

**DIPLOMATIC CONFERENCE  
FOR THE ADOPTION OF THE DRAFT  
UNIDROIT CONVENTION ON THE  
INTERNATIONAL RETURN OF STOLEN  
OR ILLEGALLY EXPORTED  
CULTURAL OBJECTS**

***ACTS AND PROCEEDINGS***



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## INTRODUCTION

At the invitation of the Government of Italy, a diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects was held in Rome from 7 to 24 June 1995.

The draft Convention submitted for adoption at the Conference had been drawn up by a committee of governmental experts convened by the International Institute for the Unification of Private Law (Unidroit). The other basic working materials of the Conference were draft final provisions prepared by the Unidroit Secretariat and comments on the draft Convention and on the draft final provisions submitted by Governments and international Organisations.

Seventy Governments and, as observers, another eight countries, the Sovereign Military Order of Malta, seven intergovernmental organisations, five non-governmental organisations, and one international professional association were represented at the Conference which elected Mr W. Gardini (Italy) President. Messrs M. Ghomrasni (Tunisia), A.G. Khodakov (Russian Federation), M. Kima Tabong (Cameroon), J. Sánchez Cordero Dávila (Mexico) and A. Wichiencharoen (Thailand) were elected Vice-Presidents of the Conference. The first and second readings of the draft Unidroit Convention on the international return of stolen or illegally exported cultural objects, Articles C and F of the draft final provisions capable of embodiment in the aforementioned draft Convention and the title of the said draft Convention were assigned to a Committee of the Whole, the Chairman of which was Mr P. Lalive (Switzerland). The Conference assigned to the Final Clauses Committee, whose Chairman was Mr V. Marotta Rangel (Brazil), the first and second readings of all but Articles C and F of the draft final provisions capable of embodiment in the

aforementioned draft Convention. The Conference also set up a Drafting Committee, the Chairperson of which was Ms R. Balkin (Australia), and a Credentials Committee, the Chairman of which was Mr N. Perl (Argentina).

The Conference completed its work on 23 June 1995 with the adoption of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects, which was opened for signature the following day, after the signature of the Final Act of the Conference at the closing session of the Conference. The Convention will remain open for signature in Rome, Italy, until 30 June 1996. It was also opened for accession on 24 June 1995. The Convention is deposited with the Government of Italy.

This volume constitutes the Acts and Proceedings of the Conference and contains the following Conference papers:

- (1) the basic Conference papers;
- (2) the papers submitted to the Committee of the Whole;
- (3) the summary records of the meetings of the Committee of the Whole;
- (4) the papers submitted to the Final Clauses Committee;
- (5) the papers and reports submitted to the Plenum;
- (6) the summary records of the meetings of the Plenum;
- (7) the texts and instruments adopted by the Conference.



**AUDIENCE GIVEN BY HIS EXCELLENCY  
MR OSCAR LUIGI SCALFARO, PRESIDENT OF THE ITALIAN REPUBLIC**

**TO HIS EXCELLENCY MR WALTER GARDINI,  
UNDER-SECRETARY OF STATE FOR FOREIGN AFFAIRS,  
AND THEIR EXCELLENCIES THE HEADS OF THE DELEGATIONS  
ATTENDING THE UNIDROIT DIPLOMATIC CONFERENCE ON THE INTERNATIONAL  
RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

*Quirinale Palace, 9 June 1995*

My thanks go in the first place to you, Mr Under-Secretary of State, as President of this Conference. And in extending my welcome to all of you, let me also thank you for the honour you have bestowed on Italy by appointing the Under-Secretary of State for Foreign Affairs of Italy as President of this Conference.

There is no doubt that the topics you are discussing are of especial interest for a judge like myself, and sometimes judges can be a little naughty. Let me therefore apologise in advance for this naughtiness.

The traditional maxim states that "possession is nine points of the law". I would suggest that it is a distorted application of this principle to seek to make lawful what is in effect unlawful behaviour. I have chosen a polite way to say this, checking what first came to mind, namely that this amounts to "the principle of the thief and the handler of stolen goods": two cases regulated by the criminal law of all civilised countries.

And to take this a step further, I might add that to look for good faith in a person who buys an art object without knowing its provenance is to attempt the impossible.

I hope you may have the time to go for a walk along the Appian Way. There is perhaps nothing more beautiful in the world. And there you may see reconstructed walls and inset in those walls a series of fragments of Roman sculpture.

I was wrong: you will not see any fragments of Roman sculpture. You will only see the empty spaces left by the theft of those Roman fragments.

Yet there really are some lawyers sufficiently

brazen to say of the purchaser of such Roman fragments: "So what! He found it on the market, on sale in normal circumstances or he was left it by a great-grandfather who worked close to a Roman Emperor ...".

Well, possession confers a sort of title. There is no doubt about that, in so far as it is a statement of fact. It becomes full ownership when I prove how I came to be in possession of that object. For the law to recognise this would be to put order and legal propriety in a sector as special and worthy of respect as that of the market in art objects and archaeological finds.

That something is wrong is brought out by two contrasting attitudes. Let us take the example of excavations. A country with a rich sub-soil is likely to have archaeological remains worthy of excavation and endeavours to defend them. It has not so much the right to defend them as the duty to defend them!

A country with clever buyers has a greater tendency to defend the thesis that "possession is as good as ownership".

The system which guarantees that justice is done to everyone is that which provides that "law is law" and does not use law in a distorted way which is at odds with the very values of law.

International law has many shortcomings and we must, in all humility, acknowledge that fact. If this assembly proves skilful enough to overcome one of those shortcomings, it will have earned the gratitude of many, and not least the thanks of the Italian Head of State.

Thank you!



## **PART I – BASIC CONFERENCE MATERIALS**



## **PROVISIONAL AGENDA**

Opening of the Conference

Election of the President of the Conference

1. Adoption of the Agenda
2. Adoption of the Rules of Procedure
3. Election of the Vice-Presidents and other Officers of the Conference
4. Appointment of the Credentials Committee
5. Organisation of the work of the Conference, including the establishment of a Final Clauses Committee and other Committees, as necessary
6. Consideration of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects
7. Examination of the Reports of:
  - (a) the Committee of the Whole
  - (b) the Final Clauses Committee
  - (c) the Credentials Committee
  - (d) other Committees
8. Adoption of the Final Act of the Conference and of any instruments, resolutions and recommendations resulting from its work
9. Signature of the Final Act and of any other instruments adopted by the Conference.





*Credentials Committee*

**Rule 4**

A Credentials Committee shall be appointed at the beginning of the Conference. It shall consist of five members who shall be appointed by the Conference on the proposal of the President. It shall examine the credentials of representatives and report to the Conference without delay.

*Provisional Participation in the Conference*

**Rule 5**

1. Pending a decision of the Conference upon their credentials, representatives shall be entitled provisionally to participate in the Conference.

2. Any representative to whose admission a State participating in the Conference has made objection shall be seated provisionally with the same rights as other representatives until the Credentials Committee has reported and the Conference has given its decision.

CHAPTER II – PRESIDENT,  
VICE-PRESIDENTS, etc.

*Election*

**Rule 6**

The Conference shall elect a President, five Vice-Presidents, the Chairperson of the Committee of the Whole provided for in Rule 46 and the Chairperson of the Drafting Committee established under Rule 47. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

*President*

**Rule 7**

In addition to exercising the powers conferred elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each plenary meeting, direct the discussions at such meetings, accord the right to speak, put questions to the vote and announce decisions. The President shall rule on points of order and, subject to these rules of procedure, have complete control of the

proceedings and over the maintenance of order thereat. The President may propose to the Conference the limitation of time to be allowed to speakers, the limitation of the number of times each representative may speak on any question, the closure of the list of speakers, the adjournment or closure of the debate, and the suspension or the adjournment of the meeting.

**Rule 8**

The President, in the exercise of his functions, remains under the authority of the Conference.

*Acting President*

**Rule 9**

If absent for a meeting or any part thereof, the President shall appoint a replacement from among the Vice-Presidents.

**Rule 10**

A Vice-President acting as President shall have the same powers and duties as the President.

*Replacement of the President*

**Rule 11**

If at any time the President is unable to perform his functions for the remaining period of the Conference a new President shall be elected.

*The President shall not vote*

**Rule 12**

The President, or Vice-President acting as President, shall not vote but may, where necessary, appoint another member of his or her delegation to vote in his or her place.

CHAPTER III – STEERING COMMITTEE

*Composition*

**Rule 13**

There shall be a Steering Committee which shall comprise the President and Vice-Presidents of the Conference as well as the Chairperson of the

Committee of the Whole. The President of the Conference or, in his absence, a Vice-President designated by the President shall serve as Chairperson of the Steering Committee. The Secretary-General of the Conference and the Chairperson of the Drafting Committee may be invited by the President to participate, without the right to vote, in the work of the Steering Committee.

#### *Functions*

#### **Rule 14**

The Steering Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the coordination of its work.

### CHAPTER IV – SECRETARIAT

#### *Duties of the Secretary-General and the Secretariat*

#### **Rule 15**

1. The Secretary-General of the International Institute for the Unification of Private Law shall be the Secretary-General of the Conference.

2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference and its Committees.

3. The Secretariat shall receive, translate, produce and distribute documents, reports and resolutions of the Conference; interpret speeches made at the meetings, prepare and circulate records of the public meetings; arrange for the custody and preservation of the documents in accordance with the decisions of the Conference; publish reports of the public meetings; distribute all documents of the Conference to the participating Governments and, generally, perform all other work which the Conference may require.

#### *Statements by the Secretariat*

#### **Rule 16**

The Secretary-General, the Executive Secretary, and any member of the Conference staff designated for that purpose may, at any time, make oral or written

statements concerning any question under consideration.

### CHAPTER V – CONDUCT OF BUSINESS

#### *Quorum*

#### **Rule 17**

A quorum of the Conference shall be constituted by the representatives of a majority of the States participating in the Conference.

#### *Speeches*

#### **Rule 18**

No person may address the Conference without having previously obtained the permission of the President. Subject to Rules 19, 20, 24 and 26, the President shall call upon speakers in the order in which they signify their desire to speak. The President may call a speaker to order if the speaker's remarks are not relevant to the subject under discussion.

#### *Precedence*

#### **Rule 19**

The Chairperson or Rapporteur of a committee, or the representative of a sub-committee or working group, may be accorded precedence for the purpose of explaining the conclusion arrived at by that committee, sub-committee or working group.

#### *Points of Order*

#### **Rule 20**

During the discussion of any matter a representative may rise to a point of order, and the point of order shall immediately be decided by the President in accordance with the rules of procedure. A representative may appeal against the ruling of the President. The appeal shall immediately be put to the vote and the President's ruling shall stand unless overruled by the majority of the representatives present and voting. A representative rising to a point of order may not speak on the substance of the matter under discussion.

*Time-limit on Speeches*

**Rule 21**

The Conference may on the proposal of the President limit the time to be allowed to each speaker on any particular subject under discussion. When the debate is limited and a representative has spoken for the allotted time, the President shall call the speaker to order without delay.

*Closing of List of Speakers*

**Rule 22**

During the course of a debate the President may announce the list of speakers and, with the consent of the Conference, declare the list closed. The President may, however, accord the right of reply to any representative if a speech delivered after the closing of the list makes this desirable.

*Adjournment of Debate*

**Rule 23**

During the discussion of any matter, a representative may move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the motion, after which the motion shall immediately be put to the vote. The President may limit the time to be allowed to speakers under this rule.

*Closure of the Debate*

**Rule 24**

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his or her wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall immediately be put to the vote. If the Conference is in favour of the closure, the President shall declare the closure of the debate. The President may limit the time to be allowed to speakers under this rule.

*Suspension or Adjournment of the Meeting*

**Rule 25**

During the discussion of any matter, a representative may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall immediately be put to the vote. The President may limit the time to be allowed to the speaker moving the suspension or adjournment.

*Order of Procedural Motions*

**Rule 26**

Subject to Rule 20, the following motions shall have precedence in the following order over all the other proposals or motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the question under discussion;
- (d) For the closure of the debate on the question under discussion.

*Basic Proposal*

**Rule 27**

The draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, prepared by the International Institute for the Unification of Private Law, shall constitute the basic proposal for discussion by the Conference.

*Other Proposals and Amendments*

**Rule 28**

Other proposals and amendments thereto shall normally be introduced in writing and handed to the Executive Secretary of the Conference who shall circulate copies to the delegations. As a general rule, no proposal or amendment shall be discussed or put to the vote at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President or Chairperson of a Committee may, however, permit the discussion and consideration of amendments, even

though these amendments and motions have not been circulated or have only been circulated the same day.

*Decisions on Competence*

**Rule 29**

Subject to Rule 20, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal or an amendment submitted to it shall be put to the vote before the matter is discussed or a vote is taken on the proposal or amendment in question.

*Withdrawal of Motions*

**Rule 30**

A motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that the motion has not been amended or that an amendment to it is not under discussion. A motion which has thus been withdrawn may be reintroduced by any representative.

*Reconsideration of Proposals*

**Rule 31**

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on a motion to reconsider shall be accorded only to the mover and one other supporter and to two speakers opposing the motion, after which it shall immediately be put to the vote.

*Invitation to Technical Advisers*

**Rule 32**

The Conference may invite or admit to one or more of its meetings any person whose technical advice it may consider useful in its work.

CHAPTER VI – VOTING

*Voting Rights*

**Rule 33**

Each State represented at the Conference shall have one vote.

*Required Majority*

**Rule 34**

1. Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of representatives present and voting, and decisions on matters of procedure shall be taken by a simple majority of representatives present and voting.

2. If the question arises whether a matter is one of procedure or of substance, the President of the Conference shall rule on the question. An appeal against this ruling shall immediately be put to the vote and the President's ruling shall stand unless overruled by a two-thirds majority of the representatives present and voting.

*Meaning of the expression "Representatives present and voting"*

**Rule 35**

For the purpose of these Rules the phrase "representatives present and voting" means representatives casting an affirmative or negative vote. Representatives abstaining from voting or casting an invalid vote shall be considered as not voting.

*Method of Voting*

**Rule 36**

The Conference shall normally vote by show of hands. However, any representative may request a roll-call vote which shall be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President. The vote of

each representative participating in any roll-call vote shall be inserted in the summary record of the meeting concerned.

#### *Conduct during Voting*

##### **Rule 37**

After the President has announced the beginning of voting, no representative shall interrupt the voting except on a point of order in connection with the actual conduct of the voting. Except in the case of elections held by secret ballot, the President may permit representatives to explain their votes after the voting. The President may limit the time to be allowed for such explanations.

#### *Division of Proposals and Amendments*

##### **Rule 38**

1. Parts of a proposal or amendment thereto shall be voted on separately if the President, with the consent of the proposer, so decides or if a representative requests that the proposal or amendment thereto be divided and the proposer raises no objection. If the proposer objects to a request for division, permission to speak on the request shall be given first to the representative making the request to divide the proposal or amendment, and then to the mover of the original proposal or amendment under discussion, after which the request to divide the proposal or amendment shall immediately be put to the vote.

2. Where parts of a proposal or amendment thereto have been voted on separately, those parts of a proposal which have been approved shall then be put to the vote as a whole.

3. If all the operative parts of the proposal or amendment have been rejected, the proposal or amendment shall be considered to have been rejected as a whole.

#### *Voting on Amendments*

##### **Rule 39**

1. A motion is considered to be an amendment to a proposal if it merely adds to, deletes from or revises

part of that proposal. An amendment shall be voted on before the proposal to which it relates is put to the vote.

2. If two or more amendments are moved to a proposal, the Conference shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote.

3. The President shall, in all cases, determine which amendment is furthest removed in substance from a proposal or whether the adoption of an amendment necessarily implies the rejection of another amendment. An appeal against the President's ruling shall immediately be put to the vote and the President's ruling shall stand unless the appeal is approved by a majority of the representatives present and voting.

4. If one or more amendments are adopted, the amended proposal shall then be voted upon.

#### *Voting on Proposals*

##### **Rule 40**

If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.

#### *Elections*

##### **Rule 41**

All elections shall be held by secret ballot unless the Conference decides otherwise.

##### **Rule 42**

Before the commencement of a secret ballot two scrutineers shall be appointed by the Conference, on the proposal of the President, from the delegations present. The scrutineers shall scrutinise the votes cast and report the results to the President indicating the number of votes cast including invalid votes, if any.

## CHAPTER VII – COMMITTEES

### Rule 43

1. If, when one person or one delegation is to be elected, no candidate obtains on the first ballot a majority of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest numbers of votes shall be taken. If on the second ballot the votes are equally divided the President shall decide between the candidates by drawing lots.

2. In the case of a tie on the first ballot among three or more candidates obtaining the largest numbers of votes, a second ballot shall be held. If on such a second ballot a tie results among more than two candidates, the number shall be reduced to two by lot and the balloting, restricted to those two, shall continue in accordance with the preceding paragraph of this Rule.

### Rule 44

When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining on the first ballot a majority of the representatives present and voting shall be elected. If the number of candidates obtaining such majority is less than the number of persons or delegations to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest numbers of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after a third inconclusive ballot, votes may be cast for any eligible person or delegation. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest numbers of votes on the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until the places have been filled.

#### *Equally Divided Votes*

### Rule 45

If a vote is equally divided on matters other than elections, the proposal shall be regarded as rejected.

#### *Committee of the Whole*

### Rule 46

The Conference shall establish a Committee of the Whole to deal with the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects.

#### *Drafting Committee*

### Rule 47

A Drafting Committee, composed of not more than nine members, shall be appointed by the Conference on the proposal of the President. The Drafting Committee shall prepare drafts and give advice on drafting as requested by the Conference or by the Committee of the Whole. It shall also prepare the Final Act of the Conference. The Drafting Committee shall not alter the substance of texts submitted to it, but shall have the power to review and co-ordinate the drafting of all such texts. The Committee shall report as appropriate to the Conference or to the Committee of the Whole.

#### *Establishment of other Committees and subsidiary bodies*

### Rule 48

The Conference may establish such other committees and subsidiary bodies as it deems necessary for the performance of its functions.

#### *Representation on Committees and other subsidiary bodies*

### Rule 49

Each State participating in the Conference shall be represented by one person on the Committee of the Whole and on other committees or subsidiary bodies to which that State may be appointed. It may assign to these committees or subsidiary bodies such alternate representatives and advisers as may be required.

*Coordination by the Steering Committee*

**Rule 50**

1. The Steering Committee may meet from time to time to review the progress of the Conference and its Committees and other subsidiary bodies and to make recommendations for furthering such progress. It shall also meet at such other times as the Chairperson deems necessary or upon the request of any other of its members.

2. Questions affecting the coordination of their work may be referred by other Committees and subsidiary bodies to the Steering Committee, which may make such arrangements as it thinks fit, including the holding of joint meetings of Committees or subcommittees and the establishment of joint working groups. The Steering Committee shall appoint, or arrange for the appointment of, the Chairperson of any such joint body.

*Officers*

**Rule 51**

Except in the cases of the Chairperson of the Committee of the Whole and the Chairperson of the Drafting Committee, each committee, subcommittee, or working group shall elect its own officers. The Committee of the Whole shall elect two Vice-Chairpersons who shall be designated as first and second Vice-Chairperson and take precedence in that order. The Committee of the Whole may elect a Rapporteur.

*Quorum*

**Rule 52**

A majority of the representatives on a committee or other subsidiary body shall constitute a quorum.

*Conduct of business and voting in Committees  
and other subsidiary bodies*

**Rule 53**

The rules relating to officers and conduct of business contained in Chapters II, IV, V, VI, VIII and X shall be applicable *mutatis mutandis* to the proceedings of committees and other subsidiary bodies, except that all

decisions of committees or other subsidiary bodies shall be taken by a majority of the representatives present and voting. However, in the case of reconsideration of proposals or amendments in a committee or subsidiary body, the majority required shall be that established by Rule 31.

CHAPTER VIII – LANGUAGES AND RECORDS

*Official and Working languages*

**Rule 54**

1. The official languages of the Conference shall be English and French.

2. The official languages shall also be the working languages.

*Interpretation from Official Languages*

**Rule 55**

Speeches made at the Conference, its committees and other subsidiary bodies in one of the official languages shall be interpreted into the other.

*Interpretation from other languages*

**Rule 56**

Any representative may make a speech in a language other than an official language. In this case, that representative shall provide for interpretation into one of the official languages. Interpretation into the other official language by the Conference interpreters may be based on any such interpretation given in the first official language.

*Summary Records*

**Rule 57**

1. The Secretariat shall prepare summary records of the plenary meetings and of the meetings of the Committee of the Whole. These summary records shall be distributed to the participants as soon as possible after the closing of the meeting to which they relate.

2. The participants shall, within three days after the circulation of the summary record, inform the

Secretariat in writing of any changes to their own statements that they wish to have made.

*Languages of Documents and Summary Records*

**Rule 58**

Conference documents and summary records shall be made available in the working languages.

CHAPTER IX – PUBLIC AND PRIVATE MEETINGS

*Plenary meetings and meetings of Committees and subsidiary bodies*

**Rule 59**

The plenary meetings of the Conference and meetings of the Committee of the Whole shall be held in public unless the Conference decides otherwise. Meetings of other committees and other subsidiary bodies of the Conference shall be held in private unless the Conference decides otherwise.

*Communiqués to the Press*

**Rule 60**

At the close of any meeting a communiqué may be issued to the press through the Secretary-General of the Conference.

CHAPTER X – OBSERVERS FROM  
INTERGOVERNMENTAL AND  
NON-GOVERNMENTAL ORGANISATIONS

**Rule 61**

1. Observers from intergovernmental and non-governmental Organisations invited to the Conference may participate, without the right to vote, in the deliberations of the Conference, its committees and other subsidiary bodies upon the invitation of the President or Chairperson as the case may be.

2. Technical advisers invited or admitted to any meeting of the Conference, its committees or other subsidiary bodies in accordance with Rule 32 may take part, without the right to vote, in the deliberations of the Conference, its committees or other subsidiary bodies upon the invitation of the President or Chairperson as the case may be.

3. Written statements submitted by invited inter-governmental and non-governmental Organisations and technical advisers may be distributed by the Secretariat to the delegations at the Conference.

4. Observers from intergovernmental and non-governmental Organisations participating in the Conference shall register with the Secretariat.

CHAPTER XI – AMENDMENTS TO THE RULES OF  
PROCEDURE

**Rule 62**

These rules of procedure may be amended by a decision of the Conference taken by a majority of the representatives present and voting.

CHAPTER XII – SIGNATURE OF INSTRUMENTS

**Rule 63**

1. The Final Act resulting from the deliberation of the Conference shall be submitted for signature by the delegations.

2. Full Powers shall be required of each Representative or Alternate Representative who signs any convention or other international instrument which may be drawn up and opened for signature by the Conference.

3. Full Powers shall be issued either by the Head of State or Head of Government, or by the Minister for Foreign Affairs.

**DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF  
STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

**and**

**EXPLANATORY REPORT**

**prepared by the Unidroit Secretariat**

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.

1970 UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND  
PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP  
OF CULTURAL PROPERTY

*Article 1*

For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

## EXPLANATORY REPORT

### I – BACKGROUND TO THE DRAFT CONVENTION

1. The origins of the decision of the Governing Council of the International Institute for the Unification of Private Law (Unidroit) at its 65<sup>th</sup> session, held in April 1986, to include the subject of the international protection of cultural property in the Work Programme of the Institute for the triennial period 1987 to 1989 <sup>(1)</sup>, date back to the beginning of the 1980s when a number of international organisations, and in particular UNESCO, expressed interest, in the context of their own work on cultural property, in Unidroit's draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables of 1974, (hereafter referred to as "LUAB").

2. That draft aroused the interest of UNESCO which requested Unidroit to consider the rules applicable to the illegal traffic in cultural property with a view to supplementing the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereafter referred to as the "1970 Convention"). There were various reasons for this request: the 1970 Convention raised, without solving, a number of important private law questions (such as its impact on the existing rules of national law concerning the protection of the good faith purchaser), and an international organisation dealing with private law was judged to be a more appropriate forum to find a solution to the problems raised. Moreover, certain States believed that the language of the 1970 Convention was not sufficiently clear. It contained for example a general obligation to respect the law of other States with regard to export controls (Article 3) but the specific provisions laid down obligations only in respect of cultural objects stolen from museums or similar institutions on condition that they had been inventoried (Article 7) and those of archaeological interest (Article 9). Finally, some States believed that the scope of application of the Convention (for example the connection between Article 1 and the

remainder of the Convention) was not sufficiently clear and that a wide interpretation could seriously interfere with the conduct of the legal trade in cultural property.

3. Unidroit therefore prepared a first study on the international protection of cultural property in the light especially of LUAB and of the 1970 Convention <sup>(2)</sup>, which was followed by a second study dealing more particularly with the rules of private law governing the transfer of title to cultural property <sup>(3)</sup>. These two studies were entrusted to Ms Gerte Reichelt of the Vienna Institute of Comparative Law. After providing a general survey of the transfer of ownership from the angle of comparative law Ms Reichelt considered one method of providing an effective protection of cultural property, namely the application of mandatory rules which would translate political considerations into legal concepts. This was a novel approach which could take the form of the recognition of foreign laws governing the export of cultural property. What therefore seemed to be crucial was to recognise the combined effect of civil law, private international law and public law when contemplating an overall solution to the complex problem of the international protection of cultural property.

4. After it had been informed that Unesco did not for the time being at least envisage the preparation of any new international instrument dealing with the private law aspects of the international protection of cultural property, the Unidroit Governing Council decided, at its 67<sup>th</sup> session held in June 1988 <sup>(4)</sup>, to set up a study group on the international protection of cultural property entrusted with the consideration of the different aspects of the subject as well as the feasibility and desirability of drawing up uniform rules on the international protection of cultural property. The group worked on the basis of a preliminary draft Convention on the restitution of cultural objects, submitted by the Austrian member of the Unidroit

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

<sup>(2)</sup> See UNIDROIT 1986, Study LXX – Doc. 1.

<sup>(3)</sup> See UNIDROIT 1988, Study LXX – Doc. 4.

<sup>(4)</sup> See the Report on the 67<sup>th</sup> session of the Governing Council, p. 32 (UNIDROIT 1988, C.D. 67 – Doc. 18).

Governing Council, Mr Roland Loewe, the essentially pragmatic approach of which was founded on the concepts of the right to payment and of restitution <sup>(5)</sup>. The study group held three sessions in Rome, under the chairmanship of the President of Unidroit, Mr Riccardo Monaco, which took place from 12 to 15 December 1988, from 13 to 17 April 1989, and from 22 to 26 January 1990 <sup>(6)</sup>. At the end of its third session, the study group approved the text of a preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects <sup>(7)</sup>.

5. At its 69<sup>th</sup> session, held in April 1990, the Governing Council examined the preliminary draft Convention and decided to convene a committee of governmental experts. The text of the preliminary draft was then discussed and revised at four meetings, all of which were chaired by Mr Pierre Lalive (Switzerland) and which were held in Rome from 6 to 10 May 1991, from 20 to 29 January 1992, from 22 to 26 February 1993 and from 29 September to 8 October 1993 <sup>(8)</sup>. The meetings were attended by representatives of fifty of the fifty-six member States of Unidroit, twenty-five non-member States, eight inter-governmental organisations, and of a number of non governmental organisations and professional associations <sup>(9)</sup>.

