc. 42, p. 41). The language proposed did not go as far as the initial proposal but might prove more acceptable to the committee.

196. The discussion within the committee related to three different aspects of the proposal: the first concerned the language employed. One representative suggested that the words "export certificate" were not acceptable as they made a general reference to what could be described as a passport that would accompany every object. He therefore suggested that an alternative might be found in such words as "licence", "authorisation" or "permit". The second point concerned the optional character of the document to which the committee had already agreed.

197. The legal consequences of the existence or absence of such a certificate constituted the third aspect of the question, on which the committee was still in disagreement. Some representatives could not accept the notion of a presumption attaching to the certificate, even with the new wording, which amounted to the creation of a legal presumption. The Chairman however suggested that it was not possible at this stage of the work to embark upon a detailed discussion of the legal implications of the proposal, whether it be in regard to the burden of proof or the legal position of the possessor according to the existence or absence of the certificate, and he proposed that the paragraph be placed in square brackets.

198. One representative insisted on the need to recognise the connection between this provision and the definition of cultural objects in Article 2, stating that if all cultural objects were to be covered by the future Convention such a provision would be unacceptable. If, on the other hand, the application of the Convention were to be limited to objects of "outstanding" significance, then it might be possible to consider further the proposal regarding the certificate.

199. While most representatives were prepared to accept the Chairman's proposal to place the provision between square brackets with a view to a more detailed examination of it at the diplomatic Conference, one representative suggested another way of reaching the same result which would avoid the square brackets. Her proposal consisted in adding at the end of Article 8, paragraph 1 a reference to the circumstances in which the object had been acquired, as had been the case with Article 4, paragraph 2. The text might therefore read as follows: "... at the time of the acquisition, having regard to all the circumstances and in particular to the existence of a certificate, that the object ...".

200. The Chairman put to the vote the two proposals regarding the export certificate. As to the first question concerning the placing between square brackets of the new wording of paragraph 1 bis, 19 delegations supported it, nine voted against and two abstained. With regard to the second proposal to introduce a new phrase in paragraph 1, 13 delegations voted in favour, eleven against and five abstained. The first solution was therefore retained, namely the adoption of a modified version of paragraph 1 bis.

201. The committee then turned its attention to paragraph 2. Some representatives recalled that the idea underlying this paragraph was to promote the return of cultural objects when the requesting State did not have sufficient financial resources to compensate a diligent purchaser. They further recalled that, at the last session, the committee had subjected the choice of the possessor to the agreement of the requesting State and while some questions had been raised, for example what were the "necessary guarantees", 18 delegations voted in favour of the retention of the paragraph, eight against and ten abstained.

202. There was no discussion of paragraph 3, which provided that the costs associated with the return of a cultural object should be borne by the requesting State, without prejudice to its right to recover costs from any other person, that principle having been generally accepted at the preceding session of the committee.

203. Paragraph 4, which provided for the possibility for a third party to pay compensation in the place of the requesting State, subject to certain conditions, corresponded to a provision which had already been deleted from Chapter II. One representative insisted that it was necessary to maintain this provision in Chapter III as it would encourage the return of cultural objects by facilitating the payment of compensation to a possessor. A majority of the members of the committee believed however that it would be preferable to have no such provision in the text and that if a claimant wished to agree with another person for the payment of compensation in exchange for certain undertakings concerning the future possession of the object, such as access, insurance and conservation, this should be dealt with by an agreement between them and not in the future Convention, which in no way prevented such arrangements. In the vote on this question, five delegations supported the retention of the paragraph, while 14 preferred its deletion and 18 abstained.

204. Lastly, the committee reaffirmed its agreement in principle as to the need to take account of the situation contemplated by paragraph 5 which corresponded to Article 4, paragraph 3. The sponsor of the words between square brackets stated that he was not insisting on their retention, while hoping that this question would not be overlooked during the discussion on the issue of retroactivity.

205. On second reading, the Secretary-General stated that paragraph 1 had been amended in accordance with the instructions of the committee. A modified version of paragraph 1 bis had been included together with paragraphs 2 and 3 which were unchanged, while paragraph 4 had been deleted (cf. Study LXX - Doc. 48, Misc. 41). The Secretariat had moreover renumbered the paragraphs in the light of the fact that paragraph 1 bis had become paragraph 2.