6. At the conclusion of its fourth session, the committee completed its work by adopting the text of a draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects <sup>(10)</sup>. The text adopted by the committee of governmental

experts was laid before the Unidroit Governing Council at its 73<sup>rd</sup> session, held in May 1994. The Council considered that the text was ripe for submission to a diplomatic Conference for adoption as it represented a compromise between the different positions of legal systems which were based on widely differing principles. The Italian Government has now convened the diplomatic Conference which will be held in Rome from 7 to 24 June 1995.

## II. – GENERAL CONSIDERATIONS

7. It is now fairly widely admitted that each State's cultural heritage contributes to its national identity and that the profound geopolitical changes currently taking place, the creation of supernational entities and the simultaneous re-emergence of regional consciousness have rendered still more urgent the recognition of the value of cultural property and its protection. Where however universal agreement is lacking is in connection with the international market in works of art, which has developed in a remarkable manner since the Second World War and has become at the present time the main cause of the impoverishment of the cultural heritage of certain nations to the advantage of others. In this connection two general tendencies have emerged which are diametrically opposed. The first underlines the economic and cultural advantages deriving from a market which is in principle unfettered, thereby permitting as far as possible all nations to have access to the cultural heritage of mankind, with the consequence that only the most serious abuses should be the subject of sanctions. Apart from the economic advantages which it offers, a free trade market in art – it is said – is likewise beneficial and desirable from the cultural point of view as the circulation of works of art across frontiers will indisputably contribute to that dialogue between national cultures which many see as the principal element directed towards concord among the peoples of the world and ultimately peace. It scarcely needs saying that this policy is most strongly advocated in those countries where the art trade is prospering and where there is abundant capital in search of investment – it is well known how attractive are investments in works of art – and where at the same time the amount of cultural property available is often relatively small.

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(5) See UNIDROIT 1988, Study LXX – Doc. 3.

(6) The Reports on the three sessions are to be found respectively in UNIDROIT 1989, Study LXX – Doc. 10, UNIDROIT 1989, Study LXX – Doc. 14 and UNIDROIT 1990, Study LXX – Doc. 18.

(7) See UNIDROIT 1990, Study LXX – Doc. 19.

(8) The Reports on the four sessions are to be found respectively in UNIDROIT 1991, Study LXX – Doc. 23, UNIDROIT 1992, Study LXX – Doc. 30, UNIDROIT 1993, Study LXX – Doc. 39 and UNIDROIT 1994, Study LXX – Doc. 48.

(9) For the complete list of participants, see UNIDROIT 1994, Study LXX LXX – Doc. 49.

(10) For the text of the draft Convention, see page 22 *et seq.*

The other approach is based on a restrictive policy of cultural nationalism that seeks to retain cultural property in its country of origin or its return to that country, an approach which cannot but appeal to those nations with a rich civilisation and culture but which are however poor in terms of material wealth.

8. The issue of the international protection of cultural property is therefore one of the greatest importance, in particular in those countries where a number of different cultures co-exist (tribal or mixed societies ...), and this all the more so when the illegal commerce in works of art is a type of crime that is expanding in a rapid and disquieting manner at international level. The greater ease with which international frontiers are now crossed, the appearance of new markets and of new clients in those States which have recently acquired wealth and improvements in communications are all factors working in favour of the illegal market, as also indeed is the extraordinary increase in the value of works of art as a consequence of the influx of capital into the market. In fact, as a result of the ever closer link between trade in works of art and the drug traffic, "dirty money" as well as that from legitimate sources is being invested in the art trade. While many documents prepared by the United Nations express the wish that countries of origin permit and encourage the legal trade in cultural property few States have implemented such a policy. On the contrary total export bans are imposed even in relation to objects which are of no great importance. Moreover the connection between legal and illegal commerce – the first becoming the regular outlet for the second of what is now traditionally called "laundered money" – leads to serious distortions in international trade. While it is evident that the greater the difficulties put in the way of legal traffic the more illegal traffic will prosper, on the other hand, for as long as illegal traffic has not been stopped, it is politically difficult to encourage legal commerce. The two measures go hand in hand.

9. The human and financial resources available, together with the laws and rules which have been introduced at national level, seem to be totally inadequate when measured against the urgent needs. With the ever increasing international character of the theft of and traffic in works of art and antiquities, States seemed at the end of the 1960s to be becoming aware

of the limited success of the action taken and of national legislation without however reaching agreement on the truly effective legal measures that needed to be implemented. On the strictly legal plane, the last thirty years have seen a proliferation of international agreements of broader or narrower scope, bilateral treaties, regional treaties such as the 1985 European Convention on Offences relating to Cultural Property and finally universal agreements, the most notable of which are the major Conventions adopted by UNESCO and in particular the 1970 Convention. However, the reception given by some of the signatory States themselves to those agreements, coupled with the persistence of illegal traffic and the low percentage of objects recovered each year, are cause for doubting their effectiveness, probably because their authors had too many objectives in mind.

10. It was particularly on account of the difficulties of application encountered by an essential private law provision of the 1970 Convention, Article 7(b)(ii), that UNESCO called upon Unidroit for assistance. This provision is concerned with cases of theft and illegal export of cultural property and makes provision for the restitution of an object even though it is in the hands of a good faith purchaser. Moreover, it lays down no time-limit within which restitution must be made although it does provide for compensation of the good faith purchaser <sup>(11)</sup>. This article has however created problems for some States which have indicated that there is a certain incompatibility between it and the provisions of their national law concerning the good faith purchaser.

11. The Unidroit study group in whose work UNESCO participated as an observer was, as mentioned above, therefore convened with a view to considering the possibility and desirability of establish

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<sup>(11)</sup> Article 7 (b) (ii) provides that: "The States Parties to this Convention undertake:

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

ing uniform rules relating to the international protection of cultural property. As regards the nature of such rules the group was of the belief that only an international Convention would be an effective instrument and that, having regard to the large number of States which had already accepted the 1970 Convention, the new instrument should be compatible with it.

12. As to the substantive content of such an instrument, the group considered that its objective should be limited and since the point of departure of the initiative was Article 7(b)(ii) of the 1970 Convention, it decided to concentrate on the two situations dealt with in that provision: the first concerns the conflict between a person who has been dispossessed of a cultural object by theft and who has therefore a legitimate interest to claim its recovery and the person who, having subsequently acquired the object in good faith, naturally wishes to retain it. The second is that of the removal of cultural objects across national frontiers in contravention of the rules of the State where the object was located.

13. The theft of works of art or precious objects is nothing new. It is a phenomenon as old as the existence of organised societies and which has always existed, more especially in times of trouble and during armed conflicts. Booty was indeed considered to be the just reward of the victor. By way of illustration, one may recall the pillage of Egyptian tombs, the forced removal of cultural objects during the Italian Wars or by Napoleon Bonaparte in the course of his campaigns, the "loans" made to colonising nations and, more recently, the sixteen hundred works of art which Hermann Goering alone accumulated during the Second World War. Naturally, the phenomenon is not limited only to organised crime or to the occasional spectacular theft of a Van Gogh or a Raphael. Many thefts relate to minor objects and the between thirty and forty thousand objects – equivalent to the collection of a provincial museum – which, according to statistics, disappear each year in Italy come for the most part from small churches, local museums and private homes. The problem is therefore one which affects both industrialised and developing countries, the full extent of which is difficult to assess. The principle source of difficulty lies in the definition of a work of art itself.

14. The basic problem to be faced in a case of theft is that of the conflict of interests between a person (usually the owner) who has been dispossessed of an object and the purchaser in good faith of that object. Legal systems approach this problem in very different ways and the experience gained by Unidroit in connection with LUAB has clearly demonstrated the difficulty of a rapprochement between the Common Law systems which have almost without exception followed the *nemo dat* rule and the vast majority of Civil Law systems which, to different degrees, have accorded greater protection to the acquirer in good faith of stolen property. The group sought therefore to establish a minimum uniform rule that could be capable of broad acceptance.

15. The other main problem with which the study group decided to deal was that of the removal of cultural objects from the territory of a State in violation of its rules. Almost all countries in one way or another exercise some control over the export of cultural objects located on their territory but serious difficulties result in the first place from the ignorance of importing countries of the regulations of exporting countries and from the fact that, in the present state of international law, measures taken to combat the illegal export of cultural objects for which provision is made in national legislation are ineffective because of their limited territorial effect, which usually excludes any possibility for the return of an illegally exported cultural object. The situation will change only if States are prepared to recognise on their own territory the legal effects of the regulations of other States by sanctioning their contravention. The interest in the question is shared, to a different degree or for different reasons, by the international community of States as a whole. Many of the victims of the illicit traffic are developing countries in Latin America, Africa, Oceania and Asia, all of which possess their own particular cultural heritage which is much sought after, but which have only limited resources to ensure the respect of their export restrictions, while many of the acts which impoverish their cultural heritage constitute an assault on their cultural identity. This concern is however felt also by a number of Western European States which, after having for so long been importers of cultural objects coming from other States, are now anxious to protect

their own cultural heritage which has to varying degrees been constituted by those objects.

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

17. Reference should at this point be made to the most recent initiatives in this connection undertaken at regional level, namely, within the European Community, EEC Regulation No. 3911/92 of the Council of the European Communities of 9 December 1992 on the export of cultural goods and EEC Council Directive 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. The purpose of these instruments is somewhat different from that of the draft Unidroit Convention in the sense that the concern of the Community was to take measures designed to protect the cultural heritage of the member States after the creation of the Internal Market and the removal of intra-communitary frontier controls consequent thereon. The other initiative concerns the countries of the Commonwealth and the adoption of a scheme designed to ensure the protection of the cultural heritage of those countries in the event of exports contravening provisions of national law. This text was adopted in Mauritius in November 1993<sup>(12)</sup>. While fully aware of the purely regional scope of these instruments, the committee of governmental experts sought to draw on those initiatives as the solutions adopted in them represented a compromise between different interests which, on a narrower scale, were the same as those of the States participating in the work of Unidroit.

18. From the outset, both the study group and the committee of governmental experts were divided into two more or less homogenous groups. On the one hand, those who in principle favoured free interna-

tional movement in cultural objects and, on the other, the partisans of a national protection of the cultural heritage. The former sought to restrict as far as possible the scope of application of the Convention and to preserve the protection at present enjoyed in their countries by the purchaser in good faith. The latter, on the other hand, wished to extend as far as possible the principle of the return of stolen or illegally exported cultural objects and thereby to obtain a maximum degree of international protection of the national cultural heritage. It took six years to bring about a rapprochement between the more extreme positions and to complete the draft Convention which was approved by the committee of governmental experts in October 1993.

19. As to its structure, the draft Convention is composed of ten articles divided in five chapters:

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

### III. – COMMENTARY ON THE PROVISIONS OF THE DRAFT CONVENTION

#### *Title and Preamble*

20. The title of the draft Convention reflects in the first place the wish of the committee of governmental experts, already mentioned above, to address two principal issues, namely the return of stolen or of illegally exported cultural objects. While the return of illegally exported objects implies *a fortiori* an international situation, the words “international return” were expressly included in the title so as to make it clear that the future Convention is not intended to apply, in respect of stolen cultural objects, to purely domestic situations as such an extension could make it difficult for a number of States to accept the Convention. The wording would likewise seem to exclude those cases in which a stolen cultural object has been exported, perhaps legally, and then reimported to the

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<sup>(12)</sup> Scheme for the Protection of Cultural Heritage within the Commonwealth, Commonwealth Secretariat, London.

country in which it was stolen, a restriction that did not commend itself to certain experts, although it was suggested that nothing would prevent any Contracting State which so wished from adapting its national law so as to permit the application of the Convention in such circumstances.

21. As is customary in connection with international private law Conventions, the task of preparing the *preamble* will be entrusted to the diplomatic Conference of adoption itself on the basis, *inter alia*, of any proposals submitted by Governments in advance of the Conference.

#### CHAPTER I – SCOPE OF APPLICATION AND DEFINITIONS

##### *Article 1*

22. Article 1 defines the scope of the draft Convention by reference to the claims to which it applies. The *chapeau* employs the somewhat vague language “claims of an international character”, any attempt to define more precisely what was an “international character” having been abandoned in view of the difficulty, if not the impossibility, of reaching agreement on precise criteria, a problem which is frequently encountered in international private law Conventions. It will thus be for the case-law in the different jurisdictions to work out a uniform notion although it was acknowledged that the use of the words “international return” in the title of the draft Convention (see above, paragraph 20) would already serve as a limiting factor capable of resolving cases that might otherwise be open to doubt.

23. The claims to which the draft Convention is applicable are set out in the two sub-paragraphs of Article 1. Sub-paragraph (a) refers to claims for “the restitution of stolen cultural objects removed from the territory of a Contracting State” and while some delegations considered that the Convention should only apply if the object had been stolen in a Contracting State and removed from that State, a majority opposed that solution on the ground that theft was an act which is condemned and punished under all national laws and that the proposed restriction would encourage the theft

of cultural objects on the territory of non-Contracting States. If this is indeed the rationale for the current wording of sub-paragraph (a), which requires that the stolen object has been “removed from the territory of a Contracting State”, the Secretariat nevertheless feels obliged to point out with respect that in cases where an object has been stolen in non-Contracting State A and is found in Contracting State B, the Convention will not apply but that the purely fortuitous fact that it has transited through Contracting State B to Contracting State C will trigger the application of the Convention, a solution that scarcely seems consistent with a desire either to protect cultural objects from theft in non-Contracting States or to encourage States to ratify the Convention (see below, paragraph 25).

24. Although it is nowhere stated in the draft Convention who is entitled to bring a claim for the restitution of a stolen object, there will, in those cases where the object is stolen within, and removed from, the territory of a Contracting State, in the vast majority of cases be some form of territorial link between that State and the claimant, be it the Contracting State itself or, for example, a museum, church or a private person. Situations are however imaginable, as for instance when the object was only temporarily on loan in the Contracting State in which it was stolen, in which the claimant might be a non-Contracting State or a person with no connection whatsoever with the Contracting State in which the theft took place.

25. With respect to illegally exported cultural objects, sub-paragraph (b) specifies that the Convention applies to their return when they have been “removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance”. An important distinction between this provision and that concerning stolen cultural objects as at present conceived lies in the fact that the State whose law regulating the export of cultural objects has been contravened must be a Contracting State, the reason being that the committee was of the belief that only States prepared to recognise the relevant rules of other States, within the limits imposed by the future Convention, should benefit from its provisions, which would moreover constitute an incentive to States to ratify it.

26. From the outset, stress was laid both by the study group and by the committee of governmental experts on the need to define with the utmost precision the notion of illegal export in view of the highly innovative character of Chapter III of the draft Convention which establishes the principle that a State on whose territory a cultural object is found which has been exported from another State in contravention of the law of that State must return it, that is to say that a State which ratifies the future Convention undertakes to respect foreign rules concerning illegal export. The present formulation was devised by a specially constituted working group following lengthy discussions within the committee of experts. The working group agreed that what was crucial was that there be a violation of provisions of national law prohibiting or subjecting to conditions the removal abroad of cultural objects with a view to their protection or to maintaining intact the national heritage, and not a contravention of just any provisions of national law concerning the export of such objects. The illegality of the removal of a cultural object must in other words derive from rules controlling the export of such objects that are motivated only by purely cultural considerations and courts should not be called upon to give effect to rules enacted for other purposes. Thus, the future Convention would not apply to exports deemed to be illicit by reason of the contravention of fiscal regulations or of rules governing the transfer of title to cultural objects.

#### Article 2

27. The delimitation of the category of cultural objects whose return may be requested is the most fundamental one for the scope of an international Convention concerning cultural property, and at the same time one of the most delicate to resolve. The difficulties are moreover multiplied in the case of an international treaty as opposed to purely internal protective legislation since it is necessary to establish a general definition that will take account of the cultural circumstances of each State and of its particular needs. Stress was laid on the difficulty, if not indeed the impossibility, of framing *in abstracto* an objective definition of cultural objects since the attribution of the epithet “cultural” to an object is the consequence of a value judgment. Thus it was that the definition of the

term “cultural objects” for the purposes of the Convention gave rise to lengthy discussions within the committee which reflected differences not only of drafting technique but also of substance as regards the definition and its implications.

28. From the technical standpoint, preferences were expressed in the committee of experts on the one hand for a general definition and on the other for one that was enumerative and exhaustive. Aware of the drawbacks presented by both approaches, a general definition risking to create problems of interpretation and application, and an exhaustive definition that of leaving gaps, the committee ultimately opted for a combination of the two approaches, that is to say a general definition accompanied by a reference, by way simply of illustration, to the various categories set out in Article 1 of the 1970 Convention (“For the purposes of this Convention, cultural objects are [...] such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention [...]”). In the light of certain objections to this technique of drafting by reference to an independent text, the committee agreed that the list of cultural objects contained in Article 1 of the 1970 Convention should be annexed to the future Unidroit Convention, without however being an integral part of it.

29. The definition establishes the general limits of the substantive application of the future Convention by providing that cultural objects are those which “on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science”. The cultural objects may moreover be publicly or privately owned (cf. Article 3(4)). The words “[f]or the purposes of this Convention” clearly indicate that the definition in Article 2 concerns only those objects involved in illegal trade (theft and illegal export).

30. The definition is therefore quite broad and most delegations were of the view that its combination with the principle laid down in Article 3(1), according to which all stolen cultural objects must be returned, might be seen as perhaps the most important measure that could be taken against the illegal commerce in cultural objects. Since, however, the future Convention would have significant implications for the rules of private law of States concerning the acquisition of

movable property, some doubts were expressed as to whether Governments would be prepared to contemplate changes to their national law for an ill-defined category of objects, and it was suggested that it would be preferable, at the risk of limiting the scope of the Convention, to adopt a narrower definition by restricting its application to cultural objects of “outstanding” significance.

31. A substantial majority within the committee was however opposed to such a limitation, in particular for the reason that it would weaken one of the most important principles underlying the Convention which was to require of all purchasers of cultural objects that they exercise diligence by enquiring into the provenance of those objects rather than to perpetuate the current practice of prospective purchasers deliberately to refrain from making such enquiries. It was moreover recalled that the proposed restriction would exclude from the scope of application of the Convention less important cultural objects such as those stolen from small churches, local museums and private homes, which should be covered on account of the ever greater number of thefts of such objects.

32. Broad as it may at first sight appear to be, the definition is subject to certain limitations for while the principle of the restitution of stolen cultural objects applies to all the categories of objects falling within the definition of Article 2, the return of illegally exported cultural objects is subject to certain conditions. The most obvious of these are the conditions laid down in Article 5(2) and while it is true that it will be for the court or other competent authority of the State addressed to determine whether there has been an impairment of one of the interests listed in the paragraph, one of the considerations that will weigh with the court will be the importance attached by the requesting State to the object. In this respect, it should also be recalled that the definition in Article 2 is to a certain extent self-limiting in that an individual or a State will bring a claim under the Convention for the return of a cultural object only when the object is considered to be of sufficient importance. In addition, the principle of the return of illegally exported cultural objects is likewise excluded in the situations contemplated by Article 7.

33. The distinction drawn between stolen and illegally exported cultural objects in terms of the scope of application of the future Convention is founded on the fact that whereas theft is a universally sanctioned offence, this is not the case with illegal export and in these circumstances some delegations wondered whether it might not clarify matters if different definitions were to be applicable to Chapter II, dealing with stolen objects, and Chapter III concerning illegally exported objects. This proposal was however seen as introducing an unnecessary element of complication, as also was one which sought to restrict the definition of cultural objects for the purposes of the Convention based on the age of a cultural object.

34. Another unsuccessful attempt to limit the definition under Article 2 lay in a proposal to impose a minimum value on the cultural objects to which the Convention would apply. The principal objections to this suggestion which, like a limitation based on the age of certain categories of cultural objects, is to be found in the European Community legislation, were twofold. The first was that the estimated value of a given object may differ substantially from one jurisdiction to another, coupled with the fact that such a limitation fails to take account of those objects in current use in some societies for ritual purposes to which it would be difficult or even offensive to attach a commercial value, and the second that the purpose of the future instrument was to protect not only the interests of States but also those of private persons who are exposed to as great if not a greater risk of theft.

35. One further proposal, the effect of which could have been to extend the application of the Convention, was that it should be left to each Contracting State to determine those cultural objects to which the Convention should apply. In the view of some delegations, each State was best equipped to determine those items of its cultural heritage which were of such significance as to justify their return in the event of theft or illegal export and it was therefore difficult for them to accept that a decision on such matters should be referred to a court in another country.

36. While the committee of experts believed it to be self-evident that each Contracting Party to the future

Convention was free to establish in its national legislation rules concerning the protection of its cultural heritage, a large number of delegations considered that it would be unacceptable for their Governments to give effect to such legislation without having the possibility to exercise some form of control, although this clearly in no way signified that courts or other competent authorities would not pay due regard to the law of the State from which a cultural object had been removed.

37. Another perceived difficulty lay in the fact that the proposed system would to a large extent deprive the future Convention of its uniform law character, while it was also pointed out that it could have a restrictive effect in relation to the chapter concerning theft in that many cultural objects owned by local bodies or private persons might well not fall within the categories designated by States as being deserving of special protection, which in effect most often meant that they were subject to export prohibitions or conditions. For these reasons, Article 2 makes no reference to national law with a view to determining the cultural objects to which the future Convention will apply.

38. It may in conclusion be noted that during the four sessions of the committee of experts, a number of proposals were made for the inclusion of other definitions in Chapter I of the draft Convention, in particular of “claimant”, “possessor”, “theft” and “illegal export”, fears being expressed by some delegations that there would in their absence be a risk of each Contracting State applying its national definition of such terms which would run counter to the aim of uniformity. The majority view was however that it would be extremely difficult to formulate such definitions and that the experience of uniform law Conventions, especially in recent years, indicated that national courts were increasingly seeking to harmonise their interpretation of key concepts in accordance with the aims and purposes of the international treaty in question.

## CHAPTER II – RESTITUTION OF STOLEN CULTURAL OBJECTS

### *Article 3*

39. From the outset of the work on the draft Convention a realisation emerged that the essential

difficulty was that of the reconciliation of two equally legitimate interests: that of the person (usually the owner) who has been dispossessed of a cultural object by theft and that of a purchaser in good faith of such an object. Ms Reichelt’s second study indicated the widely differing approaches in various legal systems to this problem while Unidroit’s experience in connection with LUAB amply demonstrated the obstacles to any rapprochement between the Common Law jurisdictions and the bulk of the Civil Law systems which latter have to varying degrees accorded much wider protection to the good faith purchaser of stolen property (see above, paragraph 14). Paragraph 1 of this article establishes the general principle of the restitution of stolen cultural objects, whether they be in public or private ownership, and independently of whether a person acquiring such an object is in good or bad faith (“[t]he possessor of a cultural object which has been stolen shall return it”). The distinction is of importance only when the question arises of whether compensation is due to the person who has acquired the object (cf. Article 4).

40. The wide consensus in favour of the principle of automatic restitution that emerged within the committee of experts at an early stage of its work reflects the evolution that has taken place both in practice and in legal theory in regard to the acquisition of ownership. In the face of the ever greater increase in the theft of cultural objects it has been deemed necessary to accord priority to the protection of the dispossessed owner as against the person who has acquired such an object as this has appeared to be the only realistic solution which could at the same time combat the illegal traffic in cultural objects. Both the study group and the committee of governmental experts were aware that from the point of view of comparative law this principle represented an important innovation for those countries which traditionally provide protection to a good faith purchaser for value, although it should at the same time be noted that Article 4 is equally innovatory for those legal systems that do not award compensation to the *bona fide* purchaser of a stolen object.

41. With respect to Chapter II, it may in the first place be recalled that an earlier version of the draft contained a provision that assimilated to theft “conversion, fraud, intentional misappropriation of lost

property or any other culpable act assimilated thereto". Some delegations favoured such an extension of the notion of "theft" while a majority considered that the scope of the chapter should be limited to theft, an offence under the laws of all countries, rather than to broaden the application of the uniform law to less easily definable situations which were dealt with in widely different ways in the various legal systems. It was therefore ultimately decided to restrict the scope of Chapter II to theft while allowing the possibility to Contracting States to extend the application of the future Convention to other wrongful acts (cf. Article 10 which contemplates the possibility of Contracting States "applying any rules more favourable to the restitution [...] of a stolen [...] cultural object than provided for by this Convention"). Whether or not a particular Contracting State avails itself of the option provided by Article 10 in this context, it will always be for the court seized of the case to determine whether the character of the unlawful act is such as to bring it within the scope of the Convention, whether by reference to its internal law or, if that is permitted, on the basis of the applicable law as determined by the rules of private international law.

42. Although, as mentioned above, there was general agreement, subject to the conditions established in Article 4, on the principle of the automatic return of stolen cultural objects which finds expression in paragraph 1 of Article 3, difficulties were encountered on two points. The first of these related to the term "possessor" which some delegations would have preferred to replace by another word such as "holder", or alternatively to define the term more precisely. In fact, some legal systems draw a distinction between possession and the holding of an object (possession in one's own name or in the name or on behalf of another person) while such a distinction is unknown in others. The prevailing view was that the text of the future Convention should be as neutral as possible and that with a view to determining the person against whom a claim for return of an object should be brought the term "possessor" should be retained on the understanding that the notion must be understood in a wide sense, in accordance with the aim of the Convention which was to facilitate the return of cultural objects, even though this broad notion might not necessarily

correspond in every case with the national law of all the Contracting States.

43. The other main question relating to paragraph 1 arises from the fact that it does not specify the person to whom the stolen cultural object is to be returned. Normally, this would be the dispossessed owner but circumstances are easily imaginable in which, for example, the object is subject to a bank guarantee, or has been lent to a museum or to an art gallery. In the event of competing claims it will therefore be for the court to determine to whom the object is to be returned in accordance with the applicable rules of law.

44. While it is clear from the language of Article 2, which specifically refers to objects of importance for archaeology, that the draft Convention applies to cultural objects removed from clandestine excavations, the committee of experts considered that the seriousness of this ever more widespread phenomenon called for special treatment. Accordingly, paragraph 2 of Article 3 provides that for the purposes of the Convention, "an object which has been unlawfully excavated [...] shall be deemed to have been stolen", and indeed the provision goes further and also assimilates to stolen objects those which have been lawfully excavated but subsequently unlawfully retained.

45. Paragraph 3 of the article deals with an issue that was the subject of particular controversy within the committee, namely that of the limitation period for the bringing of actions under the Convention for the return of a stolen cultural object and the time from which that period should begin to run. On the first question, some delegations argued against any limitation period on the ground that it would legitimise a situation which was from the beginning tainted with illegality, whereas others insisted on the fact that a time bar for the bringing of actions, especially if it were to be relatively brief, would encourage potential claimants to act with maximum expeditiousness and avoid the disturbance of long established possession. By way of compromise, and recognising the fact that stolen cultural objects of great importance are often kept off the market for a number of years, for example by their "freezing" in bank vaults, the committee ultimately reached agreement that there should be two limitation periods. The first is a short period of one or three years 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 the second an absolute period of thirty or fifty years from the time of the theft, the committee of experts recognising that the precise length of the limitation periods could only be determined by the diplomatic Conference in the light of the overall “package” constituted by the Convention as a whole.