206. Between the two readings of Article 8, the committee had considered Article 10 relating to the non-retroactivity of the future

Convention and had decided to delete the article. The representative who had proposed the language in square brackets in Article 8, paragraph 5 (now renumbered) stated that his delegation's proposal was of the outmost importance for those museums or institutions which did not purchase certain cultural objects but obtained them by way of succession or gift. Without the language in square brackets, the return of a cultural object could be requested on the basis of the knowledge of a person who had lived many years before, and not of that of an event which had occurred after the entry into force of the Convention. This difficulty could have been dealt with by paragraph 1 of Article 10 but that provision had now been deleted.

207. Another representative added that in view of the deletion of Article 10, and the absence of the phrase in square brackets in Article 8, paragraph 4 (also to be found in paragraph 3 of Article 4), it would be necessary for any State implementing the Convention to make provision in its national law for the situations which would be covered after the entry into force of the Convention. This would create problems with regard to the temporal application of the Convention by States Parties.

208. One representative noted that even if there were to be no specific provision on the question of non-retroactivity, there did exist in international law a general principle to the effect that treaties were not retroactive. Ultimately, the committee decided to delete the words between square brackets and to draw attention to the problem in the explanatory report which would accompany the text to be submitted to the diplomatic Conference.

Article 8 bis

209. The representative who had initially proposed this article, which had appeared in square brackets in the text submitted to the committee since its second session and which had never been the subject of discussion, withdrew his proposal. The article was therefore deleted.

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

210. When presenting Article 9, the Secretary-General of Unidroit drew the attention of the committee to the connection between Article 1 establishing the substantive scope of application of the Convention and Article 9 concerning the rules of jurisdiction with respect to claims under the Convention. He suggested that the questions which arose in relation to this article were the international character of a claim, the bodies which should enjoy jurisdiction under the Convention and whether the Convention

should, in addition to jurisdiction, also deal with the recognition and enforcement of judgments. He added that four different versions of Article 9 had been submitted, almost all of which adopted an approach different from the others.

211. The committee began by considering Alternative I which reproduced the text prepared by the study group and which, in paragraph 1, offered an option to the claimant to bring an action either before the courts or other competent bodies of the State where the possessor had its habitual residence, or those of the State where the object was located at the time a claim was brought. The Secretary-General of the Hague Conference on Private International Law supported the introduction of a special new ground of jurisdiction in respect of stolen or illegally exported cultural objects, that is to say the court of the place where the object was located. In fact, he pointed out that there was at the present time in comparative law no ground of jurisdiction based solely on the location of a movable, which was perfectly understandable in relation to ordinary transactions involving movables for which no international jurisdiction was required (it was necessary to bring an action before the court of the defendant or the place of performance of the contract ...). Even the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and the 1988 Lugano Convention which bore the same title, and which dealt with all aspects of jurisdiction at international level, did not contemplate this particular ground.

212. A number of representatives expressed their support for the paragraph on account of its clarity but they wished to proceed rapidly to an examination of paragraph 1 of Alternative II which was very similar. One representative believed that if the committee were to opt for this text then it would be necessary to define the concept of "habitual residence".

213. The committee then reiterated its support for paragraph 2 which allowed the parties to submit their dispute to another jurisdiction or to arbitration. One representative however recalled that since some types of contract were not universally recognised, for example consumer sales, he would have difficulty in leaving total freedom to the parties. In his view nevertheless arbitration did not cause a real problem on condition that it concerned only stolen and illegally exported cultural objects. The Chairman took note of the quasi-unanimity in favour of arbitration and the choice of jurisdiction.

214. Alternative II had been submitted by the delegation of the Netherlands and the Secretary-General of the Hague Conference, and it was this latter who explained that the present wording of Alternative I might be read in such a way as to suggest that other grounds of jurisdiction were excluded. There were however other possible grounds such as the State where the theft was committed or the place of residence of the thieves, etc. He stated that the purpose of the new paragraph 1 was to add the special ground of jurisdiction of the place where the object was located to all

those existing under the ordinary law of the States Parties to the Convention or which were based on international conventions.

215. Most representatives believed this text to be preferable to that contained in Alternative I as it stated clearly what had hitherto only been implicit, thus leaving the door open to an a contrario reading. However, the words "without prejudice to the ordinary rules ..." were the subject of criticism as some considered that they were in effect giving a "blank cheque," whereas other representatives saw them as introducing an element of uncertainty into the Convention for while there were conventions dealing with jurisdiction, this one had an entirely different objective. The words "ordinary rules" were also considered to be inappropriate and proposals were put forward such as "generally applicable" rules, "national rules" or yet again "rules in force in Contracting States relating to jurisdiction", the author of the last proposal suggesting that the provision should apply only to stolen cultural objects.

216. One representative suggested that the formula to be found in the first two alternatives was too broad and he proposed that jurisdictional rules should be tailored to particular situations. He pointed out for example that if a cultural object were to be located in State X, without its having been stolen there, or any person implicated in the theft having his or her residence in that country or being a national of it, but that one of them worked there, he would not wish to see the courts of that State enjoying jurisdiction over the matter. Another representative suggested that those problems might be solved in a clause providing that, in respect of stolen cultural objects, a Contracting State was under no obligation to apply the rules of the Convention when the law applicable to the acquisition after the theft was that of a non-Contracting State. He recognised that this was a completely novel idea and in any event, the further the discussions were prolonged, the more he was convinced that it would be preferable not to deal with jurisdiction in the text. The Chairman proposed at this stage simply taking note of this solution which would modify radically the text as a whole by in effect deleting Chapter IV.

217. Another representative noted that the text referred to a "Contracting State" and he wondered what would be the situation if the object were to be found in a non-Contracting State. He suggested that it would be useful for the Contracting State where the possessor was resident to be given jurisdiction (as was proposed in Alternative IV). The Chairman took note of this observation while stressing that the question of whether the word "Contracting" should or should not be clarified had been raised on a number of occasions and the committee should not lose sight of it.

218. Paragraph 2, which made provision for resort to be had to the provisional, including protective, measures available under the law of the State where the object was located, even though the claim had been brought before the courts of another Contracting State, was not the subject of dis-

cussion and no representative objected when the Chairman suggested that there was a consensus in favour of its retention.

219. One representative considered that the purpose of Article 9 was not only to establish the grounds of jurisdiction but also to define more specifically which international actions were admissible and he recalled a proposal tabled at earlier sessions of the committee which sought to determine which parties would be entitled to bring a claim, under what circumstances and in which States (cf. Alternative III).

220. The Secretary-General of the Hague Conference stated that while he could understand the concern which lay behind the proposal, what was at issue was in effect the scope of application of the Convention, in respect of which it was not possible to rely on the technical rules governing jurisdiction. He added that this alternative should be located in Article 1 since it was there that one found all the rules determining the scope of application of the Convention. He was moreover amazed that paragraphs 1 and 2 of the proposal should refer to the place of habitual residence of the claimant, as this was an aspect with which no other international convention had hitherto concerned itself. Another representative believed that the desired effect of paragraphs 1 and 2 would be met by Alternative II and that of paragraph 3 by the provisions of Article 1, sub-paragraph (a) as regards the international character of the situation. Finally, she could not see the practical effect of paragraph 4 since it was difficult to envisage a claimant seeking the return of an object on the basis of the existence of such an "international situation" if the object had never been removed.

221. The Chairman noted a very broad consensus within the committee against the approach set out in Alternative III.

222. The committee then considered Alternative IV which was composed of five articles and which dealt not only with the question of jurisdiction but also with that of enforcement. The Secretary-General of the Hague Conference stated that the enumeration in paragraph 1 of Article 9 of the three grounds of jurisdiction was a realistic one as those mentioned were the ones most often relied upon in practice. However, the purpose of the alternative in question was much broader since it amounted in effect to obliging States to assume jurisdiction in those cases where the facts of the situation were such as to create jurisdiction on their territory. There would in other words be a unification of the rules governing jurisdiction but limited to three grounds alone whereas in some States other grounds of jurisdiction might exist.

223. He further suggested that the States Parties to the Brussels and Lugano Conventions would certainly press for and obtain the introduction of a clause which would read along the following lines: "if two or more Parties are bound by a treaty ..., the rules contained in that treaty shall prevail over the corresponding provisions of Articles ... ", and since no

other Convention of this type specified as a ground of jurisdiction the location of the object, that ground would be lost for cultural objects whereas its retention would constitute a step forward. It was therefore necessary to ensure that if certain States called for the respect of their own systems, they should at the same time accept the jurisdiction of the place where the cultural object was located.

224. Another representative stressed that it would be extremely difficult for States to accept the jurisdiction of the State on whose territory the illegal act had been committed, for which provision was made in sub-paragraph (c) of paragraph 1, above all when those States were bound by constitutional rules protecting private property.