46. The provisional choice of the length of the periods was closely linked to their starting point. Widely different views emerged in the committee in connection with the shorter or “relative” limitation period, some delegations favouring the granting of the maximum protection to claimants by providing for a longer limitation period, deleting the words “or ought reasonably to have known” which they saw as being ambiguous and open to differing interpretations, and by stating that the period would begin to run only from the time that the claimant had actual knowledge both of the location of the object and of the identity of the possessor. Other delegations however supported a very short limitation period, the retention of the words “or ought reasonably to have known” which, in their opinion, would have the effect of rendering claimants more diligent in searching for objects which have been stolen from them, and the beginning of the limitation period as from the time that the claimant had actual or imputed knowledge either of the location of the object *or* of the identity of the possessor. The combination of a short limitation period with the retention of the notion of constructive knowledge of the claimant and the cumulative requirement of knowledge of both the location of the object and the identity of the possessor represents therefore a compromise solution which, moreover, corresponds closely to that contained in Article 7(1) of the EEC Directive. To the extent that a limitation period of one or three years may be shorter than that to be found in some existing national laws, it should be borne in mind that Contracting States remain free under Article 10 to apply those limits.

47. With respect to the “absolute” limitation period, a majority of delegations considered the initial proposal of the study group of thirty years to be too short and suggestions were made either for a fifty year period or for one of “not less than thirty years” which

would not exclude the application of provisions of national law, including those falling within the criminal law which offered greater protection. Some delegations wished to go still further by introducing no limitation period whatsoever for acquisitive prescription and in view of the failure of the committee to reach agreement on this question, it was agreed to submit to the diplomatic Conference in square brackets two periods, of thirty and fifty years respectively, as from the time of the theft.

48. In an attempt to meet the concern of those delegations which favoured a long limitation period or no limitation period at all, the committee agreed that an exceptional regime could be contemplated for those objects which lie at the very heart of each State’s cultural heritage, namely those objects belonging to public collections, which often enjoy a special legal status in some countries. This exception is dealt with in paragraph 4 of Article 3 and is based on the solution to be found in Article 7 of the EEC Directive under which this category of objects is subject to a longer limitation period of seventy-five years.

49. In view of the very wide difference existing in the national law of States in this connection it was agreed that a definition of a “public collection” would be necessary for the purposes of the Convention. After considering the possibility of referring simply to the definition contained in the EEC Directive, a majority of delegations expressed the opinion that an autonomous definition should be included in Article 3 and the following text was proposed by a special working group as a second sub-paragraph of paragraph 4: “[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 ...” ].

50. In requiring that the object must be inventoried, the committee had in mind the documentation permitting the object to be identified, however that idea might be expressed in different jurisdictions; what was important was to support the practice of those museums which keep a record of their collections and are therefore in a position to notify the theft to international registers of stolen objects. By way of limitation however, the provision requires that the object be

“accessible to the public on a [substantial and] regular basis”, the length of such public access depending on the type of institution, for example whether it is a research institute or a large museum. The word “substantial” appears in square brackets to take account of the view of certain delegations that the definition of “public collections” should not cover institutions which open their doors to the public only once each year or only to certain very limited categories of visitors.

51. Following the EEC Directive, the provision lays down a third condition to the effect that the collection must be owned by a Contracting State [or local or regional authority] (sub-paragraph (i)), that it be substantially financed by a Contracting State or such an authority, (sub-paragraph (ii)), or that it belong to a religious institution (sub-paragraph (iv)). The committee preferred the term “religious” to “ecclesiastical” which is employed in the EEC Directive as the latter refers only to the Christian faith and it was deemed indispensable by the committee to include all other religions.

52. One delegation pointed out that such a definition did not extend to collections on display in very important museums but which were neither in State ownership nor financed by the State and it called for the addition of a provision to that effect. Sub-paragraph (iii) therefore covers objects belonging to non-profit institutions which are recognised by a Contracting State as being of great importance, for example by way of tax exemption. In the absence of a consensus within the committee, a number of adjectives qualifying the word “importance” have been included in square brackets, namely “national”, “public” and “particular”.

53. Notwithstanding the efforts of the working group, the definition proposed by it was subjected to severe criticism. Some delegations believed that the definition was too broad for a special regime governing the limitation of actions and that at the same time it omitted an extremely important category of objects which are not as a rule accessible to the public, that is to say sacred or secret objects belonging to an indigenous community, a category of the utmost importance for the cultural survival of such communities. A definition of an indigenous community, based on that

of Article 1 of the 1989 ILO Convention No. 169 on Tribal and Indigenous Peoples was proposed in this connection but was not included in the text.

54. Independently of whether or not the proposed definition of a public collection was satisfactory, some delegations considered that what had been intended to be an exception was beginning to become the rule as everyone sought to include within the definition what they deemed to be important. The purpose of the provision had not however been to make up for the absence of a definition of a public collection in domestic law and a very broad definition combined with a very long absolute limitation period risked rendering the Convention unacceptable to a number of States. In view of the difficulties to which the definition gave rise, some delegations proposed the deletion of paragraph 4. Others, however, opposed such a deletion simply because the present definition was not satisfactory as 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. In conclusion, the committee decided to submit the definition to the diplomatic Conference, although leaving it in square brackets so as to underline the absence of consensus.

55. As to the length of the limitation period for the bringing of claims in respect of public collections, a consensus emerged that it should be longer than that for the other cultural objects covered by the Convention, although some delegations had insisted that there should be no limitation period at all. Here again, agreement did not prove possible and it was accordingly decided to leave within square brackets the language reflecting the alternatives of no limitation period and of a period of seventy-five years.

56. Finally in connection with Article 3, paragraphs 3 and 4 (and also Article 5(4)), a suggestion was made that provision be made for the interruption and suspension of the limitation periods in the event of war or the breaking off of diplomatic relations which might prevent the bringing of claims under the Convention for the restitution or return of stolen or illegally exported cultural objects. It was replied that a general principle of law existed governing the suspension of limitation periods and that even if the text of

the Convention contained no provision on the matter that principle would apply. It was however agreed that the question was one that should be considered by the diplomatic Conference, more particularly during the discussions on the final clauses.

#### Article 4

57. Paragraph 1 of Article 4 provides for the payment of compensation to a possessor who is required to return a cultural object under the preceding article, on condition that it proves that it took certain precautions at the time of the acquisition. It is then when considering whether it is appropriate to allow compensation to the person acquiring the object that the question of good faith becomes decisive. One of the principal merits of the initial preliminary draft was that it avoided any definition of good faith or even reference to it, concentrating attention on the concept of possession rather than on that of ownership.

58. This “right to payment” represents an intermediate solution between the extremes of according unlimited protection to a person acquiring an object in good faith *a non domino* and a refusal to grant any protection: the preparation of new legislation in some jurisdictions has shown a certain tendency to have recourse more and more to this legal device, which is applied in very different ways in different legal systems. By introducing this right, the draft seeks to bring about a situation in which all those systems that provide for good faith possession *a non domino*, without admitting the right to payment, would recognise the importance of this right for the protection of cultural objects and incorporate it in their legislation. The idea of affirming such a right to payment in an international instrument was not however untested. Some delegations indeed would have preferred the adoption of a solution which would not have provided for the payment of compensation to a possessor required to return an object, either because their law made no provision for such compensation, or on economic grounds since dispossessed owners would not always have the financial resources necessary to compensate the good faith purchaser.

59. Faced with the opposing interests of the dispossessed owner and of the acquirer in good faith,

and with the ever greater increase in the theft of cultural objects which feeds the illegal art trade, the committee finally decided to privilege the interests of the former by favouring the restitution of stolen objects (cf. Article 3). It recognised that the weakening of the protection of the good faith purchaser would represent an important change in many legal systems and that it could be rendered more acceptable, both politically and philosophically, if accompanied by the payment of compensation. It must however be stressed that at no time did the committee suggest that those legal systems which currently make provision for the return of stolen cultural objects without compensation should amend that rule by introducing the principle of compensation. It should moreover be recalled that Contracting States with such a rule may always rely on Article 10 insofar as their present law is more favourable to the restitution of stolen cultural objects than are the provisions of Article 4 of the draft Convention.

60. Once the principle of compensation was accepted, the important question arose of how to determine it and the compensation referred to in paragraph 1 is described as “fair and reasonable”, without any precise indication of the amount to be fixed by the judge in the light of the circumstances of the case. With a view to allaying the concern of those who feared that the requirement of compensation would compromise the chances for a dispossessed person to recover an object for lack of financial resources, the committee noted that the concept of fair and reasonable compensation laid down a very strict limit on compensation and allowed regard to be had to the restricted financial resources of some claimants. It was observed that a specific reference to the price paid or to the object’s commercial value would encourage the judge to give too much weight to those factors in determining what is fair and reasonable and the committee therefore preferred to leave it to the discretion of the judge to reach the same result. It may likewise be recalled that in public international law in connection with compensation for nationalisation, judges have for many years applied this notion on the understanding that it may correspond to a sum lower, and sometimes very much lower, than the real commercial value of the object or the price actually paid for it.

61. The provision makes it clear that it is for the claimant, that is to say the person dispossessed of the object, to pay compensation to the good faith possessor. It was observed that in such cases there were in effect two victims, the dispossessed owner and the innocent purchaser, both of whose interests were adversely affected by the illegal act of a third person. In the opinion of some delegations, the solution contained in the text would ensure that the only person to gain would be the vendor of the cultural object, who might be the thief himself, and a proposal was in consequence made that, whenever this was possible and appropriate, compensation should be paid to the possessor not by the dispossessed person but by the seller who was in bad faith or by an insurance company. The committee as a whole did not consider such a solution to be feasible in the text of the Convention itself but rather one that could be dealt with by national law through such mechanisms as recourse actions or the joining of third parties to the action.

62. Always in connection with the question of the person who should pay the compensation determined by the judge with a view to the restitution of stolen objects, as well as of the financial difficulties that might be faced by States or individuals called upon to pay such compensation, one delegation proposed the introduction of a mechanism that would permit the payment of compensation to good faith purchasers not by a claimant who was unable to meet the cost but rather by a third party who would guarantee public access to the object and would meet the costs of insurance and of the conservation of the object in question. A majority of delegations considered however that it would be preferable to include no such provision in the future Convention and that if a claimant wished to conclude an agreement to such effect with a third person, there was nothing in the present text to prevent it.

63. A number of delegations underlined the fact that the principle adopted in the draft constituted significant progress in this field and while they recognised that owners and those States which suffered most from thefts on their territory might consider it to be unjust, it had to be recalled that paragraph 2 of the article must be interpreted in a reasonable manner: the cases in which compensation would need to be paid would be

extremely limited since in practice very few possessors would be able to prove that they satisfied all the requirements of due diligence when acquiring an object which had after all been stolen.

64. The payment of compensation is in effect subject to an important condition, namely that the possessor must prove its "good faith". This represents a significant departure from the present situation in a number of legal systems which presume the existence of good faith but the committee was of the belief that the reversal of the burden of proof without doubt constituted one of the most important measures that could be taken to combat the illicit trade in cultural objects. It was moreover recalled that in some Civil Law systems the principle of good faith already leads in certain circumstances to the shifting of the burden of proof, in particular when it is difficult for the claimant to prove the necessary facts, in which case a good faith defendant is under an obligation to co-operate in providing the evidence, if not indeed itself to furnish it.

65. The possessor must in other words establish that it neither knew that the object was stolen nor should have entertained any doubts in that regard. The language "nor ought reasonably to have known" was included in the text so as to encourage purchasers to be more vigilant. In fact, one of the main purposes of Article 4 is to penalise those acquiring cultural objects who fail to make serious inquiries into their origin. If the sanction were to be the risk of their having to return the cultural object without any 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.

66. For the reasons mentioned above (see paragraph 57), the committee preferred to avoid the term "good faith" and the text requires that the possessor exercise "due diligence" when acquiring the object as it considered that the normal degree of diligence expected in a normal commercial transaction was insufficient for the purchase of cultural objects.

67. The court or competent authority seized of the case will assess the diligence exercised by the possessor when acquiring the object by having regard to a number of factors which are mentioned in paragraph 2 of Article 4. This provision is based on paragraphs 2 and 3 of Article 7 of LUAB, suitably adapted to take account of the special characteristics of cultural objects. While some would have preferred a more detailed definition of the diligence required, it was recalled that the paragraph was intended to offer an indirect description of the notion of good faith so as to avoid the difficulties resulting from its different understanding in the various legal systems. It was moreover stressed that the description was not intended to be exhaustive but rather to offer a guide to judges without laying down strict legal rules.

68. The lengthy and detailed formula of LUAB was not retained so as to avoid complicating the understanding of the text and its interpretation, while leaving to the judge a discretion to decide which other facts are to be deemed relevant. Among these are to be sure the other factors mentioned in Article 7(2) and (3) of LUAB, namely the nature of the object, the nature of the trade of the person disposing of the object, any special circumstances known to the purchaser concerning the acquisition of the object by the person disposing of it (origin of the object), and the circumstances in which the contract was concluded and its provisions. Attention should also be drawn to the word "including" in the present formulation which leaves total latitude to the court to pay regard to all the circumstances relating to the good faith of the possessor.

69. In addition to the nature of the parties and the purchase price of the object, mention is also made in the determination of due diligence to the consultation of any reasonably accessible register of stolen cultural objects. Consultation of such a register by any person acquiring a cultural object is a supplementary precaution which that person is required to take, although this does not mean that protection is dependent on the object being listed in a register. There exist at the present time a number of such registers and the development of telecommunications in the coming years would make their accessibility a determining factor. If various registers exist in a given country, the possessor

should consult that which is the most complete and authoritative. Always in connection with the register, the committee stressed that it is important to bear in mind the nature or quality of the person acquiring the object, since if that person is, for example, an antique dealer, this factor would have added weight in determining the existence of good faith.

70. While attention was drawn to the fact that the existence of registers of stolen cultural objects would do nothing to solve the problems associated with objects removed from clandestine excavations, it was observed that this situation was covered by other aspects of the notion of due diligence such as the quality of the parties (antique dealer or amateur collector), the place where the transaction was concluded (a dealer's gallery or a stand at a second-hand stall in a market), the purchase price (which could differ substantially according to the legitimacy of the object's provenance) and various other factors. To this end, the provision also refers to "any other relevant information and documentation which [the possessor] could reasonably have obtained", by which should be understood in particular any specific legislation of the State of origin which might for example indicate the need for any export authorisation to be secured.

71. Finally, paragraph 3 deals with the case where a cultural object has been acquired by inheritance or otherwise gratuitously and the possessor had no means of knowing the circumstances in which its predecessor had acquired the object. Taking as a basis the rule to be found in Article 10 of the EEC Directive, which was itself inspired by the initial Unidroit texts, the draft seeks to avoid condoning the bad faith of a former possessor or acquirer of an object by means of its subsequent gratuitous acquisition.

72. Two different situations are dealt with in this paragraph. The first is that of "innocent" successors of a possessor in bad faith and in such cases the bad faith of the latter is imputed to them. The second is the rarer one where the successors of a possessor in good faith come to learn that the object had been stolen and in such circumstances those successors will be in the same position as the deceased in accordance with the principles of the law of succession and will be deemed to be in good faith. It may be that in these very rare

situations there could be results that some would see as being unfair but the purpose of such a provision is not to deal with marginal cases. It should further be noted that the inclusion in the preceding article of a limitation period for the bringing of a claim once the place where the object is located and the identity of the possessor have been discovered, and the fact that the conduct of the predecessor is imputed to the possessor, implies that the position of the successor of the dispossessed person should be the same: thus the limitation period will begin to run from the time when the dispossessed person has discovered the location of the object and the identity of the possessor, and not from the time that the successor entered into possession of the inheritance.

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

73. While the principal problem arising in relation to the theft of cultural objects is that of the situation of the *bona fide* purchaser, the main issue to be faced in connection with the illegal export of such objects is the extent to which States may be prepared to recognise rules of foreign public law and, more specifically, the rules of a foreign State of mandatory application. There are at present few rules of positive law which affirm this principle although there is a growing feeling that such an innovation would reflect an increased awareness of international solidarity. From the political standpoint, it proved necessary within the committee of governmental experts to strike a compromise between two defensible positions, on the one hand that of countries desirous of limiting the removal of cultural objects from their territory and on the other that of those which favour a more liberal attitude to the international movement of such objects. The principle ultimately adopted is that a Contracting State on whose territory an illegally exported cultural object is located must return it to the country from which it was removed, subject to the limitations established by the Convention itself.

74. In this connection, attention should be drawn to the general evolution in legal thinking which has found expression in such provisions as Article 7 of the 1980 Convention of the European Communities on the Law Applicable to Contractual Obligations and Article

19 of the Swiss Law on Private International Law as well as the case-law of some countries which have indicated a willingness in certain circumstances to be more generous in taking into consideration the mandatory rules of law of another State. Moreover, a similar tendency is to be seen in the EEC Regulation and Directive on cultural property which represent a substantial change in the present state of the law. When adopting the provisions of Chapter III of the draft Convention the committee of experts was fully aware of the fact that the giving effect to foreign public law by the courts of another State constitutes an exception to the law and practice of most States and that such an exception would have to be extremely limited if the future Convention were to have any prospect of widespread acceptance.

#### Article 5

75. Paragraph 1 of this article provides that a Contracting State may request from another Contracting State the return of a cultural object in the circumstances that are set out in sub-paragraphs (a) to (c). The provision further specifies that the request must be brought before a court “or other competent authority” of the State addressed. This language was introduced because in some countries it is not only a court that may be seized of a dispute concerning a cultural object and the committee was reluctant to place limitations on the authority which may determine whether or not a cultural object should be returned.

76. Some delegations believed that the notion of “other competent authority” called for closer definition and suggested the adoption of a scheme of central authorities, to be designated by each State at the time of its ratification of the Convention, which would be empowered to centralise claims, to transmit them and to communicate information concerning them. The proposed system was not however intended to be exclusive in the sense that claims brought under the Convention could also be lodged directly with a court or other competent authority in the State addressed and that the Convention would not prevent direct co-operation between the competent authorities of the Contracting States. Although the time available did not permit the committee to examine this proposal in

detail, it should be recalled that such a mechanism has been incorporated in Articles 3 and 4 of the EEC Directive.

77. The language of sub-paragraph (a), which provides that a Contracting State may request the return of a cultural object which has “been removed from the territory of the requesting State contrary to its law regulating the export of cultural objects because of their cultural significance”, tracks that of Article 1(b) (see paragraph 25 above) and underlines the fact that the prohibition of the export of an object or the subjecting of such export to conditions must be based on purely cultural considerations such as the maintenance on the territory of the requesting State of the most representative items of its national heritage.

78. Sub-paragraph (b) extends the concept of illegal export to cultural objects that have 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”, and would allow a claim to be brought under the Convention for the return of the object from the State to which it was initially legally exported and also from any Contracting State to which the object has subsequently been removed in violation of the terms of the permit. It should however be noted that the language of the sub-paragraph does not explicitly cover the case where the object has been located on the territory of such a third State before the expiry of the permit and this is a gap which it may be necessary to fill, unless it is considered that this case could be dealt with under Article 9(3) according to which “[r]esort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located [...]”.

79. A second extension of the notion of illegal export is to be found in sub-paragraph (c) which provides for the bringing of a claim for the return of a cultural object that has 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”. Its *raison d’être* is to permit States that have no, or only very limited, legislation governing the export of cultural objects and which would therefore be

unable to bring an international claim for return under sub-paragraph (a), to do so in respect of cultural objects that have been illegally removed from an archaeological site and exported without breaching any export legislation. Its proponents also suggested that the case in question was not necessarily covered by the language of Article 3(2) (see above, paragraph 44) as there might be doubts as to whether a court in the State addressed would accord *locus standi* to a requesting State to bring a claim for return in circumstances where it had no title to the excavated object under national law.

80. The inclusion of the provision was opposed by a number of delegations which favoured a limited scope of application of Article 5 and which considered that any State which wished to impose restrictions on the removal from its territory of cultural objects should do so by the introduction of national legislation to that effect rather indirectly through the future Convention. The proposed provision was also criticised on the ground that it could give rise to confusion in the interpretation of Article 3(2) and in view of an equally divided vote as to its retention, it appears in the text in square brackets.

81. Although the committee of experts rapidly reached agreement on the principle of the return of illegally exported cultural objects, views differed widely as to the extent of its application. For a number of delegations, it was sufficient that there had been a breach of the provisions of national law to justify the automatic return of such objects. Others insisted that the principle constituted an important innovation for the law of many countries and that their willingness to admit such an exception must be subject to conditions, all the more so in the light of the broad definition of cultural objects in Article 2, which some of them already had difficulty in accepting even in respect of stolen cultural objects.

82. The hard won compromise between the various positions is reflected in paragraph 2 of the article which provides that the court or other competent authority of the State addressed shall order the return of the cultural object if the requesting State “establishes” that the object is “of outstanding cultural importance” for it or that the removal of the object

from its territory “significantly impairs” one or more of the interests listed in sub-paragraphs (a) to (d).

83. The choice of the word “establishes” in the *chapeau* of paragraph 2 is one aspect of the compromise in that it strikes a balance between the partisans of the automatic return of a cultural object for whom it should be sufficient to allege the impairment of State’s cultural heritage and those who would have preferred the use of the stronger term “proves” to express the burden placed on the requesting State. Moreover, the impairment of the cultural interest must be “significant”, which constitutes a limitation on the definition of “cultural objects” in Article 2 that does not apply to claims for the restitution of stolen objects under Chapter II.

84. As regards the interests specified under the four sub-paragraphs of paragraph 2, sub-paragraph (a) refers to “the physical preservation of the object or of its context” and is intended to cover physical damage to monuments and archaeological sites (including that caused by illegal excavations and pillage) as well as physical damage suffered by delicate objects as a result of their careless handling by looters, smugglers, dealers and possessors etc. implicated in their illegal export. In speaking of “the integrity of a complex object”, sub-paragraph (b) contemplates the dismemberment of objects such as, for example, the decapitation of sculptures, the dispersion of frescoes, the division of triptychs and the dismantling of the contents of historic buildings.

85. The reference in sub-paragraph (c) to “the preservation of information” reflects a concern not only for the culture of the requesting State but of that of humanity as a whole. What the committee had in mind here was the loss of information caused by the removal of objects from their context and the irreversible damage caused thereto (for instance the disturbance of stratigraphy), by the breaking up of a collection or the loss of documentation. The words “of, for example, a scientific or historical character” were included to take account of the problem of clandestine excavations on archaeological sites, so as to make it clear that objects originating from such excavations would *ipso facto* be considered as falling within the provision. Finally, sub-paragraph (d) covers the

impairment of the “use of the object by a living culture” and seeks to avoid the removal of objects in use in a traditional community (in particular ritual objects such as sculptures or masks).

86. It should be stressed that the interests are alternative rather than cumulative and that it is sufficient for the requesting State to establish to the satisfaction of the judge or competent authority in the State addressed that any one of them has been significantly impaired for the principle of return to come into play. Nor is the list strictly speaking exhaustive since each State retains the faculty under Article 10 to apply any rules more favourable to the return of illegally exported cultural objects than those provided by the Convention which, while not encouraging uniformity, permit States, especially those which already have more generous legislation in this regard, to grant more than the minimum level of protection around which a consensus can be achieved at international level.

87. The committee recognised however that there exist certain cultural objects, most often rare or unique, which are of especial significance but which would not be covered by the language of any of sub-paragraphs (a) to (d) (for example the Taranaki sculptures in the case of *Attorney General of New Zealand v. Ortiz*). While cases of this kind are unusual, it was considered that the nature of cultural objects is such that they should not be overlooked and for this reason the committee introduced an additional criterion as an alternative to the four preceding ones, namely the establishment by the requesting State that the object is of “outstanding cultural importance” to it.

88. So as to ensure consistency in drafting with other provisions of the draft and so as to leave to the judge a certain degree of discretion, the text lays down no criteria to determine the importance of the object. It was however suggested that the outstanding cultural importance of the object for the requesting State should be measured against the extent and wealth of its heritage, be it in public or private hands, and the rarity of the object. The adjective “outstanding” was chosen to qualify the word “importance” as it signifies that even if an object is not in itself outstanding, it is of importance in the given circumstances and justifies the request for return.

89. Under the terms of paragraph 3 of the article, a claim for the return of an object by a requesting State must contain or be accompanied by any relevant information of a factual or legal nature that will assist the court or authority seized of a claim in determining whether the requirements of paragraphs 1 and 2 have been met. The committee as a whole recognised that the production of evidence is a normal requirement that is moreover to be found in many Conventions on mutual assistance so as to facilitate their implementation and to provide legal security, and that any request from a foreign State must always be accompanied by the relevant information. The committee did not wish however either to make the provision of such information a condition for the admissibility of claims as had been envisaged in an earlier version of the draft (and unlike the EEC Directive which makes provision for the inadmissibility of a request when certain conditions are not satisfied) or to confuse the question of admissibility with the substance of claims. Moreover, the provision is of relevance to the following paragraph concerning limitation of actions for, if the limitation periods were to be very brief, it would be extremely difficult, if not impossible, for a State to provide the necessary information on time if the provision of such information were to be a condition precedent to the bringing of a claim.

90. A provision in the study group text to the effect that the request should also “contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State” was not accepted. In fact, a majority within the committee of governmental experts feared that such a condition could serve as a pretext for a systematic refusal to order the return of cultural objects although the concern of the study group had been to reinforce the credibility of the requesting State by calling upon it to base the request for return on the cultural significance of an object and not only on the fact that the object belonged to its national heritage.

91. Finally, paragraph 4 deals with the periods within which a request for the return of an illegally exported cultural object must be brought and contains the same time limits and points of departure as are established for the restitution of stolen cultural objects.

The special rule governing public collections in Chapter II has not however been retained in Chapter III, as a majority of the committee was of the belief that such collections are more exposed to the risk of theft than of illegal export and that there was no direct connection between public access and illegal export.

92. It will however be for the diplomatic Conference to decide whether the limitation periods should be the same for claims for the restitution of stolen cultural objects as for requests for the return of illegally exported objects and whether a single provision on the question might not be included in Chapter IV – Claims and actions. A number of delegations believed this to be absolutely essential if claims for the return of objects illegally removed from excavations could be brought under either Chapter II or Chapter III so that the decision as to the procedure to be followed would be taken on the basis only of proof of theft and not the length of the limitation period. Others however insisted on the difference between the legal character of theft and that of illegal export for while all States were prepared to co-operate in combating thefts of cultural objects committed abroad as theft was universally considered to be a criminal act, many States were reluctant, in the present state of the law, to treat illegal exports in a similar fashion with the consequence that shorter limitation periods should be established for Chapter III.