225. The committee then turned its attention to Articles 9 bis to 9 quinquies which reflected a proposal to complete the rules on jurisdiction by adding rules on recognition and enforcement. Some representatives suggested that the proposal raised difficult political choices in an area as sensitive as that of cultural objects. They considered that while the system was by and large comprehensive, some important questions had not been dealt with such as *lis pendens* or the problem of incompatible decisions (there might in effect be claims for restitution brought by two different claimants). While sharing the concern of those which had led them to propose the rules on enforcement, most representatives believed that there would be a severe risk of compromising the ratification of the Convention if it was sought at any price to include therein rules which were not absolutely indispensable.

226. The Chairman summed up the opinions of the representatives on the various points and requested the committee to take a stand thereon through a series of votes. In the first place he enquired of the committee whether it wished to accept the most radical proposal advanced during the discussions, namely that calling for the deletion of Chapter IV: 16 delegations voted for its retention, six for its deletion and nine abstained. Chapter IV having thus been retained, the Chairman asked the committee to vote on paragraph 1 of Alternatives I and II: nine delegations supported paragraph 1 of Alternative I, 18 preferred paragraph 1 of Alternative II and three abstained. The last vote took place on Alternative IV in which six delegations supported its retention, 15 voted for its deletion and nine abstained. That alternative was therefore rejected.

227. The Secretary-General then stated that a new Article 9 composed of three paragraphs would be submitted to the committee: paragraph 1 would be the former paragraph 1 of Alternative II, paragraph 2 the former paragraph 2 of Alternative I and paragraph 3 the former paragraph 2 of Alternative II.

228. Finally, the committee briefly considered a proposal for the introduction of two new paragraphs in Article 9 referring to the habitual

residence of the claimant (cf. Study LXX - Doc. 47, Misc. 28). The delegation which had sponsored the proposal indicated that it was intended to answer two questions: the first of these was who could bring a claim and the second where the claim could be brought. Although the committee had no time to discuss this proposal in detail, some representatives repeated their serious doubts at introducing in the Convention the concept of habitual residence in view of the general rules of private international law.

CHAPTER V - FINAL PROVISIONS

Article 10

229. This article, which determined clearly the temporal scope of application of the future Convention by providing in paragraph 1 that it only concerned situations arising after the entry into force of the Convention, had not been discussed at the previous session of the committee. Some representatives had however recalled on a number of occasions the importance which they attached to the principle of the non-retroactivity of the future Convention and the fact that their acceptance of certain provisions was entirely conditional upon the endorsement of that principle. One member of the study group recalled that the latter had drawn a distinction between the problems facing those countries which were today victims of the unlawful traffic in cultural objects and the problem of very important cultural objects which had left their country of origin many years ago, for whatever reason that might have been. A consensus had been reached within the study group to deal with illegal traffic in the future but that consensus had not extended to the past.

230. A large number of representatives reiterated their attachment to the principle of the non-retroactivity of the future Convention although some believed that the presence of a specific article to that effect was not necessary in view of the fact that the rule was already enshrined in the Vienna Convention on the Law of Treaties and had never been questioned. Other representatives were however convinced of the necessity of including such an article in the text given the special subject matter of the Convention and one of them proposed dividing up the provision by laying down one rule for Chapter II and another for Chapter III (cf. Study LXX - Doc. 47, Miscs. 19 and 26). Another proposal was made along the same lines (cf. Study LXX - Doc. 47, Misc. 32). Another representative proposed replacing Article 10 by an article to be included in Chapters II and III, while yet another suggested stating in the preamble that the intention was to legislate for the future without in any way recognising a *fait accompli* or legitimising thefts or illegal export which had taken place before the entry into force of the Convention.

cultural heritage should be returned to the territory of the State of origin, and it was in his view necessary to reject such an idea.

235. All representatives were unanimous in agreeing that the new proposal perhaps started out from an erroneous interpretation of the original text for it had not been the intention in any way to affect the right of States to call for the return of their cultural objects on a diplomatic or bilateral basis. It might therefore be necessary to state this clearly, for example in the preamble. The UNESCO representative also recalled the existence since 1978 of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation; she stated however that only on seven occasions had States had recourse to the committee. She suggested that the committee could play a role in facilitating bilateral negotiations for the restitution or return of objects stolen or illegally exported before the entry into force of Convention.