#### *Article 6*

93. When the conditions laid down by Article 5(2) have been met, the court or competent authority of the State addressed must order the return of the cultural object in respect of which the claim has been brought. Paragraph 1 of the present article however establishes two exceptions to that principle and the language employed (“may only refuse”) reflects the desire of the majority of the committee of experts to emphasise the fact that these are the only permitted exceptions.

94. In this connection, it should be recalled that most legal systems embody concepts such as “*ordre public*” or public policy whose application could be invoked by courts to reject claims brought under the Convention, for example in cases where a purchaser of a cultural object is presumed to be in good faith under

domestic law, even if that person has failed to meet the strict requirements of due diligence imposed by the Convention. Courts might invoke other grounds of refusal such as “a close connection with the culture of the State addressed”, “greater attention on the part of the requesting State”, a distant historical link with the State addressed, disapproval of the cultural policy followed by the requesting State etc. Article 6 seeks to limit to the greatest extent possible the degree of discretion open to national courts to rely upon such notions as public policy or “*ordre public*”, which have not only a legal but also an emotive content, although it would be unrealistic to imagine that there might not be exceptional cases in which they might be successfully invoked, as a kind of unwritten reservation clause, for example where there was a total breakdown of law and order in the requesting State that would expose the object to a serious risk of destruction.

95. Sub-paragraph (a) of paragraph 1 provides that a request for return may be refused if “the object has a closer connection with the culture of the State addressed”, since it might from a political point of view be difficult for a State to contemplate the return of an object which was seen as forming an essential part of its national cultural heritage. This provision was the subject of lengthy debate within the committee of experts, some arguing for its deletion on the ground that it offered a large measure of discretion to courts which would moreover be placed in an invidious position if they had to determine the relative weight of the link between the object and the culture of the requesting State and that of the State addressed, which was a cultural rather than a legal question. That burden, it was suggested, might however be reduced if the words “closer connection” were to be qualified by the adjective “manifestly”. In addition, it was pointed out that the provision might encourage the unlawful removal of cultural objects from a State by persons acting out of patriotic motives intent upon returning them to their countries of origin, a situation at present dealt with essentially through diplomatic channels.

96. On the other hand, some delegations favoured a solution that would have permitted the intervention of a third State laying a historical claim to a cultural object. This proposal was however rejected by a large

majority of the committee as not only would it complicate still further the task of a court already possibly called upon to adjudicate between the competing claims of two States but also because it would risk altering the nature of Chapter III which had been conceived in terms of the return of a cultural object to a State whose export legislation had been contravened.

97. In these circumstances sub-paragraph (a) may be seen as representing a compromise between clearly differentiated positions and which in effect accords a certain privileged position to the State addressed. *Sub-paragraph (b)*, which is placed in square brackets in view of the hesitations of some delegations as to its precise implications, further reinforces that position by providing that return may also be refused “if the object, prior to its unlawful removal from the requesting State, was unlawfully removed from the State addressed”.

98. The purpose of paragraph 2 of Article 6 is to avoid the strange result that might emerge from a combined reading of Article 5(1)(b) (concerning objects temporarily exported, for example, for an exhibition) and Article 6(1)(a) in the sense 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 might, in the absence of paragraph 2, be able to invoke a “closer connection” with its own culture and not return that object.

#### *Article 7*

99. Whereas Article 6 establishes two exceptions to the principle of return in cases where the requirements of Article 5(2) have been satisfied, the purpose of Article 7 is to disapply the provisions of Article 5(1) and in effect Chapter III as a whole (which might be a clearer form of drafting suggesting the desirability of transferring Article 7 to the end of the chapter) in two situations.

100. The first of these is dealt with in paragraph 1 of Article 7 which excludes the application of Article 5(1) when the export of a cultural object is no longer illegal at the time at which its return is requested, since there would seem to be little point in the court or competent authority of the State addressed being called upon to ignore a more liberal cultural policy introduced

by a requesting State subsequent to the removal of the object from its territory.

101. Paragraph 2 addresses more delicate questions such as the rights of artists over their own work, copyright law and the particular problem raised by the creation of objects for use by indigenous communities. Sub-paragraph (a) reflects the idea that export restrictions concerning objects exported during the lifetime of the person who created them or within a certain period following that person's death should not be effective abroad. To hold otherwise, it was suggested, could discourage creativity and would run counter to the principle enshrined in the 1980 UNESCO Recommendation on the Condition of Artists, as well as to most national legislations on the protection of cultural objects which exclude the work of living artists from their scope of application. Nothing would of course prevent States from enacting export prohibitions affecting the work of living artists but such prohibitions would not be given effect under the Convention.

102. While some delegations considered this to be a sufficient limitation on the principle of non-return, others were of the opinion that the need to guarantee to artists the possibility of selling their works and of making them known to a wide public abroad, and of protecting the interests of their families and heirs, called for an extension of the period during which export prohibitions would not be effective for the purposes of the Convention beyond the death of the artist. Even among those supporting such an extension, views differed widely as to the length of the period. Some delegations proposed one of fifty years, based on analogy with copyright law (the 1886 Bern Convention and subsequent revisions), while others argued for a twenty year period which was to be found in a number of national laws on the artistic heritage and yet others one of only five years which would be sufficient to safeguard the rights of heirs and to permit the proceedings for the winding up of an estate to be completed. In view of the wide differences of opinion within the committee, not only as to the length of such a period but also to whether the exception should be introduced at all, the relevant language of sub-paragraph (a) as a whole and the figure of five years contained therein all appear in the text in square brackets.

103. It was moreover recognised that difficulties could arise in the application of the sub-paragraph to objects whose author was unknown and in such cases the only possible criterion would be the age of the object which might itself be open to doubt. This situation is dealt with in sub-paragraph (b) and while there was general agreement that some age-limit for the object would have to be established, opinions varied as to its age at the time of the export, some delegations proposing twenty years and others fifty. The shorter period has been included in the text in square brackets.

104. One of the most frequent cases where the author of an object will be unknown, and/or the age of the object difficult to determine, is that of ethnographic objects and some delegations argued that when an object is "made by a member of an indigenous community for use by that community" Article 7(2) should not apply at all. In their view, it was imperative to recognise the ritual or cultural significance of such objects for a given community. Neither the criterion of the death of the creators of such objects, which are often the outcome of communal efforts, nor that of the age of those objects, which are frequently made out of organic materials, were apposite in this connection. While a certain consensus emerged within the committee that this problem needed to be addressed, the language appearing in sub-paragraph (b) *in fine* was the subject of criticism by some, principally on the ground that it was too broad because of the imprecision of the word "indigenous", although others drew attention to the fact that it had been chosen on account of the widely accepted interpretation accorded to it under Article 1 of the 1989 ILO Convention (No. 169) on Tribal and Indigenous Peoples. In these circumstances it was agreed that the language in question should be retained in square brackets.

105. As has been mentioned above in connection with other provisions of the draft Convention, Contracting States may under Article 10 decide not to exclude the application of Article 5(1) in any or all of the cases contemplated by Article 7.

#### *Article 8*

106. Paragraph 1 of this article lays down the principle that the possessor of an illegally exported cultural

object is 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 to have known at the time of acquisition that the object had been removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of their cultural significance. As is the case with Article 4(1) concerning stolen objects, this provision would signal an important change in the domestic law of many States and in particular those rules, sometimes enshrined in their Constitutions, guaranteeing the protection of private property, and for such States the Convention would be unacceptable unless it were to make allowance for the payment of compensation in appropriate cases. It should, in this connection, be stressed that there will be relatively few cases in which an illegally exported object will be acquired by a person exercising the necessary diligence and in which compensation will in consequence be due to that person.

107. While some delegations were of the opinion that the difference between stolen and illegally exported cultural objects was such as to justify, in the latter case, payment of compensation to a good faith possessor equivalent to the purchase price paid, a majority favoured the use of the same language as that to be found in Article 4(1), namely “fair and reasonable compensation”. This was in their view justified by the extremely high prices which works of art presently command, the limited financial possibilities of many States to pay compensation and the need to discourage speculation, all of which, together with the commercial value of the object in the State of origin and in the State where its return is sought and any other relevant circumstances would assist the court in determining the amount of compensation payable in each individual case.

108. One point in respect of which this provision does however differ from Article 4(1) is that the words “and can prove that it exercised due diligence when acquiring the object”, deemed appropriate in respect of stolen objects, do not appear in Article 8(1) since a large number of delegations considered that, as elsewhere in the draft Convention, the stigma attaching to theft ought not to be transposed to illegally exported

cultural objects. In these circumstances Article 8(1) is silent as to the question of the party (requesting State or possessor of the object) upon whom the burden lies of establishing the possessor’s knowledge of the illegal export at the time of the acquisition. This matter is in effect left to national law.

109. The aim of paragraph 2 is to exclude the possibility of the possessor’s successfully invoking its good faith, and hence being entitled to compensation, in the absence of an export certificate for an object which is required by the law of the Contracting State from which the object has been removed. A proposal to the effect that in the absence of such a certificate the bad faith of the possessor should be irrebuttably presumed was rejected by most delegations on the ground that it assumed the possessor’s knowledge of the export legislation of each country and would have the effect of rendering virtually impossible the acquisition in good faith of any cultural object. At most, they were prepared to consider the possibility of attaching a certain degree of significance to the absence of an export certificate for the purpose of determining the good faith of the acquirer of an illegally exported cultural object. The language of paragraph 2, which speaks of the absence of such a certificate as “put[ting] the purchaser on notice that the object has been illegally exported”, represents a compromise proposal but in view of its introduction at a very late stage of the deliberations of the committee of governmental experts and of persisting differences of opinion, the provision was retained in square brackets.

110. Paragraph 3 of Article 8 offers certain alternatives to a possessor who is required to return an illegally exported cultural object to the requesting State to that of receiving compensation, subject always to the agreement of that State. The rationale of the provision is that of facilitating the return of cultural objects since alternatives to the payment of compensation would on the one hand alleviate the financial burden on requesting States while it would at the same time be easier for States called upon to give effect to the legislation of another State to ratify the future Convention if it could be demonstrated to national Parliaments that its adoption would in no way entail the confiscation of private property.

111. Sub-paragraph (a) would thus allow the possessor returning an object to the requesting State to retain ownership thereof (and possibly possession if he or she were for example to own a house in that country) while sub-paragraph (b) envisages the possibility of the possessor transferring ownership of the object either against payment or gratuitously to a person of its choice residing in the requesting State. The concluding words of the sub-paragraph, which require that such a person “provides the necessary guarantees” were deemed to be necessary so as to ensure that the object would, on its return, be properly protected and conserved and not once again be illegally exported.

112. Under the terms of paragraph 4 it is the requesting State that is to bear the cost of the return of the object, by which is to be understood the administrative and material expenses of such return to that State, for example the costs of transport and of insurance. The allocation of all expenses associated with the legal proceedings arising out of the claim for the return of the object will on the other hand be determined in accordance with the procedural law of the State addressed. Likewise, the cost of returning the object should be distinguished from the compensation payable under paragraph 1 of this article as the latter is intended exclusively to indemnify the “good faith” possessor of an object for its loss.

113. While some delegations found it shocking to require of a requesting State that it meet the costs of the return if the possessor were to prefer to transfer the object for value to a person of its choice in the requesting State, a majority was of the opinion that if a State attached great importance for its cultural heritage to the return of a cultural object, it would be prepared to meet all the expenses involved, including the payment of compensation to the possessor; subject naturally to the possibility of recourse against the person who knew that the object had been illegally exported (a solution moreover to be found in Articles 10 and 11 of the EEC Directive) or against any other person such as a thief, accomplices, a receiver or those running an illegal traffic ring.

114. Finally, paragraph 5 equates the position of those who have acquired an illegally exported cultural object by inheritance or otherwise gratuitously and

who had perhaps no way of knowing the circumstances in which the previous possessor had acquired the object to the position of those who have entered into possession of a stolen cultural object (see above, paragraphs 71 and 72).

#### CHAPTER IV – CLAIMS AND ACTIONS

##### *Article 9*

115. This article deals with the question of the jurisdictions competent to determine claims under the Convention. The claimant may, therefore, under the terms of paragraph 1, bring a claim for the restitution of a stolen cultural object, or for the return of a cultural object illegally removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects because of its cultural significance, before the courts of certain Contracting States or before the “other competent authorities” of such States (see above, paragraph 75).

116. The committee of experts decided to lay down a special new ground of jurisdiction over claims for restitution or return which constitutes a distinct innovation from the standpoint of comparative law, namely that of the State where the cultural object is located. This ground of jurisdiction, which is intended to facilitate the application of the Convention, is virtually unknown in relation to claims for the recovery of movable property in Europe and is not to be found in the existing codifications of rules governing jurisdiction, in particular the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and the Lugano Convention of 1988 which bears the same title. At present, a claim must as a rule be brought before a court in accordance with the general rules governing jurisdiction, for instance the court of the domicile of the defendant. The committee believed however that the specific nature of cultural objects is such that the most effective way of bringing about their return would be to provide for the possibility of a claim being brought in the State where the object is located.

117. It was however in no way the intention of the committee to deprive claimants of the possibility of relying on the traditional grounds of jurisdiction and in

particular those for which provision is made in the international Conventions (for example the Brussels and Lugano Conventions). In consequence paragraph 1 ensures that the usual rules concerning jurisdiction in force in Contracting States, whether based on the ordinary law or on international treaties, are not affected by the Convention.

118. The question was raised of whether Article 9 ought to deal not only with jurisdiction but also with the recognition and enforcement of judgments. Although a proposal was made to this effect, a number of delegations stated that the insertion of such provisions, scarcely ever to be found in private law instruments of universal application, would make it extremely difficult, if not impossible, for them to accept the future Convention. Issues of recognition and enforcement were in their opinion best regulated by multilateral or bilateral treaties specifically addressed to those issues while it had moreover to be recalled that the problem was much less acute in the context of the present Convention since the attribution of jurisdiction to the courts of the State where the cultural object was located would mean that a successful claim for the restitution or return of a stolen or illegally exported object would be directly enforceable without the need to have recourse to the courts of a second State.

119. A further proposal was made to the effect that the international character of claims under the Convention should be dealt with in Article 9 rather than in Article 1. The suggestion was however opposed by a large number of delegations which considered that it would be confusing to deal at the same time in a single article with both the substantive scope of application of the Convention and with the grounds of jurisdiction which were invariably distinguished in international private law Conventions.

120. Paragraph 2 permits the parties to submit their dispute to a jurisdiction of their choice or to arbitration. The committee of experts was of the belief that the choice of forum, which is widely recognised in private international law, is an essential procedural freedom and that the omission of a provision to that effect could create an obstacle for certain States to ratify the future Convention. In addition, the committee considered that recourse to arbitration in relation to claims for the resti-

tution or return of cultural objects under the Convention should not only be allowed but indeed encouraged since arbitration favours the respect of confidentiality. Moreover, problems of enforcement would be reduced to the extent that the institution of arbitral proceedings is dependent on the consent of both parties and in particular that of the claimant.

121. Finally, paragraph 3 lays down an additional rule designed to promote international co-operation by taking over the formula to be found in Article 24 of the Brussels Convention concerning provisional, including protective, measures available under the law of the Contracting State where the object is located, when a claim is brought in another Contracting State. Thus, for example, if the claimant chooses to institute proceedings before a court in the State where the defendant is domiciled, the courts of the Contracting State where the cultural object is located ought not to be permitted to decline responsibility for the taking of provisional or protective measures contemplated by its law, such as the ordering of an injunction preventing the sale or export of the object.

## CHAPTER V – FINAL PROVISIONS

### *Article 10*

122. This article provides that the future Convention is not intended to prevent a Contracting State from applying its national law in circumstances where that law is more favourable to the restitution or return of stolen or illegally exported cultural objects than is the Convention itself. Conscious of the fact that many provisions of the draft Convention do not always correspond to the law and practice of a number of countries, and that some of the latter go beyond the provisions of the Convention in terms of protection (for instance the absence of compensation for a good faith acquirer of a stolen object), the study group was from the outset convinced that no impediment should be placed in the way of those countries to continue to accord more favourable treatment to claimants as the future Convention sought to lay down only minimum rules of protection. This view was shared by the committee of governmental experts and is reflected in Article 10 which reaffirms the objective of the

Convention of facilitating the restitution and return of stolen or illegally exported cultural objects.

123. Both in the study group and in the committee of governmental experts, different views were expressed as to drafting technique to be followed in relation to this article. In the opinion of some, an exhaustive list should be drawn up of those situations in which a Contracting State might accord more favourable treatment than that provided under the Convention in relation to the restitution and return of cultural objects since it should not be forgotten that the Convention was in effect establishing a uniform law and any departures from uniformity should be clearly defined. Among the situations contemplated were the extension of the limitation periods for the bringing of claims under the Convention, the refusal of compensation to a good faith purchaser of a stolen cultural object, the taking into consideration of interests other than those material under Article 5(2) and the application of national law when this would permit the application of Chapter III in cases otherwise excluded by Article 7.

124. In the course of the deliberations of the committee of governmental experts, however, a number of proposals were made for the addition of other situations in which more favourable treatment would be accorded to claimants and the view ultimately prevailed that the inclusion of an exhaustive list might unintentionally exclude certain situations. The present text therefore employs a general formulation although it is perhaps open to question whether its language is broad enough to cover one case that had been specifically mentioned, namely the possibility to extend the provisions of Chapter II to acts other than theft (such as fraud and conversion) whereby the claimant has wrongfully been deprived of possession of an object.

125. One further point which should be mentioned in connection with Article 10 is that it initially contained a provision to the effect that a Contracting State might 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”. This provision was included at a time when the draft contained an article the principal purpose of which was to deny the future Convention retro

active effect by limiting its application to claims in relation to cultural objects stolen or illegally exported 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 for restitution or return was brought. The article in question was deleted at the last session of the committee of governmental experts, some representatives believing that the same result would be achieved through the application of the relevant provisions of the United Nations Convention on the Law of Treaties. Other representatives however intimated that the Convention would be totally unacceptable to their Governments in the absence of some safeguard against its retroactive application such as the introduction of an appropriately worded reservation clause to that effect.

126. It ought also to be recalled that the decision of a Contracting State to avail itself of the option offered by Article 10 is a unilateral act and the fact that a State has decided to apply rules more favourable to the restitution or return of stolen or illegally exported cultural objects than that provided for by the Convention is of relevance only to claims brought before its own courts or other competent authorities and lays no obligation on the courts or authorities of other Contracting States to apply those rules.

127. Finally, attention should be drawn to a certain ambiguity in the wording of Article 10 since it is unclear whether it is intended to create an obligation for Contracting States to apply more favourable rules of national law as may exist at present or in the future or rather to leave States an option in that regard. This matter was not determined by the committee of experts and if the latter course were to be approved it might, in the interests of legal certainty, be preferable to introduce a provision whereby Contracting States would make a declaration, at the time of signature or at any other time as might be specified in the Convention, listing those situations in respect of which they would apply more favourable treatment to claims for restitution or return than is provided for by the Convention.

**DRAFT FINAL PROVISIONS CAPABLE OF EMBODIMENT  
IN THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN  
OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

with

**EXPLANATORY NOTES**

**drawn up by the Unidroit Secretariat**

INTRODUCTION

1. In accordance with traditional practice, the draft final provisions capable of embodiment in a Unidroit Convention are drawn up by the Secretariat of the Institute in advance of the diplomatic Conference of adoption.

2. In this instance, the draft final provisions of the future Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects as set out below are based essentially on those of the 1988 Unidroit Conventions on International Financial Leasing and on International Factoring.

DRAFT FINAL PROVISIONS

*Article A*

1. *This Convention is open for signature at the concluding meeting of the diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until [30 June 1996].*

2. *This Convention is subject to ratification, acceptance or approval by States which have signed it.*

3. *This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.*

4. *Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.*

**Commentary**

The four paragraphs of this article reflect provisions traditionally to be found in Unidroit Conventions (cf. Article 15 of the Financial Leasing Convention). While practice varies as to the length of time for which international private law conventions remain open for signature after their adoption, the average is approximately twelve months and for this reason the date of 30 June 1996 has been included in paragraph 1 in square brackets, although it will of course be for the diplomatic Conference itself to decide this question.

*Article B*

1. *This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [third] instrument of ratification, acceptance, approval or accession.*

2. *For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the [third] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the*

*deposit of its instrument of ratification, acceptance, approval or accession.*

### **Commentary**

This article corresponds to Article 16 of the Financial Leasing Convention. Here again however, practice is not uniform in regard to the number of instruments of ratification, acceptance, approval, or accession that must be deposited in order for a private law convention to enter into force. The authors of the 1988 Unidroit Conventions on International Financial Leasing and on International Factoring opted for the number of three, thus following the pattern of the conventions adopted within the framework of the Hague Conference on Private International Law, the most recent example being the 1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (hereafter referred to as the 1993 Hague Adoption Convention).

#### *Article C*

*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.*

### **Commentary**

This provision appears as Article 10 of the draft Convention (see CONF. 8/3, paragraphs 122 to 127), although it was the intention of the committee of governmental experts that it should be included in the final provisions. As formulated, Article C would allow a Contracting State to the future Unidroit Convention to apply any rules to which it is bound by an international instrument or by its national law (including its conflicts of law rules) that are more favourable to the restitution of a stolen or illegally exported cultural object than as is provided for by the Convention.

As stated in paragraph 127 of document CONF. 8/3, there is a certain ambiguity in the wording of Article 10 since it is unclear whether it is intended to create an obligation for Contracting States to apply more favourable rules of national law as may exist at present or in the future or rather to leave States an option in that regard. This matter was not determined by

the committee of experts and if the latter course were to be approved it might, in the interests of legal certainty, be preferable to introduce a provision whereby Contracting States would make a declaration, at the time of signature or at any other time as might be specified in the Convention, listing those situations in respect of which they would apply more favourable treatment to claims for restitution or return than is provided for by the Convention. Provision has been made for such a declaration in Article F(a).

Some States might however not wish to see an automatic application of Article 10 and, subject to the decision to be taken by the Conference in this regard, the Secretariat has proposed a form of wording in Article F(b) which seeks to meet their concerns.

#### *Article D*

*1. This Convention does not affect any international instrument to which Contracting States are [, or may become,] Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.*

*2. Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of this Convention.*

### **Commentary**

It is customary for international private law conventions to contain a provision safeguarding existing agreements, often of a regional character, dealing with the same or a similar subject-matter. It should, however be recalled that at the fourth session of the committee of governmental experts one representative expressed concern at an earlier proposal on the ground that it referred to “agreements already concluded” which did not cover European Community instruments such as Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. Moreover, the language in question did not extend to future instruments whereas

it was not inconceivable that the Directive would be revised in the future or a new instrument adopted. In these circumstances it was agreed that the member States of the European Union would table a new text for consideration by the diplomatic Conference.

Pending the submission of such a text the Secretariat has provisionally included as Article D(1) a slightly amended version of Article 39(1) of the 1993 Hague Adoption Convention, which employs the word “instrument” but which, unlike the Hague text, contains the words “or may become” in square brackets.

Paragraph 2 of Article D is based on Article 39(2) of that same Convention and could be of especial interest if the future Unidroit Convention were not to establish a system of central authorities intended to facilitate the application of the future Convention (see CONF. 8/3, paragraph 76).

#### *Article E*

*1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.*

*2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.*

*3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:*

*(a) the territory of a Contracting State in Article 1(a) shall be construed as referring to the territory of a territorial unit of that State;*

*(b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;*

*(c) the Contracting State where the cultural object is located in Article 9(1) shall be construed as referring to the territorial unit of that State where the object is located;*

*(d) the law of the Contracting State where the object is located in Article 9(3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and*

*(e) a Contracting State in Article 10 shall be construed as referring to a territorial unit of that State.*

*4. If a Contracting State makes no declaration under paragraph 1, this Convention is to extend to all territorial units of that State.*

#### **Commentary**

In recent years a variety of formulae have been employed in international private law conventions to meet the difficulties sometimes experienced by States with a federal system of government involving a constitutionally guaranteed division of powers among the constituent units of the federation.

In particular, such clauses permit States to accept the Convention in the first instance for certain territorial units only and then to extend its application to other territorial units and it is with a view to achieving that result that Article E is submitted as a basis for discussion at the diplomatic Conference.

While paragraphs 1, 2 and 4 are standard provisions to be found in a number of conventions, paragraph 3 is based on Article 36 of the 1993 Hague Adoption Convention and has been adapted so as to attempt to address the difficulties which might be faced by some federal States in connection with the international restitution and return of stolen and illegally exported cultural objects. In particular, it seeks to ensure that:

(a) the stolen object has been removed from the territory of a territorial unit to which the Convention has been extended;

(b) claims for the restitution or return of stolen or illegally exported cultural objects may only be initiated

before a court or other competent authority of a territorial unit to which the Convention has been extended;

(c) claims for restitution or return under the Convention based on the location of an object may only be made in and before the courts or other competent authorities of a territorial unit to which the Convention has been extended;

(d) resort to provisional measures can be had under the law of a territorial unit to which the Convention has been extended and in which the object is located;

(e) a territorial unit to which the Convention has been extended can apply rules more favourable to the restitution of objects than is provided for by the Convention.

#### *Article F*

*A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that:*

*(a) it will avail itself of the option provided under Article C to apply rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by the Convention in the situations to be specified in its declaration;*

*(b) it will not avail itself of the option provided under Article C to apply rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by the Convention.*

#### **Commentary**

The need to retain either sub-paragraph (a) or sub-paragraph (b) will depend upon the decision to be taken by the diplomatic Conference concerning the automatic application of Article C.

The question also remains open as to whether the Conference may wish to add any further sub-paragraphs to Article F, in particular in relation to the question of the possible retroactive application of the

future Convention, since some delegations in the committee of governmental experts stated that it would be impossible for their Governments to accept the Convention if it were to impose an obligation on them to return cultural objects that had been stolen or illegally exported before the entry into force of the Convention for them.

#### *Article G*

*1. Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.*

*2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.*

*3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.*

*4. Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.*

#### **Commentary**

Precedents for the provisions of Article G are to be found in many international conventions and in particular in Article 21 of the Financial Leasing Convention.

#### *Article H*

*No reservations are permitted except those expressly authorised in this Convention.*

## Commentary

The wording of article H follows literally that of Article 22 of the Financial Leasing Convention.

### Article I

1. *This Convention may be denounced by any Contracting State at any time after the date on which it enters into force for that State.*

2. *Denunciation is effected by the deposit of an instrument to that effect with the depositary.*

3. *A denunciation takes effect on the first day of the month following the expiration of six months after the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it takes effect upon the expiration of such longer period after its deposit with the depositary.*

## Commentary

The language of the provisions of Article I is identical to that of Article 24 of the Financial Leasing Convention.

### Article J

1. *This Convention shall be deposited with the Government of the Italian Republic.*

2. *The Government of the Italian Republic shall:*

(a) *inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:*

(i) *each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;*

(ii) *each declaration made under Articles E and F;*

(iii) *the withdrawal of any declaration made under Article G (4);*

(iv) *the date of entry into force of this Convention;*

(v) *the agreements referred to in Article D;*

(vi) *the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;*

(b) *transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).*

## Commentary

The functions of depositary of Unidroit Conventions are traditionally exercised by the Government of the State on whose territory the diplomatic Conference for the adoption of the Convention in question is held. With slight adaptations, Article J corresponds to Article 25 of the Financial Leasing Convention.

### Authentic text and witness clause

*IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.*

*DONE at Rome, this ..... day of June, one thousand nine hundred and ninety-five, in a single original, of which the English and French texts are equally authentic.*

## Commentary

The general language of the provision follows many precedents. The reference to English and French as the authentic texts of the future Convention reflects the fact that these are the two working languages of Unidroit and that the authentic texts of Unidroit Conventions have accordingly hitherto been traditionally drawn up in these two languages.

**STATES AND ORGANISATIONS REPRESENTED AT  
THE DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE  
DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN  
OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**  
(Rome, 7 - 24 June 1995)

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## **PART II – COMMITTEE OF THE WHOLE**



**COMMENTS BY GOVERNMENTS ON THE DRAFT UNIDROIT CONVENTION  
ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY  
EXPORTED CULTURAL OBJECTS**

CONF. 8/5  
April 1995

**(COLOMBIA AND TURKEY)**

**COLOMBIA**

The Unidroit draft is essentially different from the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in that it contemplates the return of illegally exported cultural objects even in circumstances where they have not been stolen.

Moreover, it assimilates cultural objects that have been illegally removed from excavations to stolen objects, confers jurisdiction on authorities and establishes procedures for the return of objects, rules governing proof, defences, etc., none of which are dealt with in the UNESCO Convention at present in force.

The definition of cultural objects as those of historical interest etc. does not require that they should have been recognised as such by the State of origin, which might cause uncertainty as it is not clear who is to determine these criteria. The UNESCO Convention is much clearer in this respect. The present draft is very precise in that it refers essentially to the procedures for the return of objects. This clarification is important and while it ignores a number of provisions of the existing Convention which are equally significant, this ought not to give rise to problems if the present draft is considered as being an adjunct to the UNESCO Convention.

**TURKEY**

*DRAFT UNIDROIT CONVENTION ON THE  
INTERNATIONAL RETURN OF  
STOLEN OR ILLEGALLY EXPORTED CULTURAL  
OBJECTS*

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 three years 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 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.

*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 an export certificate issued by the competent authorities of the country of origin 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 the 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 three years 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 fifty years from the date of the export.

#### *Article 6*

(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 7*

(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 8*

(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 9*

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.

**(PEOPLE'S REPUBLIC OF CHINA, JAPAN  
AND NEW ZEALAND)**

**CHINA**

The Government of the People's Republic of China congratulates the Unidroit Secretariat on its successful formulation of the draft Convention and finds the current text generally acceptable. The Chinese Government would also like to propose the following revisions to the draft Convention:

**CHAPTER I – SCOPE OF APPLICATION  
AND DEFINITION**

*Article 1*

*Sub-paragraph (b)*

We propose that sub-paragraph (b) be revised to read:

“the return of cultural objects removed from the territory of a Contracting State contrary to its laws and regulations governing the export of cultural objects ...”.

Reason: In some jurisdictions, the legal rules governing the export of cultural objects may take the form of administrative regulations in addition to laws enacted by legislative bodies.

We propose that the phrase at the end of sub-paragraph (b) “because of their cultural significance” be deleted.

Reason: The “cultural significance” of a cultural object is self-evident, in particular where the export of such a cultural object is contrary to the Contracting State's applicable laws and regulations. Besides, this point has already been touched upon in Article 2. The same phrases appearing elsewhere in the present text (for example in Article 5(1)(a)) should also be deleted.

**CHAPTER II – RESTITUTION OF STOLEN  
CULTURAL OBJECTS**

*Article 3*

*Paragraph (1)*

We propose that the term “possessor” in paragraph 1 be replaced by “holder”.

Reason: We consider that “holder” is a more neutral word and has a broader sense than “possessor” and, accordingly, every reference to “possessor” elsewhere in the present text should also be replaced by “holder”. In addition, we propose that a paragraph be added to define the notion of “holder”.

*Paragraph (2)*

We propose that paragraph 2 be revised to read:

“... an object which has been unlawfully excavated or unlawfully retained though lawfully excavated shall be deemed to have been stolen.”

Reason: The present text of this paragraph may give rise to some ambiguity that would mislead people when interpreting it as it may include the two following situations: (1) an object which has been unlawfully excavated and unlawfully retained; (2) an object which has been lawfully excavated and unlawfully retained. Obviously, that is not what was intended by the drafter.

*Paragraph (3)*

Paragraph 3 should read as follows:

“Any claim for ... a period of three years ... a period of fifty years from the time of the unlawful excavation or first unlawful retention.”

Reason: A longer period of time allowed to the requesting State is more favourable for the protection of cultural objects.

The term “theft” in the present text may lack sufficient clarity. In cases where the object was lawfully excavated and was subsequently unlawfully obtained by somebody, who then passed it on to other people, there might be difficulties in determining the point of time at which the object was “stolen”.

*Paragraph (4)*

Paragraph 4 should read as follows:

“However, a claim ... of a Contracting State shall not be subject to prescription.”

Reason: An indefinite period of time for bringing a claim is more desirable than a definite one.

Concern: We have some difficulties with the current wording “a Contracting State” in this paragraph. Does it refer to the requesting State or the State addressed or both of them? For the sake of clarity, we propose the following revision:

“... a claim for restitution of an object belonging to a public collection of either the requesting State or the State addressed shall ...”.

*“Public collection”*

The language between square brackets in the second sub-paragraph of paragraph 4 should be retained and the brackets removed. In addition, we propose the following choices and additions for this sub-paragraph. The language “substantial and” should be retained and the square brackets removed. The text would read:

“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 its local or regional authority,

(ii) an institution substantially financed by the Contracting State where it is located or the local or regional authority of the Contracting State;

(iii) a non profit institution which is recognised by the Contracting State where it is located or by the local or regional authority of the Contracting State (for example by way of tax exemption) as being of national or public or particular importance, or”

Reason: The current expression “a Contracting State” lacks clarity and certainty and may be inter-

preted as referring to a Contracting State other than the Contracting State where such an institution is located.

CHAPTER III – RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

*Article 5*

*Paragraph (1)*

*Sub-paragraph (a)*

Paragraph 1(a) should read as follows:

“... to its laws and regulations governing the export of cultural objects.”

Reason: Such revision is to be made in order to be in conformity with the wording of Article 1(b).

*Sub-paragraph (c)*

The square brackets in sub-paragraph (c) of paragraph 1 should be removed and the language between the brackets retained. Furthermore, we propose that the order of sub-paragraphs (b) and (c) be reversed.

Reason: What is provided in sub-paragraph (c) is a necessary supplement to sub-paragraph (a); therefore, (c) should not only be retained but also immediately follow (a).

Concern: We have some uncertainty regarding the overlap between sub-paragraph (c) and what is referred to in Article 3(2) of Chapter II by the notion of “unlawful excavation”.

*Paragraph (2)*

We propose that the term “significantly” in the introductory language of paragraph 2 and the term “outstanding” in the last line of paragraph 2 be deleted.

Reason: These two terms may establish an over-stringent standard for a requesting State to meet.

*Sub-paragraph (d)*

“(d) the need of the object by a living culture,”

Reason: The term “use” may have too limited a sense.

Concern: We fear that the four situations listed in paragraph 2, though supplemented by the seemingly inclusive sentence at the end of this paragraph, may be not capable of encompassing all situations where a requesting State should reasonably be entitled to the return of a cultural object removed from its territory. It is therefore desirable that a few more situations be contemplated and added.

#### *Paragraph (4)*

Paragraph 4 should read as follows:

“Any request for return ... within a period of three years from ... and in any case within a period of fifty years from ...”.

Reason: A longer period of time allowed to the requesting State is more desirable for the protection of cultural objects.

We propose also to add the following words:

“... within a period of fifty years from the date of the removal of the object from the territory of the requesting State and in the situation envisaged in paragraph 1(b), from the time of expiration of the permit under which the object was exported.”

Reason: The situation contemplated in (b) differs from those in (a) and (c). In (a) and (c), the removal of the object from the territory of the requesting State is unlawful from the outset, either contrary to the State’s law governing cultural object export or the law governing the excavation of cultural object. However, in the situation of (b), the object was exported lawfully (under a permit) from the requesting State, and it is only after the expiration of that permit that the object is unlawfully retained outside the territory of the requesting State, so that in such a situation the period of time of fifty years should start to run from the expiration of the permit instead of the time of export.

#### *Article 6*

##### *Paragraph (1)*

###### *Sub-paragraph (a)*

We propose that sub-paragraph (a) of paragraph 1 be deleted.

Reason: We fear that the phrase “ a closer connection” has too much ambiguity and uncertainty. In practice, it will hardly be workable to determine the State with whose culture the object has a closer connection, in particular when the dispute arises between two Contracting States that have an identical or similar cultural tradition.

###### *Sub-paragraph (b)*

We propose that the brackets around sub-paragraph (b) be removed and that the language of sub-paragraph (b) be retained and incorporated in the introductory language of paragraph 1. In addition, we feel that it is desirable that this paragraph should be revised to read:

“it was from the State addressed that the object was first unlawfully removed.”

Reason: The rationale offered in the present sub-paragraph (b) does not give many grounds for the refusal of the State addressed to order the return of an object, for it is quite common that an object is unlawfully traded from one country to another around the world. In such cases, it does not appear justifiable that the State addressed may refuse to order the return of the object to the requesting State on the ground that the object had once passed through the former’s territory.

##### *Paragraph (2)*

We propose that paragraph 2 be revised to read:

“The provisions of the preceding paragraph shall not apply in the case of objects referred to in Article 5, paragraph 1(b).”

#### *Article 7*

##### *Paragraph (2)*

###### *Sub-paragraph (a)*

We propose that the language between brackets in paragraph 2(a) be deleted.

Reason: The deletion of the language between the brackets is more favourable to the protection of the cultural objects than the retention of it.

###### *Sub-paragraph (b)*

We propose that the two pairs of square brackets in (b) be removed and the language retained.

## Article 8

### Paragraph (1)

We propose that the first part of paragraph 1 be revised to read:

“The holder (currently “possessor”) of a cultural object removed from the territory of a Contracting State within the meaning of Article 5(1) ...”.

Reason: We fear that the current expression “contrary to its law regulating the export of cultural objects because of their cultural significance” may not be capable of including all situations in Article 5(1) if regard is had only to the case where the object is removed in violation of the law regulating the export of the cultural object.

### Paragraph (2)

We propose that the language of paragraph 2 currently between brackets be retained and the brackets removed.

### Paragraph (3)

#### Sub-paragraph (b)

We suggest that the term “a person” in paragraph 3(b) be replaced by “a person or an entity” in order to encompass cases where the holder (currently “possessor”) transfers the ownership to an institution (for example, a museum or an art gallery).

## JAPAN

1. The draft Convention has two quite distinct aspects. It seeks, on the one hand, to unify the substantive private law rules of Contracting States in respect of the restitution of stolen cultural objects (Chapter II). On the other, it creates a new legal regime for the return of cultural objects exported in violation of the export regulations of Contracting States (Chapter III). Needless to say, the latter’s legal character is entirely different from that of the former, as the latter empowers a State directly to require an individual possessing a cultural object in another State to return it to its territory on the sole ground that the cultural interest of the first State was violated (which will normally

constitute a violation of the public law of the first State), whatever right the individual might have in the object under the applicable private law. We are of the view that the draft Convention should, by a reservation clause, permit a State to opt to ratify one part of the Convention only.

2. As the draft Convention requires special treatment for objects characterised as “cultural objects” under the Convention, the scope of the Convention must be defined as clearly as possible. In this connection, a proper balance must be maintained between the need to protect cultural objects and the need to protect private property rights and free trade. Moreover, in respect of a request by a State for the return of an illegally exported cultural object, as this is a new cause of action created by the Convention, we consider it very important to clarify exactly what legal implications the request has regarding the rights and obligations of the parties concerned. The following comments are offered without prejudice to our final position on the draft Convention.

## Article 1

3. According to paragraph (a) of Article 1, the Convention applies to stolen cultural objects only when they have been removed from the territory of a Contracting State. We are in favour of the approach of limiting the Convention’s application to stolen cultural objects with some connection with a Contracting State. However, the connection should be designation by a Contracting State as a cultural object, as indicated in 5 below, and not the fact the object has been removed from the territory of a Contracting State, as in the present text. The present paragraph (a) of Article 1 gives rise to the following problems: First, given the present wording, it is difficult to understand why the Convention should not be applicable to cultural objects stolen in and removed from the territory of a non-Contracting State, when such cultural objects are present in the territory of a Contracting State. Second, there can be little need for an international instrument of this kind to protect a cultural object that was stolen in a State and, whether or not once removed from its territory, is now located in the same State. With a view to striking a balance between, on the one hand, the idea

that theft is to be condemned under all national laws and the need to exclude purely domestic situations from the scope of the Convention on the other, it is suggested that the words “removed from the territory of a Contracting State” in that paragraph be replaced by the words “which are located in a Contracting State and were stolen outside the territory of that Contracting State.”

In addition, as indicated in 5 below, it is our view that this Convention should apply only to cultural objects designated as such by a Contracting State.

4. The meaning of the words “an international character” in the *chapeau* of Article 1 is not clear. It is not appropriate to use so vague a term in defining the scope of the Convention. Although paragraph 22 of the Explanatory Report by the Secretariat suggests that it is expected that the case law in different jurisdictions will work out a uniform notion of “an international character”, we consider this too optimistic, especially as there is no supreme court with mandatory jurisdiction at the international level to unify interpretation of this Convention. The words “an international character” should, therefore, be deleted.

#### *Article 2*

5. Since the definition of a cultural object is a key notion of this Convention, it is important that the definition contain a clear criterion for distinguishing cultural objects deserving the special protection of the Convention from other property. Also, as we consider it neither necessary nor appropriate for this Convention to oblige a Contracting State to protect cultural objects of non-Contracting States, the application of this Convention should be limited to cultural objects of a Contracting State. The notion of cultural objects in this Convention should, therefore, be defined in such a way that only those cultural objects designated by a Contracting State will be protected by the Convention. On the other hand, however, there seems to be a need to avoid the designation requirement being abused. As is indicated in paragraph 36 of the Explanatory Report, it should be possible for other Contracting States to have some degree of discretion regarding recognition of such designation. Accordingly, we suggest that designation by a Contracting State should be regarded

only as a minimum requirement triggering application of the Convention, not something depriving a national court seized of a claim for the restitution or return of a cultural object of discretion with regard to deciding on the merits of the case whether or not the object in question really deserves special protection under the Convention. In short, the definition of cultural object in Article 2 should be composed of both substantive requirements, as in the present text, and a formal requirement of designation by a Contracting State. Article 2 should, therefore, be modified as follows:

#### *(Article 2)*

1. For the purposes of this Convention, cultural objects are those which

(a) have been designated by a Contracting State as cultural objects at the time when they were stolen or when they were exported contrary to its law regulating the export of cultural objects because of their cultural significance; and

(b) (present text of Article 2 unchanged)

2. The designation as a cultural object referred to in paragraph 1 (a) shall be effected in writing by the competent authorities of a Contracting State in accordance with its domestic law.

3. Each Contracting State shall, at the time of the deposit of its instrument of ratification, acceptance, approval or accession, or at a later date, inform the depositary of this Convention of the name(s) and address(es) of the authority (authorities) competent to designate a cultural object in accordance with paragraph 2.

#### *Article 3*

6. Paragraph 1 of Article 3 does not address the question of who is to be entitled to claim restitution of a stolen cultural object under this Convention. If, as appears from paragraph 43 of the Explanatory Report, the answer to this question is to be left to the rules of private international law of Contracting States, we fear that this article might give rise to disputes over the

interpretation of the Convention, as there is no guarantee that a right in movable property established under the law of one State (usually the State in which a cultural object was stolen) will necessarily be recognised by the law of another State (usually the State where the cultural object is currently located), given the differences in private law (including private international law) among States. Hence, if it is not possible for this Convention to unify substantive private law as to the question of who is to be entitled to bring such a claim, there is a strong necessity for this Convention at least to provide rules for determining the applicable law for settling the question. In our view, the following are two possible approaches:

*(Alternative 1)*

The question of who shall be entitled to bring a claim for restitution of a stolen cultural object shall be governed by (the law of the State in which the cultural object is located) (the law of the State in which the cultural object was stolen).

*(Alternative 2)*

The question of who shall be entitled to bring a claim for restitution of a stolen cultural object shall be governed by the rules of private international law of the State in which the claim is brought.

7. Likewise, if it is not possible to have a unified definition of “theft” in this Convention, then there should at least be rules for determining the applicable law for defining the notion of “theft” in a given case. In our view, the rules should be the same as those for determining the applicable law to govern the question of the person entitled to bring a claim for restitution of a stolen cultural object.

8. Paragraph 2 of Article 3 should be deleted for the following reasons:

(1) An object which has been unlawfully excavated could be dealt with adequately by the provisions on the return of illegally exported cultural objects in Chapter III, as each State is free to impose export

restrictions on unlawfully excavated cultural objects.

(2) Regarding lawfully excavated and unlawfully retained objects, it is unnecessary to create such a category, as this Convention is already applicable to lawfully excavated cultural objects that are either stolen or illegally exported. Furthermore, if “unlawfully retained objects” are also deemed to have been stolen, demarcating the scope of this Convention by the word “stolen” will become impossible, as the notion of “unlawfully retained” is too broad.

9. As to the length of the short limitation period provided in paragraph 3 of Article 3, we are of the view that a period of three years is appropriate, as one year is too short for a private person to bring an action in another State for the return of a stolen cultural object. For an absolute limitation period, thirty years would be preferable to fifty years in the interests of avoiding placing a possessor in an uncertain legal situation too long and of ensuring the safety of transactions.

10. As regards paragraph 4 of Article 3, we are opposed to the idea that a claim for restitution of a cultural object stolen from a public collection will not be subject to any prescription, for the same reason as mentioned in paragraph 9 in respect of the absolute limitation period. An absolute limit of less than 75 years would be appropriate. At all events, a “public collection” should be limited to one so designated by a Contracting State. The present draft definition of public collection is too vague to justify special protection under the Convention for cultural objects belonging to the category, as it contains such ambiguous terms as “substantially financed by a Contracting State” or “a non-profit institution which is recognised by a Contracting State (for example, by way of tax exemption) as being of importance”. It cannot be difficult for each Contracting State to designate what it considers public collections for the purpose of this Convention, as the very notion of “public collection” implies its public nature.

*Article 4*

11. Paragraph 1 of Article 4 gives the right to “fair and reasonable compensation” only to a *bona fide* possessor of a stolen cultural object who exercised due

diligence. Paragraph 60 of the Explanatory Report states that the question of what is “fair and reasonable compensation” is left to the discretion of the judge. We consider it appropriate to guarantee all *bona fide* possessors such compensation. In our view, however, in addition to such compensation, the possessor should have the right to recover from the claimant what he has spent for the preservation or repair of the cultural object, where and to the extent permitted under applicable law, irrespective of whether or not the possessor knew or ought reasonably to have known that the object was stolen. Accordingly, we suggest that the following new paragraph be added to Article 4:

*(New paragraph (4))*

Without prejudice to Article 4 paragraph 1, the possessor of a stolen cultural object required to return it shall be entitled at the time of restitution to reimbursement by the claimant for what he has spent for the preservation or repair of the cultural object.

12. Where the possessor of a stolen cultural object is entitled to payment by the claimant of fair and reasonable compensation and/or, as suggested above, reimbursement for what he spent for the preservation or repair of the object, the possessor should be permitted to refuse to return the cultural object until he has received such compensation and/or reimbursement. In the kind of situation to which this Convention is intended to apply, where the claimant and possessor will normally be in different countries, it will be all the more important to recognise such a right of refusal on the part of the possessor, as it would in practice be difficult for the possessor to enforce his right to compensation and reimbursement against a claimant in another country after restitution of the object.

*Article 5*

13. As already mentioned, a request in accordance with Article 5 is a new cause of action created by the Convention. While fully supporting the idea of creating such a new legal regime to prevent illegal trade in cultural objects, we consider it necessary to clarify the legal effect of the request on the ownership of the possessor of a cultural object. Assuming the case

where the possessor is also the owner of the cultural object under applicable laws, if the legal consequence of the request is to deprive the possessor of his ownership of the cultural object, “fair and reasonable compensation” under Article 8 should be at the very least the price he paid for it. On the other hand, if the legal consequence of the request is to be limited to the physical return of an illegally exported cultural object to the territory of the requesting State, without affecting the question of ownership, there should be a clear provision to that effect. For instance, the following paragraph could be added to Article 5:

*(New paragraph)*

The effect of a request for the return of an illegally exported cultural object under this Article is limited to its physical return to the territory of the requesting State.

14. Paragraph 2 of Article 5 has the effect of obliging the court or other authority to order the return of the object if the requirements are satisfied. The Convention, however, should not oblige the court to arrive at a specific judicial decision, as, in accordance with the principle of the separation of powers, the courts must be independent in order that they may judge fairly and impartially whether or not a request for return is appropriate. Therefore, as a matter of drafting, requirements (a) and (b) and the words “outstanding cultural importance” in this paragraph should be made requirements for the request in paragraph 1. This paragraph should, therefore, read as follows:

*(New paragraph (2))*

The requesting State shall be required to establish that the removal of the object from its territory significantly impairs one or more of the following interests:

((a) to (d), the last line of the present text unchanged.)

15. As a matter of drafting, sub-paragraph (b) of paragraph 1 of Article 5 is inconsistent with paragraph (b) of Article 1, since the latter limits the scope of application of this Convention to those cultural objects stipulated in sub-paragraph (a) of paragraph 1 of

Article 5 in respect of illegally exported cultural objects.

16. Sub-paragraph (c) of paragraph 1 of Article 5 should be deleted for the same reason as stated in 8 above in connection with paragraph 2 of Article 2.

17. As to the limitation period for requesting the return of an illegally exported cultural object (paragraph 4), three years for a short period and thirty years for an absolute period will be appropriate, for the same reasons as stated in 9 above.

#### *Article 6*

18. Paragraph 1 of Article 6 is not acceptable, on the same grounds as in 14 above, since it, too, would have the effect of obliging the court to arrive at a specific judicial decision. This paragraph should, therefore, be combined with paragraph 1 of Article 7 as a provision relating to cases where the provision of paragraph 1 of Article 5 shall not apply, and Articles 6 and 7 should be combined as follows:

#### *(New Article 6)*

(1) The provisions of Article 5, paragraph 1 shall not apply where

(a) the cultural object (same as present sub-paragraph (a) of paragraph 1 of Article 6),

(b) the cultural object (same as present sub-paragraph (b) of paragraph 1 of Article 6), or

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

(2) (same as present paragraph 2 of Article 7).

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

#### *Article 8*

19. We consider it necessary for the Convention to have a provision such as paragraph 1 of Article 8

concerning compensation for the possessor in the event of his being required to return a cultural object pursuant to a request under Article 5. As to the “fair and reasonable compensation” of paragraph 1 of Article 8, regard should be had to its possible linkage with the effect of a request under Article 5. As suggested above, if the request will have the effect of depriving the possessor of ownership, fair and reasonable compensation should be the purchase price paid by the possessor, in cases where he obtained the object by purchase. We consider that the property interests of the possessor of an illegally exported cultural object deserve greater protection than do those of the possessor of a stolen cultural object, because the possessor of an illegally exported cultural object has acquired the object from its legal owner by an otherwise perfectly legal transaction, but is, nonetheless, required to return it by virtue of this Convention because the export regulations of a foreign State have been violated.

20. For the same reasons as mentioned in paragraphs 11 and 12 above, the possessor of an illegally exported cultural object, whether or not he knew or should have known that the object was illegally exported, should be entitled to reimbursement for what he has spent for the preservation or repair of the object and should be permitted to refuse to return it until he has received fair and reasonable compensation and such reimbursement.

21. Paragraph 2 of Article 8 should be deleted, as it is to be feared that this paragraph deals with a matter that should be left to the judge evaluating the evidence, and, thus interferes with the judge’s discretion in the finding of fact.

22. Paragraph 3 of Article 8 is unnecessary, as it is always possible for the possessor and the requesting State to dispose of a cultural object by agreement between them without this paragraph. Paragraph 110 of the Explanatory Report states that paragraph 3 of Article 8 is intended to make it clear that adoption of this Convention does not entail the confiscation of private property. However, it is essential that it be stated explicitly what will be the effect of a request for the return of an illegally exported cultural object where no agreement is reached between the possessor and the

requesting State. If the effect is to deprive the possessor of ownership, it would appear that adoption of the Convention will entail confiscation of private property. It will, therefore, be more appropriate for the Convention to provide that the effect of a request for the return of an illegally exported cultural object under this article is limited to its physical return to the territory of the requesting State, as suggested in 13 above in connection with Article 5.

#### *Article 9*

23. In order to demonstrate that this Convention is not intended to go so far as unifying the procedural laws of Contracting States and that a claim or request under this Convention shall be pursued through the existing domestic legal system, it is desirable that the Convention contain a clear provision to the effect that a claim or request under the Convention shall be pursued in accordance with the procedural law of the jurisdiction State.

### **NEW ZEALAND**

#### **CHAPTER II – RESTITUTION OF STOLEN CULTURAL OBJECTS**

#### *Article 3*

##### *Paragraph (3) – Limitation of Action*

New Zealand would suggest the inclusion of the longer time frames of three and fifty years, respectively, in the Convention. While it is generally preferable to act on such claims expeditiously, there may be occasions where lack of reliable information and/or bureaucratic or legal requirements may mitigate against swift lodgement of a claim from the time when the claimant knew of the object's location. Similarly it could easily be fifty years (or more) after an object is stolen before its location becomes known to the dispossessed owner.

New Zealand would therefore prefer paragraph 3 to read:

“Any claim for restitution shall be brought within a period of three years 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 fifty years from the time of the theft.”

##### *Paragraph (4) – Limitation of action where the object is from a public collection*

New Zealand supports the inclusion of “shall not be subject to prescription” in this paragraph. This would allow future generations of a Contracting State to claim for restitution of an item in a situation where new information as to the object's whereabouts has come to light many years after its theft, and acknowledges the importance of public collections to a country's national heritage.

Paragraph 4 would accordingly read:

“However, a claim for restitution of an object belonging to a public collection of a Contracting State shall not be subject to prescription.”

#### **CHAPTER III – RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS**

#### *Article 5*

##### *Paragraph (1)(c)*

New Zealand supports the inclusion of this section. Retention of this section would protect States that are not covered by paragraph 1(a) because they do not have the necessary legislation controlling cultural exports, and which may not be covered under Article 3(2).

##### *Paragraph (4)*

As in Article 3(3) and (4), New Zealand would support the options providing the longer time frames for limitation of actions. It is therefore suggested that paragraph 4 read:

“Any request for return shall be brought within a period of three years 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 fifty years from the time of the export.”