236. Another representative recalled that if the Convention did not itself make provision for its temporal sphere of application, the general principle of non-retroactivity would apply but she stated that she could understand the concern of those States which felt that they would be unable to ratify the future Convention if the principle of non-retroactivity were not to be expressly mentioned in the text. She therefore proposed deleting paragraph 1 of Article 10, wondering whether paragraph 2 might not be sufficient for those States. Some representatives believed that the paragraph was so self-evident that it would be preferable if one wished to say anything at all to do so in the preamble.

237. In the light of the criticisms made, the delegation at the origin of the proposal containing an exception to the principle of non-retroactivity (Study LXX - Doc. 47, Misc. 25) proposed a new formulation limiting the application of the exception. In effect, it contemplated the application of the Convention "where objects [were] stolen or illegally removed prior to the entry into force of the Convention and acquired by the possessor subsequent to the entry into force of the Convention" (Study LXX - Doc. 47, Misc. 31). It called on the committee to vote on this new proposal or, in the alternative, to delete paragraph 1.

238. The Chairman summarised the situation, recalling that the adversaries of the principle of non-retroactivity had a twofold and legitimate concern. The first was the idea that Article 10 could be interpreted as legitimising the illegal traffic in, and theft of, cultural objects before the entry into force of the Convention, while for others this clearly manifested an error in interpretation which could be avoided by clarification in the preamble. The second concern was that the provision could be interpreted as limiting the freedom of States to call for the restitution of cultural objects otherwise than under the Convention, while in fact it was unthinkable that Article 10 in any way limited the freedom of a State to proceed on the basis of bilateral or diplomatic negotiations.

Here again this could be made clear in the preamble of the future Convention.

239. The Chairman then put to the vote the proposal contained in document Study LXX - Doc. 47, Misc. 31: 14 delegations voted in favour of the proposal, 15 against and four abstained. The proposal was therefore rejected. He then asked the committee to vote on the deletion of paragraph 1: 17 delegations voted in favour, 8 against and 8 abstained. Paragraph 1 of Article 10 was therefore deleted.

240. Paragraph 2, which provided that a State may make a claim outside the Convention for the restitution or return of an object that had been stolen or illegally exported before the entry into force of the convention was not the subject of any lengthy discussion. Some representatives considered that such a provision was unnecessary as its content would in any case be applicable in conformity with the normal rules of international law, and that it could be restated in the preamble of the future Convention.

241. The same was true of paragraph 3 which related in particular to excavations. One representative however drew the attention of the committee to a new proposal in Study LXX - Doc. 47, Misc. 29. He recalled that situations existed in which it would be impossible to prove the exact date on which the excavated cultural object had been acquired or exported whereas this date was decisive for determining the application of the Convention and, if nothing were to be said, there could be no restitution of such objects on the basis of the future Convention. Some representatives however believed that this proposal would extend the temporal scope of application of the Convention to cultural objects which had been illegally removed from excavations before the entry into force of the Convention, which was another way of reintroducing the principle of retroactivity and they were therefore opposed to it.

242. In these circumstances, the Chairman enquired whether there was any wish to retain the last two paragraphs and no representatives having taken the floor, it was decided to delete the article as a whole.

Article 11

243. The committee then turned to Article 11 which provided that the future Convention did not prevent Contracting States from applying their national law in cases where this would be more favourable than the provisions of the Convention to the restitution or return of stolen or illegally exported cultural objects. The Chairman requested the members of the committee to indicate their views on the choice of legislative technique to be followed, that was to say a detailed provision of the kind at present to be found in Article 11, or a general formula.

244. The Secretary-General of Unidroit recalled that the study group had initially envisaged a general formula which would permit those States whose legislation offered more favourable treatment to the claimant not to reduce that protection. The group had however subsequently come to the conclusion that the character of the rules laid down by the future Convention was in contradiction with the technique followed by the study group which would have a negative effect in that it would deprive the Convention of its character of a uniform law, and that it would therefore be preferable to specify the situations in which a Contracting State (the State addressed) could offer to the claimant more favourable treatment than that for which the future Convention made provision. He suggested that the question of the choice of the formula to be adopted was once more on the table since, during the sessions of the committee of experts, further situations had been contemplated and this could give rise to even more potential problems.

245. A majority of representatives favoured the return to a general formula, one of them suggesting the form of wording which was to be found in a proposal that had been made for Article 1, paragraph 2 and which read 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. 47, Misc. 2).