*Article 6*

*Paragraph (1)(b)*

New Zealand would support the retention of the square-bracketed section. If an object had previously been unlawfully removed from the State addressed, it would seem just for that State to retain it. This section could also help to avoid the waste of resources where one successful claim is negated by a successful counter claim with the object ending up back with the original State addressed.

*Article 8*

*Paragraph (2) – Export Certificates*

New Zealand would support the retention of this section. In a number of states the system of export certificates forms the heart of cultural export legislation. By including this section, the Convention would give particular recognition to this system which is specifically dedicated to the prevention of the unlawful export of cultural objects. It would strengthen the legal position of such documents internationally and greatly assist Contracting States using such a system in successfully claiming for the return of objects.

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April 1995

**GERMANY**

The Federal Government supports the proposal to ensure the restitution of stolen cultural objects and the return of cultural objects exported in violation of existing laws regulating the export of cultural objects of national value by creating claims under international law.

With regard to stolen objects, this principle has long been applied under German law. Ownership of a stolen object cannot, in principle, be legally transferred to a third party (*cf.* section 935 (1) of the German Civil Code), meaning that the owner is legally entitled to claim restitution from the possessor (*cf.* section 985 Civil Code).

The Federal Republic of Germany understands the desire expressed by many countries to protect objects which are of cultural significance for the State of origin from transfer abroad by means of appropriate regulation. However, such limitations may seriously impair the legal trade in such items, which will increase in line with the scope of application of a restitution norm. In many cases a potential buyer will not, even after reasonable and appropriate research, be able to ascertain whether an object is of cultural significance for the country of origin (which is often not even known). For this reason, in case of doubt, he will in practice refrain from buying the object if comprehensive restitution regulations exist.

The Federal Republic does not pursue the goal of comprehensively limiting international trade in cultural objects. The global circulation of such objects also serves to promote understanding of cultural diversity and thus also to strengthen cross-border relations between peoples and nations.

Past experience has repeatedly shown that even far-reaching restrictions cannot prevent an exchange of goods that is undesirable for the State in question, but rather promote the formation of black markets. Such a development is more likely to be prevented if the duty to return is limited to objects of outstanding cultural significance.

I. The Federal Republic of Germany thus strongly supports a limitation of the planned Convention on the International Return of Stolen or Illegally Exported Cultural Objects in terms of time and content.

1. Time limitation

The Federal Republic of Germany deems it indispensable that the provisions of the Convention should not apply to cultural objects which were stolen or illegally exported prior to its entry into force. An express regulation to this effect was at first included in the draft Convention. This provision was deleted during the last meeting of the committee of governmental experts with reference to the Vienna Convention of the Law of Treaties, although the delegations still agreed that a retroactive application of the Convention should be excluded.

In the opinion of the Federal Government it is necessary to include a clear provision to this effect in the Convention. The Vienna Convention on the Law of Treaties does not exclude the retroactive application of treaties. The relevant Article 28 of the Vienna Convention does not represent a strict regulation, but merely an interpretative rule. However, the wording of the central provisions of Articles 3, 5 and 6 of the draft Convention in particular might lead one to conclude that the Contracting States wished a retroactive application. For example, Article 3(1) merely provides that stolen cultural objects shall be returned. However, there is no provision in the text of the Convention limiting such a return to cultural objects stolen after the entry into force of the Convention. Any possible conclusion from the drafting process (deletion of Article 10(1) of the earlier version) to the effect that the Contracting States had agreed to a retroactive application of the Convention during the final phase of negotiations must be avoided from the outset.

For this reason the Federal Government deems it necessary to include a provision along the lines of the former Article 10(1). The Federal Republic of Germany cannot accept the Convention if there is no guarantee that it cannot be applied to cultural objects which were stolen or illegally exported prior to its entry into force.

## 2. Limitation in terms of content

As far as the return of illegally exported cultural objects is concerned, the draft also goes too far in terms of content for the reasons already given. The Federal Republic of Germany has on several occasions suggested that the Convention be limited to objects of outstanding cultural significance and would like to take this opportunity to propose once again to the Conference the following wording of Article 5(2):

“(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 object concerned is unique or outstanding and thus of particular cultural importance for the requesting State.”

The Federal Republic of Germany will not be able to accede to the Convention if the scope of application

of Chapter III is not limited in this manner. Council Directive 93/7/EEC of 15 March 1993 likewise envisages claims for return only in the case of cultural objects of a certain age and value categories.

II. During the Conference a number of other difficult issues will have to be discussed. It thus seems to us to be useful to underline a few points in advance:

### 1. Time limits

The Convention's time limits should be set in accordance with Article 7(1) of Council Directive 93/7/EEC of 15 March 1993 governing the restitution of cultural objects illegally removed from the territory of a Member State.

This means, in the case of Article 3(3) and Article 5(4) of the draft, a relative time limit of one year and an absolute time limit of 30 years.

If the object is part of a public collection, the claim should be declared not subject to prescription.

### 2. Public collection

The definition of the term “public collection”, too, should be based on Council Directive 93/7/EEC of 15 March 1993 (Article 1(1), second indent); there are no reservations against the inclusion of religious communities.

### 3. Violation of excavation regulations

The provision envisaged in Article 5(1)(c) is superfluous. It is up to the acceding State to pass national legislation to prevent the export of archaeological objects.

### 4. Compensation

The level of possible compensation due to the possessor should be defined solely by the term “fair” in Article 4(1) and Article 8(1) of the draft, which is also employed by Council Directive 93/7/EEC of 15 March 1993 (Article 9, sentence 1). This will ensure that the court's decision is appropriate to the circumstances pertaining in the individual case. The formulation “fair and reasonable”, on the other hand, appears to us to be

less clear and to allow excessive room for interpretation.

The level of compensation will in principle need to be based on the price paid by the buyer. Compensation may be higher or lower according to the individual case, since the court must also take other factors into account, such as the objective value of the cultural object, the emotional interest of the buyer and the costs borne by him to preserve the object.

The requesting State's capacity to pay compensation is, however, not an appropriate criterion for assessing the level of compensation.

#### 5. Burden of proof

Germany does not object to the possessor of a stolen cultural object having to prove, in order to claim compensation that, in accordance with Article 4(1), he exercised due diligence when acquiring the object.

According to German legal perception, however, the burden of proof must lie with the requesting State if the cultural object has been removed from its territory in violation of its export regulations. Article 8(1) should be formulated to take account of this consideration.

If no agreement is reached with regard to this question, and should the Convention deliberately leave the question of burden of proof open in Article 8(1), this fact should be expressly stated. Article 9, paragraph 2 of Council Directive 93/7/EEC of 15 March 1993 contains a corresponding provision ("The burden of proof shall be governed by the legislation of the requested Member State").

#### 6. Presumptive effect in the absence of an export licence

Article 8(2) should be deleted.

In order to judge the question of whether the buyer knew or ought to have known that the cultural object was exported in violation of export regulations, the competent court will attribute to the lack of a required export licence the importance it deserves under the specific circumstances of the individual case when assessing the evidence.

However, Article 8(2) appears to go beyond this by denying to the possessor the right to invoke his good faith in the absence of an export licence. Thus the interested party would be liable to make enquiries which would hardly be reasonable. In addition, a certification system would be created which is unacceptable to Germany. Therefore we cannot agree to the proposed provision.

Finally, it must be assumed that there are many objects which were exported from the country of origin prior to the entry into force of the Convention and which thus remain freely tradable. Persons who seek to purchase a certain object for which an export licence was not required under current trade practice cannot, in particular with older objects, ascertain whether these were exported before or after the Convention came into force. In view of the sheer volume of the present international trade in artefacts, the lack of an export licence should not imply that the buyer acted in bad faith.

#### 7. Agreed alternative solutions

Article 8(3) is superfluous.

The requesting State and the possessor may also agree on other means of restitution than those laid down in the Convention. Thus there is no need for an express reservation in Article 8(3).

In addition, the provision gives rise to misunderstanding, as it allows the conclusion to be reached that the court of the State addressed must not only decide on the return of the cultural object but also on its legal ownership. For this reason the provision should be deleted.

#### 8. Jurisdiction

Article 9(1) of the Convention in its current version gives rise to considerable legal and practical problems.

Jurisdiction in the State in which the object is located is to be without prejudice to the other rules in force in Contracting States governing international jurisdiction. Thus a large number of cases may arise in different Contracting States. Not only the country of location, but also those where the defendant has his

customary domicile or where the wrongful act was committed may be considered as places of jurisdiction. As the Convention deliberately leaves open the definitions of claimants and defendants, the likelihood of parallel cases regarding the same object arising in different Contracting States is even greater. In view of a possible multiplicity of actions the handing down of conflicting judgments cannot be ruled out. In addition, fundamental questions regarding the recognition of judgments given in a particular place of jurisdiction (*ordre public*) remain open.

In Germany's opinion, therefore, a specific provision on jurisdiction, as envisaged in the draft, should be dispensed with. Should this prove impossible, the idea of as clear and simple a convention as possible would best be served by stipulating exclusive jurisdiction at the location of the object, or else at the customary domicile of the defendant. Based on the US delegation's alternative to Article 9 (Unidroit 1992, Study LXX – Doc. 29, p. 79), we propose the following (alternative) wording (only in case a jurisdiction provision is deemed indispensable):

“A claim or a request under this Convention may only be brought before the courts of the Contracting State in which the cultural object is located at the time of lodging the claim or request. Should the cultural object not be located in a Contracting State or should its location be unknown to the claimant, the latter may have resort to the courts of the Contracting State in which the defendant has his customary domicile”.

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May 1995

**(FRANCE AND UNITED STATES OF AMERICA)**

**FRANCE**

France favours the adoption of a Convention which would take its place among those legal instruments which effectively permit the struggle to be waged against the illegal traffic in works of art and *objets d'art*.

While in agreement with the objectives that are being pursued, France is of the belief that the rules governing the restitution and return of cultural objects, which to a significant degree depart from traditional principles, should be clearly circumscribed and implemented in the most uniform manner possible.

To this end, France would make the following observations:

I. Scope of application and definitions

(a) Cultural objects

The definition of “cultural objects” in Article 2 calls for certain reservations to the extent that it establishes a scope of application which is much too vague and uncertain.

In effect, the cultural objects which may be subject to restitution as they are defined in Article 2 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.

Such a scope of application would seem to be too broad and should be limited at least to the definition contained in Article 1 of the UNESCO Convention. There are in fact grounds for fearing a considerable increase in claims for the return of objects of minor importance as well as a deterrent effect on purchasers to the detriment of the market and international trade in works of art.

(b) Public collection

The definition of “public collections”, as it appears in square brackets in Article 3, must be reviewed in so far as it would be difficult to include within it material contained in archives and libraries. Those should be mentioned expressly.

II. Limitation of actions

It is proposed that Article 3 be amended so that the restitution of an object would not be subject to

limitation (or would be extinguished within a period of ten years to be fixed) in cases where that object belongs to a public collection.

With a view to ensuring consistency and unified rules, it would likewise be desirable to make provision for no limitation period in respect of the return of illegally exported objects belonging to public collections.

### III. Exceptions to the decision ordering the return of an object (Article 6)

Article 6 of the draft Convention gives rise to serious difficulties. In effect, it could create a serious risk of encouraging interference with the legitimate interests of the owners of cultural objects. This article seems to be neither necessary nor appropriate and could be deleted.

### IV. Article 8, paragraph 2

Article 8(2) should be deleted, as it establishes a presumption which is much too burdensome in respect of the knowledge of the possessor of the illegal character of the export of the object.

This provision in effect requires that any person should, before the acquisition of a cultural object, be aware of the geographical origin of the object, to enquire into the customs legislation of the country of origin and, where necessary, to check the existence of an export certificate also in respect of previous acquisitions.

### V. Article 10

Article 10 provides that a Contracting State may apply rules which are more favourable to the restitution or the return of an object (than those provided for in the Convention).

This is so even though the rules of the proposed Convention represent a delicate compromise between the protection of conflicting interests (the dispossessed owner and the good faith purchaser).

This article would also permit a State unilaterally to upset this balance in the sole interest of the dispossessed owner when authorising the return or the

restitution of a cultural object, for example by lengthening the limitation periods or by not applying the principle of compensation.

Such a provision could give rise to legal uncertainty and should be deleted.

### Explanatory Report

The notion of “fair and reasonable” compensation as it is described in paragraphs 60 to 63 of the Explanatory Report gives rise to serious concern on the part of France, as it is inconsistent with certain constitutional principles. It would therefore be desirable for those paragraphs to be revised or deleted.

### UNITED STATES OF AMERICA

The following are general comments and recommendations. The United States will put forward additional drafting recommendations and questions for clarification at the Conference.

#### *Preamble*

The preamble should recognise the purposes of the Convention as discouraging or ending illegal movement of cultural objects, as well as the preservation of cultural heritage. The preamble should state that the Unidroit Convention is not intended to replace or modify in any way the UNESCO Convention or enforcement actions taken thereunder. In this regard, the extent to which any article enhances the preservation of cultural heritage should be the litmus test for its inclusion in the Convention.

#### Definitions

The United States urges that the provisions of the Convention be further clarified and that important terms be defined sufficiently so that there is a common understanding of the scope of application – when a removal is “international” so as to trigger the Convention, who is entitled to bring a claim, etc. Since the Convention purports to establish private rights of action, it is important to agree on basic terms.

This is especially so, for example, for the definition of “cultural object”. The decision so far to have a very broad definition so as not to exclude any object which

some ratifying State may wish to cover, is so broad that the Convention may fail to secure acceptance. If special recovery rights are to be granted by treaty, ratifying States should know with reasonable predictability to what those rights attach. A core definition should first be agreed upon which is likely to be implemented, and which could then be expanded through bilateral relationships or otherwise. The United States has proposed the UNESCO Convention definition as one possibility, since it has already been accepted by a large number of States.

#### *Article 3*

##### *Paragraph (1)*

The provisions of Articles 5(1)(b) and 7(1) should apply to Article 3 as well.

##### *Paragraph (2)*

This sub-paragraph should be deleted, but retained in Article 5.

#### *Article 4*

##### *Paragraph (1)*

Modifications may be appropriate to avoid conflicts with procedural laws.

#### *Article 5*

##### *Paragraph (3)*

Delete as unnecessary or clarify its purpose.

#### *Article 6*

Delete the article. A provision in effect legalising otherwise proven illegal removals would undermine the Convention's basic purpose. Such an article would promote, not lessen, disputes. If it is retained, a right of reservation would be necessary, as well as the right reciprocally to deny recovery rights to claimants from any State party invoking this provision as to the reserving State's claimants.

#### *Article 8*

##### *Paragraph (2)*

Creating a legal presumption arising from the

presence or absence of particular documentation is not workable. In a number of customs régimes, export documents are one of a number of factors to be considered before any presumptions arise.

#### *Article 9*

##### *Paragraph (2)*

Choice of court should be subject to acceptance by the forum State court.

#### *Reinstatement of non-retroactivity provision*

After full consideration, we believe that the Convention should explicitly make clear that it does not deal with prior occurrences. The uncertainty created by the absence of such a provision could detrimentally affect acceptance of the Convention. If there is more than one standard as to the meaning of retroactivity, alternate standards can be set out in the form of permissible declarations.

#### *Additional issue*

#### *Application to objects acquired by military forces or civilian authorities in periods of hostilities or occupation*

The views of participating States should be clarified as to the application of the Convention to these circumstances. Such acquisitions may be subject to customary international law applicable to hostilities, or treaties and Conventions, such as the 1954 Hague Convention on protection of cultural property in times of war. In addition, standards for return have been negotiated by national archival authorities as to historical and governmental documentation, which should be taken into account.

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May 1995

#### **PAKISTAN**

#### *Article 3*

1. Under paragraph (3) of Article 3, it has been mentioned that any claim for restitution shall be brought within a period of [one year] [three years]

from the time when the claimant knew or ought reasonably to have known the location of the objects and identity of its possessor, and in any case within a period of [thirty] [fifty] years from the time of the theft. It is proposed that the period of [thirty] [fifty] years from the time of theft should be increased to one hundred years as many countries like Pakistan became independent a little less than fifty years ago and may not have sufficient time to present their claims for restitution.

2. Similarly, Pakistan has a reservation on the time limit of [seventy-five] years as mentioned under paragraph (4) of Article 3. In fact, there should not be any time limit on the claim for restitution of objects belonging to a Contracting State.

3. With regard to the text as mentioned under (i) of paragraph 4 of Article 3 which reads “Contracting State (or local or regional authority)”, it is suggested that the local or regional authority may file petitions only through the Contracting State.

#### *Article 5*

4. Article 5 mentions that those objects are to be returned to their origin which have either been illegally exported or taken from the country of origin to some other country by means of theft. There is no mention of

the countries of Asia, Africa and other States which have been under the subjugation of colonial rule. A paragraph should be added to return those objects and works of art which were taken away by the foreign/ colonial powers and which are still held by them.

#### *Article 6*

5. Article 6 provides that “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, (b) the object, prior to its unlawful removal from the territory of the requesting State, was unlawfully removed from the State addressed”. The objects may have a close connection with culture of the Contracting State because of historical events shared by both the countries but Pakistan maintains that the objects must be returned to the State of its origin or where they actually belong.

**COMMENTS BY INTERNATIONAL ORGANISATIONS  
ON THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN  
OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

CONF. 8/6  
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**UNESCO (\*)**

**Introduction**

UNESCO has been working hard for many years to hinder illicit traffic of all kinds in cultural objects. In particular, it is responsible for the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and has been seeking to have as many States as possible become parties to it. That Convention has not, however, solved the problem of illicit traffic to date, although it has certainly raised awareness of the problem and led to some changes of attitudes in receiving countries, even where they are not party to the Convention.

In 1984 UNESCO asked Unidroit (the International Institute for the Unification of Private Law) to work on the rules of private law applicable to illicit traffic in cultural objects in order to complement the 1970 UNESCO Convention. UNESCO was concerned to improve the working of the 1970 Convention in three ways:

(i) the 1970 Convention raised, but did not solve, a number of important issues of private law (such as the impact on existing rules of national law concerning the protection of the *bona fide* purchaser) for which, it could be argued, UNESCO, strictly speaking, has no mandate. To make the Convention fully effective there was a need to have issues of private law in national systems (not only rules such as the degree of care which should be taken by a purchaser of cultural objects if he or she were to be considered *bona fide*, but also questions such as limitation periods for action

and exceptions for “public policy” in the national legal system) dealt with by an international body with expertise in private law;

(ii) the 1970 Convention has a very general obligation (Article 3) on States Parties to regard export and theft of cultural objects contrary to national laws adopted by States Parties under the Convention as illicit. This is followed by specific obligations restricted to specified categories of materials (inventoried objects stolen from museums or similar institutions (Article 7); archaeological and ethnological materials of a State whose cultural patrimony is in jeopardy (Article 9)). This flexibility (or ambiguity) has led to diverse interpretations of the Convention, and, in some cases, to reluctance to adhere to it. It was felt that a supplementary instrument, equally specific as to stolen and as to illegally exported cultural objects, would render the obligations of States parties clearer and respond to the sensibilities of States which felt that the 1970 Convention was not sufficiently precise;

(iii) UNESCO was concerned to ensure that dealers and collectors take responsibility for inquiring into the origin of the objects which they handle.

Unidroit was in fact familiar with the problems of unifying law concerning the transfer of movables as it had published a draft Uniform Law on the Protection of the *Bona Fide* Purchaser of Corporeal Movables in 1968. This draft was the result of work initiated in 1962 by a Working Committee constituted by Unidroit. The draft was submitted to the member State of Unidroit for comment. In the light of their observations a Committee of Governmental Experts convened by Unidroit had re-examined the draft and revised it in several places. The draft, now known as the draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB) was finalised in 1974. However the draft was never

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(\*) The detailed annexes to the UNESCO comments (CONF. 8/6) are available from the Unidroit Secretariat.

adopted. The difficulties of unifying the law in this area were described by Mr Sauveplanne thus:

“The topic governed by the present draft is dealt with very differently in the law of the various countries. While the large majority of continental countries base themselves on the principle of the protection of the transferee in good faith, other legal systems and in particular the Common Law systems, are, on the contrary, based on the opposing principle of the safeguarding of the rights of the dispossessed owner. However, in neither group is the basic principle rigorously applied. The systems which are based on the principle of the protection of the transferee lay down conditions for this protection which often seriously limit its efficacy. On the other hand, the systems which are based on the principle of maintaining the right of the dispossessed owner also provide exceptions which considerably limit the scope of the principle. These conditions and exceptions vary from country to country. On the whole, the protection given to the transferee in good faith is sometimes extended to all acquisitions, whatever the reason for the owner’s dispossession; apart, however, from a few exceptions, most civil law countries exclude the acquisition of movables of which the owner was dispossessed by loss or theft. As for the legal systems which protect the rights of the dispossessed owner, the transferee in good faith is nevertheless protected in certain well-defined cases. In Common Law countries most of these exceptions to the basic principle have been introduced by legislation.”

Although this text (LUAB) was not finally adopted for all categories of goods, UNESCO saw it as a useful model for the protection of cultural property, since there was widespread opinion of legal experts that in this area at least, a change of the existing rules protecting an acquirer as against an original owner, which in effect facilitated the illicit trade, should be made.

After UNESCO’s request to take up private law issues relating to the protection of movable cultural heritage, Unidroit began by preparing two expert

reports <sup>(1)</sup> on the subject. Subsequently, three meetings were held, in 1988, 1989 and 1990 of a Unidroit study group which prepared the text of a Preliminary Draft. This study group comprised legal experts from various legal systems and from “exporting” as well as “importing” countries, including experts with special experience in illicit traffic and legal trade in cultural objects, and included two consultants to UNESCO.

The text which the group prepared was studied at four sessions of a Unidroit committee of governmental experts held in Rome in May 1991, January 1992, February 1993 and September-October 1993. At the best attended meeting 53 States were represented and altogether some 74 States took part in one meeting or another. The governmental experts discussed the complex of problems raised by legal techniques which would restrain illicit traffic, and the particular solutions suggested by the study group.

The fourth session of the committee of governmental experts settled the text which is now to be studied by the diplomatic Conference. The text represents a compromise of diverse positions between legal systems based on very different principles. One critical issue which will have to be settled by the Conference is that of the length of time within which claims can be made (prescription/imprescriptibility) and whether longer periods should be allowed for certain special categories of cultural object. Other difficult issues in the discussion were the definition of cultural property and the breadth of application of the Convention.

The draft Convention, if finally adopted, will not affect the legal status of items transferred before its entry into force. Claims for those objects, if not subject to the 1970 UNESCO Convention (now in force for 81 States), will still have to be resolved through bilateral negotiation or through UNESCO’s Intergovernmental Committee for Promoting the Return of Cultural

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(1) Reichelt, G. “International Protection of Cultural Property” (1985) *Uniform Law Review*, I, 43; “Second Study Requested from UNIDROIT by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property in the Light also of the Comments Received on the First Study” (1988) *Uniform Law Review*, I, 53.

Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.

The new draft Unidroit Convention is free of the ambiguities which some have found in the interpretation of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, while leaving a margin of appreciation to those applying the Convention which should ensure sufficient flexibility in its operation.

It applies to all stolen objects (Article 3) of cultural significance (Article 2) whether in private or in public hands, whether taken from a collection or an individual item. In that sense it is wider than Article 7 of the UNESCO Convention.

It applies to illegally exported objects (Article 5) of the same kind of significance (Article 2) whose removal significantly impairs an important cultural interest (Article 5(2)). In that sense it is narrower than Article 3 of the 1970 UNESCO Convention but much more specific, and it provides a procedure applying to important illegally exported objects other than ethnographic and archaeological materials mentioned in Article 9 of the 1970 UNESCO Convention.

Furthermore, the obligations of the State addressed are more detailed, and should be easier and more straight-forward for requesting States to put in operation, since States Parties to the 1970 UNESCO Convention have adopted differing means of implementing Article 9 of that Convention.

The provisions of the Unidroit draft requiring diligence do not appear in the 1970 UNESCO Convention. This is a key provision, for it is intended to alter the widely accepted practice among collectors and dealers of not rigorously checking the provenance of objects. It applies equally to stolen or illegally exported objects and is sanctioned by the loss of the right to any compensation to a person in possession of such an object. In this respect the Unidroit draft, if adopted, could have an important impact for the future on the flow of illegally acquired cultural objects.

The Unidroit draft Convention thus deals with some of the most difficult issues remaining doubtful or

unresolved after the adoption of the 1970 UNESCO Convention.

For the 81 parties to that Convention, it represents a step towards greater protection of their movable cultural objects.

For important market States which have expressed their support for the principles of the UNESCO Convention but have not become party to it, the Unidroit project provides an opportunity to achieve an instrument for the same purpose in a form which should not present difficulties of interpretation.

UNESCO welcomes the completion of the draft text of Unidroit as a further contribution to and strengthening of the fight against illicit trade in cultural objects and will continue to co-operate closely with Unidroit for its adoption.

A compromise

It is important to recall that the draft produced by the study group responded to a serious problem recognised by all, but had to reconcile legal systems with very different principles on the acquisition of property as well as national interests of opposite tendency. The only possible way to achieve a solution was by compromise.

All States stand to gain from reaching an agreement, but such an agreement will only be reached if each and every one makes an effort and sacrifices some points which are important to it.

Most Continental European States, which are not at present Party to the UNESCO Convention, are being asked to make a fundamental change by returning stolen cultural property and some illicitly exported cultural objects rather than protecting the *bona fide* purchaser (as defined previously in their national systems); in return they will also profit by being able to claim cultural property stolen or illegally exported from their territory. Private owners in those countries will have a direct right of recourse to the court or other appropriate tribunal (under the UNESCO Convention, the State itself must take action).

Although Common Law States will be able to retain their rules on the return of cultural property

(which are more generous than those in the draft), they will need to look to their rules on the time restrictions of claims. They would however be able to claim important cultural objects which have been exported contrary to their export control as well as stolen objects which have been previously irrecoverable because they are in the hands of a *bona fide* purchaser in a State which gave protection to them. Thus their museums and private owners will be able to recover, by a direct right of action, stolen cultural property from possessors in jurisdictions which currently protect the *bona fide* acquirer.

“Exporting” States will make major gains by an easier process for recovery of all stolen goods and the most important illegally excavated objects at the price of not covering all illegally exported objects as they would like. It will, however, still be open to them to enter bilateral agreements on categories of illegally exported cultural objects which are not covered by the Unidroit scheme, or to negotiate the return of individual objects with holding countries.

In adjusting the conflicting interests of States, e.g. in maximum freedom of trade and in protection of endangered cultural heritage, as well as the varying legal approaches, compromise was essential. While it is understandable that the line of compromise can be moved, it is quite clear that a failure to reach some middle point between the different views will prevent the emergence of a Convention at all.

As against this, the benefits of the good, if not perfect, text which can be achieved have to be weighed:

- the practice in the art trade whereby little information is given and few questions asked will be reversed;
- illicit traffic should become, therefore, less attractive to its perpetrators;
- all stolen cultural objects will be able to be recovered between Contracting States;
- the current refusal of art market countries to apply export controls (except in limited cases between States of the European Union) would be changed for those States most in need of protection for their cultural heritage.

These are advantages which make a significant advance on the present legal situation and should not be lightly given up, neither because of preferences for a different form of drafting, nor because the draft does not go as far in substance as a State might wish.

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It is important to bear in mind that this is a convention of private law: proposals to require the establishment of administrative units or to create duties of the administration beyond those which would normally apply in the support of its courts are not appropriate in this context.

Furthermore, the constraints of drafting international instruments must be considered. Techniques of drafting which are appropriate in national legal systems may well create problems for other States if used in an international instrument. Statements of principle can be translated into national law by legislation which conforms to the national standard.

(1) Amendments to the text should avoid complicating it: where a simpler formulation will achieve an adequate result additional provisions should be avoided, as these often cause additional problems of interpretation and application.

(2) The Convention is not self-executing. Matters that can be left to domestic law to settle (e.g. procedural matters) should not be dealt with in the Convention. It will be difficult to reach agreement on such matters in view of the variety of procedural systems current, nor is it necessary if a State undertakes to adopt the substantive provisions by whatever procedural means are available to or necessary for it.

(3) The diplomatic Conference should work towards a workable international compromise instrument which will attract a large number of participant States. The diplomatic conference is not intended to produce merely a statement of principle, which can be much more economically done in an academic forum, but a legal instrument which will improve the existing legal situation in respect of the recovery of lost and stolen cultural objects. In drafting such an international instrument, regard

must be had to the legal imperatives of other States (their constitutional requirements, legal traditions and legal philosophy) and the political feasibility of the changes which they will be required to make.

(4) The instrument should not seek to do too much: after 30 centuries of relocation of cultural objects in peace and war, one instrument cannot turn the tide of history. What this instrument can do is take one or two clear steps to reversing the current tide of theft, illegal excavation and illegal export of cultural objects which will result in their return by practical legal steps. The draft is based on a simple triggering fact: theft or illegal export after the date of entry into force.

#### COMMENTARY ARTICLE BY ARTICLE

##### Title

Considerable discussion took place in the study group on the title. One proposal was that the Convention should use the term “cultural property”. This was objected to on the ground that the term “property”, at least in English, implied commercial elements such as the power to alienate, exclude and exploit which were inappropriate to, and in many systems untrue of, cultural items. The counter-proposal to use the phrase “cultural heritage”, despite its widespread use in other international instruments such as the *1972 Convention concerning the Protection of the World Cultural and Natural Heritage* or the *1992 European Convention on the Protection of the Archaeological Heritage*, was objected to as having emotional overtones. The neutral term “cultural objects” was therefore used as a compromise solution.

“on the international return of”

While some States wanted this phrase included in the title, others did not. UNESCO considers that it is not accurate, since the Convention uses the term “return” only in relation to Chapter III (illegally exported cultural objects) and not Chapter II (stolen objects) for which it uses the term “restitution”. It should be noted that the word “restitution” is currently used in Article 1(a), 3(3) and 3(4), 4(1), 9(3) and 10 and the word “return” in Articles 1(b), 5(1), 5(2) and 5(4), 6(1), 7(1), 8(1), 8(3) and 8(4), 9(3), and 10.

The twentieth session of the UNESCO General Conference in 1978 made a distinction between the notions of “return” and “restitution” which is embodied in the title and the Statutes of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.

The term “restitution” should be used “in case of illicit appropriation”, i.e. when objects have left their countries of origin illegally, according to the relevant national legislations and with particular reference to UNESCO’s 1970 Convention on the subject.

The term “return” should apply to cases where objects left their countries of origin prior to the crystallisation of national and international law on the protection of cultural property <sup>(2)</sup>.

In the context of the draft Unidroit Convention, therefore, an alternative solution would be to use “restitution” throughout. However a current of opinion among experts has been that it would be useful to reserve “restitution” for cases where an object is returned to its owner after theft in contrast to the “return” of an object to its country of origin, which may in fact not be returned to its owner.

UNESCO proposes that the phrase “international return of” be omitted as it is not necessary, the scope of application being made clear in Article 1. If, on the other hand, this phrase is retained, then the word “restitution or” must be inserted after “international”. More accurately the title would read “UNIDROIT Convention on the Restitution of Stolen and the Return of Illegally Exported Cultural Objects”. This is very clumsy, and the shorter title, simply “UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects” should be preferred.

##### Preamble

The Preamble has not yet been drafted. UNESCO wishes to propose that the following considerations be kept in mind:

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(2) “Guidelines for the use of the ‘Standard Form concerning Requests for Return or Restitution’,” UNESCO Doc. CC-86/WS/3, p. 11.

- a statement of the importance of cultural exchanges
- a statement as to the severe damage done by illicit traffic (e.g. clandestine excavation, loss of material culture from its community of origin etc.)
- a statement that States parties are prepared to make significant changes in their national law to ensure the conservation, security and accessibility of cultural objects by ensuring their return in cases of theft or illegal export
- a statement that the adoption of provisions to control the illicit trade in the future in no way legitimises thefts or illegal exports which have taken place before its adoption.

The following draft may serve as a basis of discussion:

#### PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

CONVINCED that the preservation and dissemination of culture is of the utmost importance to the welfare of humanity and the progress of civilisation,

NOTING that legal exchanges by way of sale, gift, exhibition or reciprocal transfer are of the highest importance,

DEEPLY CONCERNED by the severe damage being caused to the cultural heritage of all peoples and of humanity as a whole by the illicit trade and, in particular, by the loss to their owners by theft of all kinds of cultural objects,

DEPRECATING the loss of historical and other scientific evidence because of the damage to the stratigraphy of archaeological sites caused by random and unlawful excavation and the loss to traditional communities of cultural objects in use by them,

AWARE that existing rules of national law which protect the title of an acquirer of a cultural object even where no inquiry has been made as to the provenance of the object facilitate the illicit trade in cultural objects,

CONSCIOUS that the general adoption of rules ensuring the restitution of stolen cultural objects to their owners and of illegally exported cultural objects to the countries from which they have been illegally exported would assist in hampering the illicit trade and in separating the licit from the illicit trade,

BUT NOTING that the adoption of provisions to control the illicit trade in the future in no way legitimises thefts or illegal exports which have taken place before their coming into force,

HAVE AGREED as follows:

#### CHAPTER I – SCOPE OF APPLICATION AND DEFINITION

##### *Article 1*

“claims of an international character”

It is not clear that this would allow a claim in the situation of *Winkworth v. Christie’s Ltd.* <sup>(3)</sup> where the cultural objects of an English collector were stolen from him and sold in Italy to an Italian who, some two years after the theft, offered them for sale in Christies, London. Winkworth’s claim for recovery was unsuccessful. However, the present formulation would allow a judge some flexibility to hold such a case covered.

While some governmental experts thought that such a situation should not be covered, there are good reasons to ensure that, where an international transaction has taken place, the Convention rules should apply. If they do not, there will be an incentive for dishonest dealers to “launder” goods through any convenient foreign jurisdiction and return the goods with impunity to the jurisdiction where the original owner was deprived of them. The study group had not suggested that the draft Convention be limited to international situations. Although this limitation was adopted by a clear vote of the governmental experts, it has several disadvantages:

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<sup>(3)</sup> The case report can be found in the English Law Reports [1980] 1 Ch. 496.

(a) it does away with the possibility of having uniform law on transactions concerning cultural objects (thus providing purchasers and dealers with two standards of diligence, depending whether the transaction is international or not);

(b) it creates the problem of defining what is an international transaction and

(c) it may appear unjust to the citizens of a State that its government provides better protection for foreign owners than for its own citizen-owners.

#### *Article 1(a)*

The use of the words “removed from” rather than the word “stolen” reflects a long debate over many sessions.

Firstly there was the question whether “stolen” would (or should) cover clandestinely excavated objects. While the legislation of some countries provides that these are stolen, that of others does not. In the event, a neutral term “removed” was used in both Article 1(a) and 1(b) so that no implication could arise in that respect.

The European Directive on the return of cultural objects unlawfully removed from the territory of a Member State covers goods “unlawfully removed from the territory of a Member State in breach of its rules on the protection of national treasures . . .”. This would appear to cover objects resulting from illegal excavations.

Article 15 of the European Directive provides:

“This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen”.

States of the European Community will need to study carefully the relationship between the two texts where illegally excavated goods are concerned. Differences between the two texts are likely to be the length of prescription (barring of action by lapse of time) (Article 7 Directive; Article 3(3) UNIDROIT); definition of cultural object covered by the legislation

(Article 1 + Annex of Directive; Article 2 UNIDROIT); likelihood of compensation (Article 9 Directive; Article 4 UNIDROIT). Any inconsistencies could be dealt with by a provision in the Unidroit draft that relations between States Members of the European Union would be handled in accordance with the Directive (i.e. by making an exception to the Unidroit provisions for cases between Union members).

For States outside the European Community there is no concern with the application of the EC rules, since the EC rules apply only to cultural objects which have been illegally removed from one country of the European Community to another and not to objects which have been illegally removed from countries outside that community.

#### *Article 1(b)*

The phrase “contrary to its law regulating the export of cultural objects because of their cultural significance” was the result of long negotiations.

Originally the text read “contrary to its law of export”. It was suggested that this would include simple customs infractions which had no relevance to the cultural significance of the object and where the cultural value of the object was, as it were, incidental to the breach of the law. Some experts argued that their States would not wish to accept that obligation.

Another interpretation was that this might mean that only laws on export (i.e. customs legislation) could be observed, whereas the relevant legislation was cultural heritage legislation.

The effort to avoid both these problems led to the use of the language now appearing in this article.

#### *Article 2*

The philosophy behind the definition in Article 2 was that there should be a general definition which applies generally to the whole Convention, but that this should be cut down in application to illegally exported cultural objects. The view of the experts in the study group was that there is a much wider agreement on the need to return stolen cultural objects than there is on illegally exported cultural objects. This corresponds to

UNESCO's experience in the administration of the *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Furthermore, it should not apply only to cultural objects classified by a State, but to all objects of cultural importance.

This situation was reflected in the original draft prepared by the study group by using an extensive definition which was applied without limitation in the case of stolen goods (Chapter II) and with restrictions in the case of illegally exported goods (Chapter III). The same effect could have been achieved by having an extensive definition within Chapter II and a restrictive definition in Chapter III. However some experts considered that it was not a good technique of drafting to have two definitions in the same instrument and they preferred to have a general definition which would be limited by the operative provisions of Chapter III.

During the meetings of governmental experts, some delegations wanted to add the word "outstanding" before the word "importance". This addition would have limited the application of Chapter II on stolen goods.

This would negate the most important principle of the draft Convention, which is to require ALL purchasers of cultural objects to be diligent in investigating provenance. If only some objects will need to be returned after theft, and only some require diligent inquiries into title, the present practice of wilful ignorance in the art trade will not be reversed.

Apart from not changing the present practice which facilitates illicit traffic, this addition would also not have assisted in the case of less important stolen goods, such as privately owned collections (like the Netsuke collection of Mr Winkworth) and locally important items (such as the mediaeval figure stolen from an English church which could only be repatriated from Belgium by compensating the *bona fide* possessor). It was the intention of the study group that all such goods should be returned (subject only to compensation where the possessor can prove diligent inquiry). This is particularly important to deal with the flood of thefts from small churches, local museums and private houses.

One delegation had suggested limiting the definition to objects over 100 years old. This would create an inconsistency with the UNESCO Convention and would unfairly penalise objects of ethnographic significance and modern art.

The combination of a wide definition with the provision in Article 3(1) that all such stolen objects are to be returned is probably the single most important legal step which could be taken against illicit traffic in cultural objects.

The study group spent a good deal of time examining the type of definition. While some would have preferred a more specific definition, it was not possible to find agreement on a specific formulation. It should be noted that the types of definition used in national legislation on the protection of the cultural heritage are most diverse: they may be classification, enumeration, categorisation, or a combination of these<sup>(4)</sup>. The majority felt that a more general definition was workable, was more appropriate in an international instrument and chose a formula which is very common in national legislations. It read

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

In view of the very broad disparity between national legislations in defining this concept, and the great variety of definitions in international instruments, it was felt unfruitful to try to pursue a detailed definition. However it was understood that the broad definition would have to be applied by the judges of States who would have to deal with applications for the return of cultural objects. It would therefore be in the hands of those who would have most interest in defining this concept fairly specifically and perhaps narrowly. While the more detailed enunciation of this definition would have been left in the hands of those who have to apply the Convention, it was nonetheless felt that judges would be sensitive to the cultural value

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(4) For a detailed discussion on types of definition of the cultural heritage see Prot, L.V. and O'Keefe, P.J. *Law and the Cultural Heritage: Vol. III - Movement* (Butterworths, London, 1989) pp. 26-30.

of an object in another society which was not so valued in his or her own. This has been the case, for example, of judges in societies of Western European culture when considering objects of cultural value to indigenous communities <sup>(5)</sup>.

Some delegations had proposed the addition of other adjectives such as “religious” or “natural” heritage. However, it was widely felt that such words were already included in the more general formula used, and that the addition of more words might result in the application of the interpretative principle *expressio unius exclusio alterius* (what is not specifically included is purposely excluded). One delegation pointed out that the legislation of his country used the phrase “antiquities and art treasures”. The meeting was agreed that the general phrase in the Unidroit draft would clearly include objects covered by such national expressions: it would be impossible and unnecessary to include all the different terms used in national legislation.

The general formulation, which reflected the national legislation of many countries, survived until the fourth meeting of governmental experts.

At this meeting one or two delegations still expressed their preference for a more specific definition. Although most preferred the study group formulation, an effort to compromise was made and it was decided to base the definition on the categories set out in the UNESCO Convention. UNESCO emphasises that if an enumerative definition is used, it is most important that it be based on the UNESCO categories, since many (and possibly most) States will be party to both the UNESCO and the Unidroit Conventions. (There are currently 81 States Parties to the UNESCO Convention, 41 of which have been involved in the Unidroit negotiations to date).

There is one very important difference in the definition in Article 1 of the UNESCO Convention. That definition reads

“For the purposes of this Convention, the term “cultural property” means property which, on religious or secular grounds, is *specifically designated by each State as being* of importance for archaeology, prehistory, history, literature, art or science . . .”

In view of the debate already described on the need to cover all stolen cultural objects (see above the first five paragraphs on Article 2), it was felt that the reference to specific designation by a State should be omitted in the definition in the Unidroit draft.

The Unidroit formulation is also important for the many countries where a great deal of cultural material is in the hands of private owners: no additional remedy to that given by national private law is given in the UNESCO Convention, but the provisions of Chapter II of the Unidroit draft will now oblige States to create such a remedy where it previously did not exist (e.g. where the *bona fide* purchaser is protected to the exclusion of the robbed owner).

The adjustment for the Unidroit Convention of the UNESCO definition by the exclusion of the reference to designation is therefore an important element in its acceptability.

To some extent the difference between the formulation which presently appears in the draft and the former more general definition is a difference in traditions of legal drafting. Whereas some systems are content to leave to their judges the application of general clauses such as previously used in the draft, others prefer more detailed regulation as in the present formula. If the general style (earlier) definition had been adopted, it could have been explicitly interpreted in implementing legislation in States which felt that their legal system would have difficulty in adjusting to this style of definition.

When it was decided to use the UNESCO definition, some delegations felt that its length would unduly unbalance the instrument as the definition was very long. The solution was that the definition in the 1970 Convention could be attached as an Annex for convenience. However, some States may find it difficult to accept reference to another instrument, especially, but not exclusively, if they are not parties to that

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<sup>(5)</sup> *F.G. Charrier v. Bell* 496 SO. 2d 601 (1986) (grave-goods) [United States]; *Onus v. Alcoa* (1981) 36 A.L.J. 425 (artefacts on traditional site) [Australia].

instrument. If this proves to be a problem, the inclusion of the categories directly in Article 2 would seem the only appropriate alternative.

## CHAPTER II – RESTITUTION OF STOLEN CULTURAL OBJECTS

The need to overturn the special protection of the acquirer of goods in certain circumstances was specifically legislated for by the Allied States in the Declaration of London of 1943 which expressly stated that dealings with property situated in occupied territories would be declared invalid

“whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected”.

In application of this Declaration, many countries, including those who were neutral in the war (Sweden, Switzerland and Portugal) adopted legislation and many important cultural objects were returned. (In Switzerland and Sweden, in particular, this involved overturning the protection of the “good faith” purchaser).

The solution chosen by the Declaration of London was reflected during negotiations for the *1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention)*. The original draft text of that Convention included provisions for the return of cultural property which had been taken from occupied territories to the authorities of those territories. These provisions were subsequently relegated to a separate Protocol. The Protocol has been accepted by 74 States.

The 1970 UNESCO Convention on illicit traffic provides in Article 7 that returns of cultural property stolen from a museum or similar institution and appearing in the inventory of that institution should be subject to the requesting State paying “just compensation to an innocent purchaser or to a person who has valid title to that property”. This clause was equally applicable to States in three different categories:

(i) States whose law normally would entitle the acquirer to keep the object;

(ii) States whose law normally would entitle the original owner to have the object returned, but would have to pay compensation;

(iii) States whose law normally would entitle the original owner to have the object returned without having to pay compensation.

Some States in the first group may have had difficulty in accepting the UNESCO Convention, since it would be a significant change in their civil law, enshrined in a Civil Code and Constitution, and such a major change would need to be made by a Convention which focussed on private law, and not incidentally in a treaty whose primary focus was the public law aspects of illicit traffic. The provision was included primarily to enable States in the second group to become party to the Convention – few of the European States with important art markets have, however, done so. The United States, one of the States in the third group, has renounced its right to obtain compensation from States which undertake to return cultural objects stolen from its institutions also without compensation.

However, many expert studies since the date of the 1970 Convention have noted that the protection of the “good faith” purchaser generally facilitates the illicit trade and that the only way substantially to hinder the illicit trade in cultural property is to ensure the return of cultural objects to the original holder after a theft, even at the cost of changing the rule in many European legal systems protecting the *bona fide* purchaser of stolen goods (Chatelain <sup>(6)</sup>, Fraoua <sup>(7)</sup>, Rodotà <sup>(8)</sup>, O’Keefe and Prott <sup>(9)</sup>, Reichelt <sup>(10)</sup>). A change in the

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(6) Châtelain, J. Means of Combatting the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC (Commission of the European Communities), Doc. XII/757/76-E (1976) 114.

(7) *Le trafic illicite des biens culturels et leur restitution* (Editions universitaires, Fribourg) 195, 179.

(8) Rodotà, S. “Explanatory Memorandum” in Council of Europe, *The Art Trade* (1988) 8.

(9) *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, Paris) (UNESCO Doc. CLT/83/WS/16 1983, 141 pp. 126-130); in French as *Mesures législatives et réglementaires nationales visant à lutter contre le trafic illicite de biens culturels* pp. 53-58; in Spanish as *Medidas legislativas y reglamentarias nacionales de lucha contra el*

rule is not to prefer the solution of one legal system over that of another, but to choose the rule most likely to hinder illicit trade. For this reason, the study group chose to propose that every stolen cultural object should be returned and that compensation should only be available where the holder could prove that he had made diligent inquiry in order to avoid buying a stolen cultural object.

#### *Article 3(1)*

This provision has the clarity which befits a statement of principle. It should be noted in general that the draft Convention is to state principles: these will have to be implemented by detailed legislation in each jurisdiction in accordance with the principles of that legal system.

This was the version originally proposed by the study group. Efforts to improve it were held, in fact, to have made it more complicated. The addition of qualifying phrases to order to make the provision more precise created, in this as in many other provisions of the draft, complications which are removed if the more general principle is left unadorned. The intention can be clarified in a commentary; the mechanics of its operation will be the subject of legislation by each State.

#### *Article 3(2)*

This article was inserted to deal specifically with objects derived from clandestine excavations.

The study group draft had covered these in Chapter III in what is now Article 5(2)(a), (b) and (c). However some clandestinely excavated objects would fall under Chapter II since they could be proved to have been stolen from their owner, a State (where it claims ownership of the archaeological subsoil), or of an individual (excavator or landowner or finder in other systems of law).

The inclusion of Article 3(2) has destroyed the symmetry of this system. The difficulty in recovering

clandestinely excavated objects is not so much the difficulty of proving ownership, as the difficulty of proving which country the object came from and when. If these facts can be proved, clandestinely excavated objects could be recovered under either Chapter II or Chapter III. Proof by a State that a particular object has been illegally excavated on its territory can be difficult, especially of objects from a culture which spreads over several geographical boundaries.

The chief difference is the stricter degree of care required under Chapter II than under Chapter III. The study group draft had the merit of allowing recovery of clandestinely excavated objects when they could be proved to be stolen subject to the stricter duty of diligence, and leaving other clandestinely excavated objects to be recovered, where no offence against ownership could be proven, according to the provisions of Chapter III.

While Chapter II applies to all stolen cultural objects, no clandestinely excavated object would be left outside the protection of the Convention if clandestinely excavated objects which could not be proved to have been stolen were claimed under Article 5, since it would be evident that the removal of every clandestinely excavated object had impaired the interest of the physical preservation of the context of the object (Article 5(2a)), and the interest in the preservation of information of a scientific or historical character (Article 5(2c)). The nature of the object itself and of its removal would likely also bring into play the interest in the preservation of the object itself (Article 5(2a)) and the integrity of a complex object (Article 5(2b)).

It has been suggested that a separate Chapter could be devised to deal only with clandestinely excavated objects. UNESCO does not favour this proposal because it would create confusion. There are many objects which are clandestinely excavated which may not be known to be so, e.g. whether an object was part of grave-goods, part of a monumental complex or a freestanding object made for commercial purposes is in many cases not clear.

For the same reason it may be difficult to require a higher duty of care of a purchaser in respect of clandestinely excavated objects which have not been

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*tráfico ilícito de bienes culturales* pp. 53-57; *Law and the Cultural Heritage: Vol. III – Movement* (Butterworths, London) 1989, 648.

(10) 1988, 39, article mentioned above n. 1.

stolen. While a purchaser can clearly be required to investigate title, it may be considered unreasonable by some States for a purchaser to be required also to verify how an object entered the market, when this may not even be clear to experts.

After careful consideration of the alternatives, UNESCO proposes that the draft convention should retain the system of the study group.

*Article 3(3)*

“or ought reasonably to have known”

These words make the application of the provision somewhat easier, since it is very difficult to prove at what point and whether a claimant had knowledge. This phrase would leave it to the tribunal in the requested country to make a reasonable finding as to the publicity or notoriety of the acquisition and would need, of course, to take account of the presence of the original owner in another country.

While some government experts thought it very important that this phrase be included, others felt that, even if it were not, it was likely that judges in many countries would in any event apply their general rules concerning delay on the part of the claimant.

The length of the limitation period to be applied has been one of the most debated issues in the Convention. The present text is a compromise. The very short period (one or three years) was accepted only on the basis that it had to be shown that the plaintiff knew both the location of the object and the identity of its possessor. In earlier versions of the draft, this period was longer, but time started to run as soon as the plaintiff knew either the location of the object or the identity of the possessor.

The technique of using two limitation periods is also a compromise solution. Some experts wanted a single, very long limitation period, or claims unlimited by time. Others wanted very short periods, but measured from the time when the claimant had sufficient information to act. A number of experts felt strongly that there needed to be some finality in liability for claims, even if the claimant had not had information at an early stage. The short period, if measured from the date of the claimant’s knowledge or

from the date of demand for return and refusal (as decided by certain judges in cases in New York <sup>(11)</sup>) would in fact allow claims after some decades. However, the absolute limitation period would prevent uncertainty of title hanging forever over significant numbers of objects in the art trade.

The 1970 UNESCO Convention does not include reference to any limitation period. However, it should be noted that the claims made under that Convention are to be made by States to other States Parties and not directly against individuals. In general, therefore, such States would apply their own rules in administering the Convention e.g. where the implementing legislation has provided that import of a cultural object protected by foreign export legislation is a customs offence (as is the case in Australia, Canada and the United States), the limit imposed on prosecution would be that generally applicable to customs offences in that jurisdiction.

The London Declaration (see above) also included no reference to a limitation period, and at least one commentator thought that “for the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered” <sup>(12)</sup>.

Finally, it should be noted that the recent revelation of considerable amounts of cultural property missing since the Second World War has reactivated discussion about the need to provide for the return of such property even after many decades of concealment or non-identification. It would seem appropriate to take this emerging consensus into account in setting limitation periods.

*Article 3(4)*

Article 3(4) did not appear in the study group draft, nor in early drafts of the governmental experts. It was introduced after the acceptance of a similar article in

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(11) See the cases of *Menzel v. List, Kunstsammlungen zu Weimar v. Elicofon* and *Solomon R. Guggenheim Foundation v. Lubell* (demand and refusal) and *O’Keefe v. Snyder* (date of knowledge) summarized in the Annex hereto.

(12) Hall, A.R. “The Recovery of Cultural Objects Dispersed During World War II” 1951 *Department of State Bulletin* (United States) 337 at 339.

the European Directive. However, it raises a number of problems.

In the first place it discriminates against those States where museum collections are basically in private hands. The provision which now appears in square brackets was therefore proposed in order to cover those kinds of private museum institutions. However, some members of the working group could not accept this proposal, on the ground that they had not accepted it in the European Directive, even in relation to their own private museums, because it constituted an unacceptable widening of the exception to the general rule on time limitation of claims.

In the second place Article 3(4) discriminates against the cultures of indigenous peoples, some of whose most important cultural material, on which their cultural survival even depends, is not kept in museums. This is therefore a major problem for States with indigenous peoples, and some of these States have constitutional duties to protect their rights. It is also a problem for UNESCO, which cannot endorse a text which discriminates against indigenous peoples. It runs contrary to general developments in the United Nations which are to enhance protection of these peoples (The Decade for Indigenous Peoples was inaugurated by the United Nations in 1994).

One delegation therefore proposed that the additional period would apply to the "sacred and secret" objects of indigenous peoples. This would thus be restricted to the essential core objects of those peoples. Some delegations were alarmed at the potential width of this class, since they were not familiar with international practice in the identification of indigenous peoples. The United Nations has just considered the definition of "indigenous peoples" in connection with the United Nations draft declaration on the rights of indigenous peoples. The Note by the U.N. Secretariat (E/CN.4/Sub.2/1994/2 pp. 3-4) gives several descriptions of this term but notes (p. 5 of the Note) "that certain terms, although widely used in international law, are not strictly defined. These concepts are in a continual process of evolution and refinement." UNESCO considers that this practice of non-definition should be followed, as the term is currently well understood in international law. However, if a definition

were considered essential in the Unidroit instrument, UNESCO would propose that the wording of para. 379 of the Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities be adopted:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."

However, even if a satisfactory definition were agreed on, some delegations may find that the widening of the exception from public collections to private collections to indigenous peoples would make the Convention unacceptable to them.

UNESCO's view is that the same treatment must be given to all relevant groups. UNESCO could not support an article which gave preferential treatment to some collections and not others and to museum collections and not to the essential cultural resources of indigenous peoples. Thus the longer period should be given to all, or to none.