246. A majority of representatives supported the new language of the proposal but considered that it should be located at the end of the text and not in Article 1 which concerned the scope of application. Some representatives also wished to see the application of more favourable rules which already existed made obligatory for Contracting States (cf. Study LXX - Doc. 47, Misc. 4).

247. Following this first exchange of views, the Chairman decided to entrust a working group with the task of drafting the new provision on the basis of the proposal that had been made. This group suggested to the committee that the present text of Article 11 be replaced by the proposal made in plenary (Study LXX - Doc. 47, Misc. 2) although some doubts had been expressed as to whether that proposal would necessarily cover all the questions dealt with in the detailed formula (for example the possibility of extending the application of Chapter II of the Convention to offences other than theft) (Study LXX - Doc. 47, Misc. 7). The group had also agreed that its mandate did not cover the question of whether the language of Article 11 should leave an option for Contracting States to apply more favourable rules or whether it should be an obligation for Contracting States to apply such rules as already existed or might in the future exist.

248. The group had also considered the question of whether the final clauses of the Convention should contain a provision contemplating a declaration by Contracting States as to those instances in which they would provide more favourable treatment than that offered by the Convention or

whether such information might be exchanged in the framework of a system of central authorities as had been proposed by one delegation. Although the group had considered that this matter was not covered by its terms of reference, it had nevertheless wished to raise it before the committee.

249. As to the question of whether the new formulation covered all those matters which were dealt with in the present list, one representative suggested that those points which were not covered by the new provision were not related to the question of more favourable treatment. This was in particular the case with sub-paragraph (a) (iv) ("to apply its national law when this would require just compensation in the case where the possessor has title to the cultural object") which was already dealt with in paragraph 1 of Articles 4 and 8. Likewise, the possibility that the costs mentioned in Article 8, paragraph 3 should be borne by a State other than the requesting State or by another person was already alluded to in that latter provision. Another representative also wished to see an explicit reference to the possibility of extending the application of Chapter II of the Convention to offences other than theft and a clarification as to the applicable law. To this end, he proposed the text of a new article (cf. Study LXX - Doc. 47, Misc. 16).

250. The committee voted by a large majority in favour of the text submitted by the Unidroit Secretariat which was based on the discussions of the committee and set out in Study LXX - Doc. 47, Misc. 40.

Article 12

251. The committee then considered a proposal which had been submitted at its second session (cf. Study LXX - Doc. 29, Misc. 51) but which had never been the subject of discussion, aimed at safeguarding the application of agreements concluded before the entry into force of the Convention by States Parties concerning the return of cultural objects that had been exported. One representative suggested that the drafting of this article posed problems for the member States of the European Community in relation to the Directive and the Regulation. In effect, the article only spoke of "agreements already concluded" which did not cover community instruments and referred to agreements concluded before the entry into force of the Convention whereas it was not inconceivable that the Directive would in the future be revised or a new instrument adopted. In the absence of a representative of the EEC Commission the Belgian delegation, acting in the name of the country at present chairing the EEC Council, announced that the member States of the Community were obliged to enter a reservation on this article until such time as they could submit a new text to the diplomatic Conference.

252. The Secretary-General recalled that it was customary to include such a provision in the final clauses of private law Conventions. A draft set of final clauses would be prepared by the Secretariat for the

diplomatic Conference containing the usual provision (for example the number of ratifications necessary for the entry into force of the Convention, the federal clause, etc.), which would permit the present article to be deleted for the time being. The committee agreed to this proposal.

Article 13

253. This article had also been submitted at the second session of the committee (cf. Study LXX - Doc. 29, Misc. 51) without there being any discussion on it. It related to an undertaking on the part of States Parties to impose no customs or other charges upon claims made pursuant to the Convention or on cultural objects returned pursuant to the Convention. Some representatives were of the opinion that the drafting of the article needed to be amended as the connection between customs duties and other charges and claims brought under the Convention was not clear (sub-paragraph (a)).

254. Other representatives wondered whether the word "other" did not refer to the costs of legal proceedings or a guarantee to be deposited by a non-resident bringing an action before foreign courts so as to ensure the payment of costs and damages which he or she might be ordered to pay ("*judicatum solvi*"). They also recalled that similar provisions were to be found in a number of the Conventions of the Hague Conference on Private International Law, but that the dispensation from depositing such a guarantee was usually accompanied by automatic enforcement through the diplomatic channel. Some representatives believed that in the absence of such a provision the guarantee required could be very high in respect of claims brought under Chapter II and that it might discourage States with financial difficulties from requesting the restitution of stolen cultural objects. This would cause no problems under Chapter III since a State would in any event be dispensed from the need of depositing such a guarantee. Another representative proposed deleting the article and amending paragraph 4 of Article 8 so as to include legal costs.

255. The Chairman suggested that the article could be deleted, principally because of the doubts which existed as regards its purpose and that it would be sufficient to mention the matter in the explanatory report. It was so decided.

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256. The President warmly thanked the participants for their contributions to the discussions during the session which he declared closed at 2 p.m. on 8 October 1993.

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APPENDIX II

AGENDA

1. Adoption of the draft agenda (G.E./C.P. - Ag.4)
2. Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Study LXX - Docs. 37 to 41)
3. Other business

(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.

**DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF
STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**
as resulted from the fourth session of the Unidroit committee
of governmental experts on the international protection
of cultural property (Rome, 29 September - 8 October 1993)

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

This Convention applies to claims of an international character for

- (a) the restitution of stolen cultural objects removed from the territory of a Contracting State;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance.

Article 2

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

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

(2) For the purposes of this Convention, an object which has been unlawfully excavated or lawfully excavated and unlawfully retained shall be deemed to have been stolen.

(3) Any claim for restitution shall be brought within a period of [one] [three] year[s] from the time when the claimant knew or ought reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the time of the theft.

(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State [shall not be subject to prescription] [shall be brought within a time limit of [75] years].

[For the purposes of this paragraph, a "public collection" consists of a collection of inventoried cultural objects, which is accessible to the public on a [substantial and] regular basis, and is the property of

- (i) a Contracting State [or local or regional authority],
- (ii) an institution substantially financed by a Contracting State [or local or regional authority],
- (iii) a non profit institution which is recognised by a Contracting State [or local or regional authority] (for example by way of tax exemption) as being of [national] [public] [particular] importance, or
- (iv) a religious institution.]

Article 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled at the time of restitution to payment by the claimant of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

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

(3) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) A Contracting State may request the court or other competent authority of another Contracting State acting under Article 9 to order the return of a cultural object which has

- (a) been removed from the territory of the requesting State contrary to its law regulating the export of cultural objects because of their cultural significance;
- (b) been temporarily exported from the territory of the requesting State under a permit, for purposes such as exhibition, research or restoration, and not returned in accordance with the terms of that permit [, or
- (c) been taken from a site contrary to the laws of the requesting State applicable to the excavation of cultural objects and removed from that State] .

(2) The court or other competent authority of the State addressed shall order the return of the object if the requesting State establishes 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,

or establishes that the object is of outstanding cultural importance for the requesting State.

(3) Any request made under paragraph 1 shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 and 2 have been met.

(4) Any request for return shall be brought within a period of [one] [three] year[s] from the time when the requesting State knew or ought reasonably to have known the location of the object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the date of the export.

Article 6

(1) When the requirements of Article 5, paragraph 2 have been satisfied, the court or other competent authority of the State addressed may only refuse to order the return of a cultural object where

- (a) the object has a closer connection with the culture of the State addressed [, or
- (b) the object, prior to its unlawful removal from the territory of the requesting State, was unlawfully removed from the State addressed].

(2) The provisions of sub-paragraph (a) of the preceding paragraph shall not apply in the case of objects referred to in Article 5, paragraph 1(b).

Article 7

(1) The provisions of Article 5, paragraph 1 shall not apply where the export of the cultural object is no longer illegal at the time at which the return is requested.

(2) Neither shall they apply where

- (a) the object was exported during the lifetime of the person who created it [or within a period of [five] years following the death of that person]; or
- (b) the creator is not known, if the object was less than [twenty] years old at the time of export [;

except where the object was made by a member of an indigenous community for use by that community].

Article 8

(1) The possessor of a cultural object removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance shall be entitled, at the time of the return of the object, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been unlawfully removed.

[(2) Where a Contracting State has instituted a system of export certificates, the absence of an export certificate for an object for which it is required shall put the purchaser on notice that the object has been illegally exported.]

(3) Instead of requiring compensation, and in agreement with the requesting State, the possessor may, when returning the object to that State, decide

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees.

(4) The cost of returning the object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the object by inheritance or otherwise gratuitously.

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

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

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

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

CHAPTER V - FINAL PROVISIONS

Article 10

Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of a stolen or illegally exported cultural object than provided for by this Convention.