#### *Article 4(1)*

The whole reason for Article 4 was to penalise acquirers of cultural property who do not make proper enquiries into provenance. It is at present standard practice for dealers and auctioneers not to name their vendors and for buyers not to question the credentials of sellers. If buyers were subject to the risk of losing the object if they did not make inquiries, then this practice would change, as they would be more likely to refuse to buy unless information was given.

However the reversal of the protection of a *bona fide* (good faith) purchaser is a major step for many countries which have regarded this principle as a pillar of their legal system.

(i) Many scholars have seen the free circulation of goods as a primary principle of their legal system. Depriving a possessor of an object in some legal systems would be a major change, and the reference to compensation was therefore included in order to make the presentation of this change politically and philosophically more acceptable.

(ii) For some States which have a constitutional guarantee of rights of private property, it is only constitutionally possible to deprive the *bona fide* acquirer of property in the public interest and with an indemnity. While there was a large degree of agreement that provisions to prevent receiving of stolen goods justified depriving the acquirer where proper inquiries into provenance had not been made, a provision which did not provide for some indemnity where all due inquiries had been made and the article proved nevertheless to be stolen might, it was thought, be held unconstitutional.

(iii) Finally, if proper diligence had been applied it is likely that few cases will arise where the article proves nevertheless to have been stolen and few where, therefore, compensation will be necessary.

At no stage was it ever intended to suggest that national systems which already provided for return of stolen cultural objects without compensation should change this rule by providing compensation. This is reflected in Article 10 which enables such countries (e.g. a number of Common Law jurisdictions) to maintain their existing rules. A provision in this sense, in one form or another, has been in the draft since its earliest days. UNESCO regards it as essential that the draft Convention does not encourage any State, or any group within a State, to lower the protection of an owner of cultural property in any way.

The provision of compensation strikes some States, which have major thefts from their territory, as unfair, but the number of cases where compensation should be necessary should be very small. In practice, there should be very few possessors who can prove that they met all the tests for due diligence in the acquisition and nevertheless acquired a stolen object. If this continues to cause concern, more details could be included in the clause concerning diligence (see discussion under Article 4(2) below).

It is also significant that the burden of proof will now lie on the acquirer of the object to prove that he or she made the requisite searches. In many legal systems, the *bona fides* of an acquirer is assumed, and the claimant has the difficult job of proving bad faith. This left unchallenged a very large area where purchasers simply did not pursue inquiries, through apathy, ignorance or intent, and were nonetheless protected by the rules as to good faith. This has enabled a large share of cultural objects in the international market to be transferred as a matter of course without clear evidence of provenance. The change in the burden of proof should make significant changes in this practice.

#### *Article 4(2)*

When Unidroit worked on a uniform law for the transfer of movables, its first draft gave considerable protection to a “good faith” purchaser, on the basis that this facilitated international trade.

However a strong criticism voiced by the governments of the member States of Unidroit was that over-emphasis had been given to the rights of the transferee and that more attention should be paid to the interests of the dispossessed owner. At the very first meeting of the study group on cultural objects, the advantages of rules protecting the good faith purchaser (facilitates trade) and the owner (ensures return of stolen property) were discussed. While both rules had merit, it was decided that only a rule requiring increased diligence on the part of purchasers would restrain the passing of illegally acquired cultural objects into the legitimate market and hence provided a ready and lucrative sale for thieves and speculators. The effort to hinder the illicit trade was, it felt, a strong and sufficient justification for choosing to protect the original owner by requiring the return of a stolen cultural object and to refuse compensation to a purchaser except in cases where he or she could prove that he or she had made diligent inquiries.

The formulation in the draft Unidroit Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB) 1974 required the transferee to take account “of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the

transferor's acquisition of the movable known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded".

The formulation in Article 4(2) of the current draft does not include all of these items, though it adds the need to consult a reasonably accessible register or data base of stolen cultural objects. This takes into account the development of such data bases for stolen cultural property in the period since LUAB was drafted.

Some experts felt that, because a purchaser in a legal system which had traditionally protected him or her under generous rules for assessing "good faith" would have to be deprived of his property without compensation under the Unidroit proposals, it would be helpful to make even clearer the degree of diligence necessary.

In determining whether the possessor exercised due diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties, the provisions of the contract, the circumstances in which it was concluded, the price paid, the provenance of the object, any special circumstances in respect of the transferor's acquisition of the object which are known to the possessor, any reasonably accessible information as to whether the cultural object had been excavated illegally and whether the possessor consulted any accessible register or data base of stolen cultural objects which it could reasonably have consulted.

In this formulation, the use of the word "including" is important, as it would allow the tribunal to take account of other relevant circumstances. The addition of the words in bold type was considered by the study group. However, some experts felt that the additional words suggested above were by implication included in any case. While some experts would be content to see the additional factors included in a commentary, others would have preferred to see more detail given in the article itself.

#### *Article 4(3)*

This article was to ensure that a beneficiary of a gift should not be able to profit by the wrongdoing of his predecessor. Cases have been known where museums,

which are bound by an ethical code of acquisition based on the ICOM Code of Ethics not to acquire objects which have been stolen, illegally exported or clandestinely excavated, have nonetheless encouraged a potential donor to acquire a desired object which would contravene the museum's own rules, in the expectation that the museum would finally receive it as a gift.

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

This chapter, on illicitly exported cultural objects, complements Chapter II on stolen cultural objects.

There is no doubt, for many States, that the fact that an object was illegally exported from another country does not make it an illegal import or place any legal hindrance to its acquisition in that State. Prior to the adoption of the European Directive and Regulation on the matter, this was the practice of all European States, except those party to the 1970 UNESCO Convention (Italy, Spain, Portugal, Greece; France and Switzerland have announced their intention to become party).

The *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* was the first instrument to challenge that position. However that instrument has been adopted by only one major art importing State, the United States (and by a few others with interests both in importing and exporting, such as Argentina, Australia and Canada).

According to the European Directive, all European States are bound to return to other Member States cultural objects illegally exported from a Member State which is designated by national legislation or regulation as a "national treasure" and falls within one of the categories listed in the Annex, some of which include minimum criteria of financial value.

If this obligation to return illegally exported cultural objects to the countries from which they were illegally exported were undertaken in respect of countries outside the community, it would also improve the present legal situation for those States. However, the European categories of cultural objects do not include objects of an ethnological, ritual or spiritual nature

which are of considerable importance to States with traditional communities.

Countries of the Commonwealth, acting on a proposal of the New Zealand Government in 1983, requested a draft for reciprocal recognition of export controls within the Commonwealth. This scheme was finally adopted at a meeting of Ministers in Mauritius in November 1993.

The adoption of principles committing countries of import which are not party to the 1970 Convention to return ANY categories of illegally exported cultural property is an important advance on the present legal situation. (The United States implementation of the 1970 agreement provides procedures only for illegally exported archaeological or ethnological objects, whose pillage puts the cultural heritage of the State in jeopardy).

The adoption of this chapter would therefore greatly improve the present legal situation.

*Article 5(1)(a)*

The phrase “contrary to its law regulating the export of cultural objects because of their cultural significance” is the survivor of many other phrases suggested during the course of the negotiations. (cf. commentary on Article 1(b)). These included

“contrary to its law”

“contrary to its law applicable to cultural objects”

“contrary to its export legislation”

“contrary to a legislative provision prohibiting the export of cultural property because of its cultural significance”

“contrary to its law applicable to the protection of cultural objects and to the disposal of property rights therein”, and

“contrary to the mandatory rules of law of the State in question”.

The specific reference to “disposal of property rights” or “mandatory rules” seems too narrow – e.g. rules on exchanges and loans by museums would seem to be excluded, and these are surely relevant.

The present phrase “contrary to its law regulating the export of cultural objects because of their cultural significance” was also used in Article 1 and is the result of long negotiations. Some delegations feared that the text “contrary to its law of export” might include simple customs infractions which had no relevance to the cultural significance of the object and where the cultural value of the object was, as it were, incidental to the breach of the law. Certain experts felt that their States would not wish to accept that obligation.

Another interpretation was that this might mean that only laws on export (i.e. customs legislation) could be observed, and a foreign court or other competent authority might not apply an export prohibition where it was contained in the relevant cultural heritage legislation.

*Article 5(1)(b)*

This provision did not appear in the study group draft, and some delegations did not consider that it was really necessary. However, it does spell out clearly what might otherwise be the result of judicial interpretation, and is a reassurance for States which have international transfer of important cultural objects for the purposes mentioned.

*Article 5(1)(c)*

This provision was proposed at the same time as the provision which is now Article 3(2). The same remarks therefore apply here.

*Article 5(2)*

The study group considered very seriously the areas where there was the most convincing case for international co-operation. It was felt that many countries would not agree to enforce export controls where these forbade any export of cultural materials whatever. However there was general agreement that they would consider return of very important cultural objects whose export was controlled where the removal of objects of this kind would inevitably cause substantial damage to the cultural heritage of the country of export. The difficulty was how to describe these cases.

There was substantial agreement that these cases would be

– physical damage to monuments and archaeological sites (including that done by illicit excavation or pillage): (a)

Examples: damage to Mayan stelae during their removal; spademarks, breaks and subdivision of materials;

– physical damage to delicate objects by unprofessional handling by pillagers, possessors, runners, dealers etc. involved in the illicit export: (a)

Examples: cracking of paintings detached from their frames; chipping of sculptures by inadequate packing;

– dismemberment of complex objects: (b)

Examples: beheading of Khmer sculptures, removal of a facade of a Mayan temple; dispersion of frescoes, division of triptychs, or stripping interiors from historic buildings

– loss of information by removal of objects from their context and irreversible damage to the context: (c)

Examples: disturbance of stratigraphy by use of earth moving equipment; break-up of a collection in museum thefts or loss of documentation by destruction of an inventory etc.

– removal of objects still in use by the traditional community: (d).

Example: the Afo-a-Kom, a ritual figure of supreme importance, said to have embodied the spirit of the Kom (Cameroon); traditional carvings representing spirits, ritual objects such as masks in traditional communities, funerary objects.

The variety of the objects given as examples indicates how difficult it would be to find a purely descriptive definition of the objects to be covered. The study group therefore proposed describing those objects in terms of the substantial interests of States to protect their cultural heritage from the kinds of damage specified. Any object the removal of which could be argued as involving damage of any of the kinds specified would therefore be returned in order to deter the trade from undertaking damaging activities of the kind.

Independent experts such as anthropologists, archaeologists, ethnologists from all countries, including the major art importing States, are agreed on the severe damage that illicit traffic creates in all these respects.

This would therefore appear to be the minimum content of an agreement to recognise and enforce the export controls of a foreign State.

The last clause of Article 5(2) was included to cover the rare case of outstanding significance which would not be included in (a) to (d). Such a case was that of *Attorney-General of New Zealand v. Ortiz*<sup>(13)</sup>, where the New Zealand Government failed to obtain the return to it of important Maori carvings which had been illegally exported from New Zealand and were on sale at Sotheby's. The carvings had been buried up until the time when they were extracted by the seller to the dealer who illegally exported them. Of a style no longer being practised (the Taranaki style) and of extremely fine technique and beauty, the New Zealand Government wished to use them as an inspiration to young Maori carvers. There is little doubt that the New Zealand Government could have proved that these panels were of outstanding cultural importance to the New Zealand people. The case is so far unique, but such is the nature of cultural works that it seems wise to make allowance for such rare cases in the future Convention.

This provision has been misunderstood. It does not give an "exporting" State the right to declare any object whatever to be "outstanding". If it claims the object before a court or other tribunal in the State addressed it has to prove, to the satisfaction of the tribunal, that the object is of outstanding cultural importance. This it can do by bringing evidence of art historians, anthropologists etc. as New Zealand could well have done in the case concerning the Taranaki panels.

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(13) The case report can be found in the English Law Reports 1982 I Q.B. 349; [1982] 3 W.L.R. 571 (C.A.) [United Kingdom].

### Article 5(3)

The previous version of this article read as follows:

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

The rewording of the paragraph was thought to avoid debate about admissibility but also to make it clear that the requesting State had both the opportunity and the obligation to bring information in support of its claim.

### Article 5(4)

The debate on periods of limitation was as strong in respect of this provision as in regard to Article 3(3). However there was clear agreement that the periods of limitation should be the same under Chapter II as under Chapter III.

### Article 6

This article, which has caused much discussion, was put in for a technical legal purpose and has been much misunderstood.

In private international law as applied in most national systems (i.e. the rules concerning international transactions), courts have traditionally reserved wide powers to refuse claims on the ground of “public policy”. Such a reason might be used to prevent return of cultural objects in cases clearly covered by the Convention (e.g. because “public policy” would prevent depriving a purchaser, presumed *bona fide* under the domestic rules of that system, 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 effect of the draft. All sorts of other grounds of “public policy” might be adduced by judges – such as “freedom of trade”, “closeness to the culture of the State addressed”, “better care” in the State addressed, some historical link, albeit remote, of the object with the State addressed, disapproval of the cultural policy of the requesting State and so on.

While some experts thought that courts did not abuse the head of “public policy” and that the article was therefore unnecessary, experts in private international law with a strong familiarity with cases where public policy had been invoked, feared that the omission of a limiting article of this kind would leave open many possibilities of evading the essential purpose of the Convention. It should be recalled that “freedom of trade” has been declared a head of public policy in at least one European State. Far from running counter to the spirit of the Convention, this article seeks to ensure that its provisions will not be circumvented.

### Article 6(1)(a)

Article 6 was designed to prevent this by stating (in its original form) that the “only” possible reason for refusing 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.

### Article 6(1)(b)

The addition of any other exception, such as that now appearing in Article 6(1)(b) clearly weakens this effort to limit refusal to return. However States may feel that this particular case should be admitted. It covers the case where, for example, an object is illegally exported from Spain and is located in an auction house in the United Kingdom. Suppose that, according to Spanish law, it has become part of the Spanish cultural heritage and is subject to export control. However, before it arrived in Spain years ago, it had been stolen from an English collector or illegally exported from Great Britain. Should the English court be obliged to return it to Spain?

### Article 6(2)

The effect of this paragraph is that, where an object has a closer connection with the country of location, but is part of a dismembered complex, the country of location would not be able to retain it. It has to be presumed that the requesting State is the State holding the remains of the complex. It is, however, difficult to imagine a case where the country of location could have a closer connection with the dismembered part

than the country where the complex stands from which it was taken.

*Article 7(1)*

The effect of this article is to prevent claims for the return of cultural objects whose export was illegal at the time they were exported, but would have been legal at the time the claim is being made. There has been relatively little discussion of this provision.

*Article 7(2)*

Article 7(2)(a) was intended to ensure that the claim for illegal export under Article 5 need not be accepted by a State where the object concerned was exported during the lifetime of its creator or for a short period thereafter. This was to ensure that there would be relatively no interference with the careers of professional artists, many of whom are dependent on recognition outside their own country to establish their reputations.

Article 7(2)(b) was intended to cover the case of ethnographic objects where the creator may not be known. In such cases an alternative means should be found – and in this case it was suggested that the age of the object would be an appropriate test.

Where objects of ritual or worship are concerned which are removed from a tribal community, contrary to the wishes of that community, why should it be unable to recover? It is not always easy to prove that the removal from such a community was “theft” but this is a kind of illicit trade which may have very severe repercussions not only on the cultural life, but even on the cohesion, of the society concerned. Such objects are often in high demand for the illicit trade because “tribal art” raises high prices on the international market. An example is provided by the case of the Afo-a-Kom, a ritual figure of supreme importance, said to have embodied the spirit of the Kom (Cameroon). Elsewhere in Asia and the Pacific area there are important carvings in traditional style representing spirits. Ritual objects such as masks which in traditional communities (as among Native Americans) are often replaced, and the carver may even be known, but these objects are made for the community and seen as belonging to it.

The effect of 7(2) now is that the provisions of Article 5 shall not apply, i.e. there can be no claim for an illegally exported cultural object, where the object is less than 20 years old (unless the object was made by a member of an indigenous community for the use of that community), i.e. there will be an action even where the claim is made during the creator’s lifetime or the object is less than 20 years old if it was made by a member of an indigenous community for use by that community.

*Article 8(1)*

The provision for compensation here, as in respect of stolen objects, is to facilitate a major change in domestic law for many States. Where there are significant collecting and art dealing communities, States adopting the new Convention will be depriving their own citizens of objects which, until acceptance of these obligations, they had every right to retain.

Two points should be borne in mind:

(i) “knew or ought to have known” would now cover a vast number of cases, especially since a summary of the export control laws of over 140 countries has been published by UNESCO. The number of cases where compensation would be necessary should therefore be few.

(ii) some States have constitutional prohibitions on the taking of private property which can only be met where there is provision for compensation in cases where fault cannot be proved.

It is clear that the present text does not require the same degree of diligence as is required in Chapter II regarding stolen cultural objects. There was discussion on this point at several of the meetings of governmental experts, and some experts felt that the same high level of diligence should be required in respect of illegally exported objects as for stolen objects. Others felt that there was already a major change under way in requiring the return of some illegally exported cultural objects and that a higher degree of liability of acquirers might not be politically acceptable and might jeopardise the success of the Convention. The issue will undoubtedly be raised again at the diplomatic Conference.

#### *Article 8(2)*

It should be noted that this provision would only have effect where

- the requesting State has a system of export controls
- it can prove that the object
- came from the requesting State
- after the entry into force of the Convention
- that the exportation of the object required a certificate under its legislation and
- no export certificate can be produced by the acquirer.

However, such a provision could have a most beneficial impact on the market. Consider the case of the Sevso treasure, a late Roman hoard of silver ware which was offered for sale with forged Lebanese export certificates and was claimed by Croatia and by Hungary. Although these countries were unsuccessful in their efforts to prove that the treasure originated in their country, it remains true that no valid export certificate has ever been produced for this material. It must have come from one of the countries of the former Roman Empire: all of these have legislation which controls the export of objects of this degree of cultural importance.

No purchaser should, therefore, be exempted from the need to demand proper export documentation. If buyers refuse to buy goods for which there is no adequate export documentation, the market for such cultural objects will decline.

Certain other provisions requiring export certificates were proposed but were not adopted in the text that is being submitted to the diplomatic Conference. It is the view of UNESCO that provisions as to export certificates which are those of public law should not appear in this Convention. They quite properly appear in the 1970 UNESCO Convention, which is concerned with public law aspects of the problem. However private law provisions relating to the effects of a purchaser not demanding an export certificate where it is necessary are properly part of the Unidroit draft e.g. Article 8(2).

The article is seen as important by many States which have instituted export controls. In many cases, such as that of the Sevso treasure, although there could be more than one possible State of origin, all of those concerned have export controls and no valid documents can be produced. Such cases should be a clear indication to purchasers of the illicit nature of the objects being offered.

#### *Article 8(3)*

This paragraph provides an alternative to compensation under Article 8(1).

This article was designed to allow a holder to retain ownership after the return of the object, or to transfer it to a person in the territory of the requesting State, whom the State is satisfied will be a trustworthy custodian, and who will not connive at further illicit export of the object.

The words “and who provides the necessary guarantees based on the approval of that State” are necessary to prevent the return of the object to the original vendor; otherwise dealers in the requesting State could offer goods subject to an export ban on the understanding that they would repurchase the object from a client who had to return it. The dealer would then sell it elsewhere (probably to a buyer in a country not party to the Convention). It is clear that such a scheme would be no real deterrent to the speculative breach of export regulations.

#### *Article 8(4)*

The effect of this provision is to ensure that the claimant State will have to pay for transport, insurance etc. once the object is to be returned. However, it is still able to recoup the cost from the illicit exporter (where known) under its own legislation.

#### *Article 8(5)*

The provision reflects the content of Article 4(3) and ensures that a beneficiary of a gift should not be able to profit by the wrongdoing of his predecessor. Cases have been known where museums, which are bound by an ethical code of acquisition based on the ICOM Code of Ethics forbidding the acquisition of

illicitly trafficked cultural objects, have nonetheless encouraged a potential donor to acquire a desired object which would contravene the museum's own rules, in the expectation that the museum would finally receive it as a gift.

#### CHAPTER IV – JURISDICTION

##### *Article 9(1)*

The normal rules of law would permit an action to be brought against a defendant in the jurisdiction of his habitual residence (domicile) and possibly in some other jurisdictions such as the that of the place where the theft had been committed or the place of habitual residence of the thieves. This proposal, giving an action in the jurisdiction where the cultural property is situated, is an innovative one. This was felt desirable because the claimant may know where the object is (in a museum on loan, in a restorer's workshop, in a bank vault) but not know the identity of the possessor. This would enable him or her to bring an action for the return of the object against its holder (bailee) and to have an order made, e.g. for the safekeeping of the object or forbidding its sale, pending resolution of the claim.

##### *Article 9(2)*

This provision was relatively uncontroversial, almost all discussants agreeing that the parties might choose another jurisdiction, including arbitration, if they wished.

##### *Article 9(3)*

This provision was agreed to be essential to prevent the disappearance, destruction or inappropriate handling (e.g. by "restoration") of a cultural object while litigation was pending.

A detailed series of proposals under this article was made at the third session of governmental experts for provisions on the recognition and enforcement of judgments. The committee decided that it would be preferable not to deal with these issues in the Convention, but to leave them to the rules currently

applicable under normal rules or rules already established by other conventions.

#### CHAPTER V – FINAL PROVISIONS

##### *Article 10*

This article was primarily designed to ensure that States which already provided for the return to their owner of stolen objects without compensation to the possessor would retain those rules. at no stage was it ever intended to suggest that national systems which already provided for return of stolen cultural objects without compensation to the possessor should change this rule by providing compensation.

During the meetings of the study group and of the governmental experts it was pointed out that the exception to the uniform rule in favour of more generous treatment to the despoiled owner covered a number of other situations and, to make this quite clear, more specific provisions were proposed over several working sessions.

The version of the draft article, which was presented to the fourth session of governmental experts, finally read as follows (the text is in bold and the commentary of UNESCO is shown in italics):

**(1) 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;**

*This was intended to allow States to apply the rules of the Convention to acts of fraud or fraudulent conversion where these were not otherwise included in the concept of theft.*

**(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);**

*This would allow States to allow a longer time period for claims, i.e. not to change their national legislation in this respect where it was more generous in allowing claims for stolen goods.*

**(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);**

*This provision would allow States who do not require compensation for the holder of stolen goods who has to return them to the true owner not to require compensation. The aim of the whole Unidroit project was to improve the protection of cultural property by ensuring its return to its owner.*

*Compensation was considered only because depriving a possessor of an object in some legal systems would be a major change, and the reference to compensation would make the presentation of this change politically and philosophically more acceptable.*

A proposal in respect of Article 4 made by the delegation of Finland at the second session would have made it clear that retention of the more favourable system is mandatory. In the view of UNESCO that provision should be retained, but a decision should be taken as to whether to deal with this issue in Article 4 or Article 11.

**(iv) to apply its national law when this would require just compensation in the case where the possessor has title to the cultural property.**

*This proposal would have completely negated the philosophy behind the whole project, which is to deny compensation in cases where, under the present law in many legal systems, the holder is presumed to be bona fide and thus regarded as owner, even where he has not used diligence. The threat of return of the object, without compensation where diligence has not been used, would have the salutary effect of*

*requiring traders and collectors to make proper enquiry. This would have an important effect generally in deterring illicit trade in cultural objects and is one of the fundamental principles of the draft which should not be put aside.*

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

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

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

**(iii) to apply its national law when this would disallow the possessor's right to compensation contemplated by Article 8;**

**(iv) to apply its national law when this would deny the possessor the options provided for in Article 8(2);**

**(v) to require that the costs referred to in Article 8(3) be borne by other than the requesting State.**

**(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.**

*All these provisions would have allowed States which already have provisions more generous to claimants than the minimum standards provided for in the Convention to retain those standards.*

*UNESCO was therefore in favour of these provisions.*

*However, in keeping with a proposal of the Finnish delegation that such provisions should be mandatory, rather than optional (it being contrary to the intention to allow any State to diminish its existing more favourable régime), a form of words which would reflect this idea was proposed by UNESCO.*

The UNESCO proposal was as follows:

(1) 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 the Convention notwithstanding the fact that the theft of the cultural object occurred before the entry into force of the Convention for that State;

(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 of the requesting State other than those material under Article 5(3)

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

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

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

(i) where this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3(2);

(ii) where 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 legislation of that State,

(i) where this would permit the application of Article 5 in cases otherwise excluded by Article 7;

(ii) where this would disallow the possessor's right to compensation contemplated by Article 8;

(iii) where this would deny the possessor the options provided for in Article 8(2);

(iv) where this would require that the costs referred to in Article 8(3) be borne by other than the requesting State.

It was clear however, that this solution, though more precise and accurate, had the effect of importing a high degree of detail into what is, after all, a subsidiary clause of the text. The UNESCO observer at the fourth session of governmental experts therefore suggested a return to the first type of formula, such as that used by the study group, which consisted of one single clause.

The fourth session of the governmental experts decided in favour of the simpler form of clause. As at present drafted, it is evident that the liberty to apply "any rules more favourable" refers only to the Contracting State where action is being brought for the restitution or return of a cultural object; a requesting State cannot unilaterally impose a greater obligation on that State than the latter has undertaken by becoming party to the Convention.

If there is any concern that the text would not be understood in this fashion by all Parties, the Conference might wish to consider the formulation of the study group, where these implications were expressed clearly as follows:

"Any State Party to this Convention may accord wider protection to a person dispossessed of a cultural object in the circumstances described in Article 2(1) or to the rights of a requesting State under Articles 4 and 5 by disallowing or restricting the right to compensation of the person in possession of the object or in any other manner".

Finally, the suggestion made by one delegation that this clause should include a reference to the ability of a Contracting State to require just compensation in a case where the possessor has title to the cultural object would completely negate the philosophy behind the whole project, which is to deny compensation in cases where, under the present law in many legal systems, the holder is presumed to be *bona fide* and thus regarded as owner, even where he has not used diligence. The suggestion that this is needed because of

constitutional requirements for just compensation if a person having title to an object is required to give it up does not take account of the legal mechanisms used to prevent the acquisition of title. For example, a number of countries with such a constitutional provision have created customs offences of illicit import, which make an object liable to confiscation. Where there has been a breach of a law of this kind, there is no constitutional impediment to the State taking the object and disposing of it as it wishes. Thus customs offences of illicit import relating to the requirements of the 1970 UNESCO Convention are in force in Australia, Canada and the United States. Since these rules are announced for the future, acquirers will be warned that acquisition contrary to the national rules enacted to implement the Convention will result in forfeiture of the object, and no injustice will be done.

#### GENERAL DISCUSSION

##### Possible clause on non-retroactivity

Until the last session of the governmental experts, the draft contained a provision on retroactivity. The provision in the preliminary draft furnished by the study group read:

“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”.

It was clear at the beginning of negotiations on the draft that many delegations would have liked the draft to cover objects taken in the past. However, while there was a widespread consensus that agreement could be reached on co-operation to stop the present and future illicit trade, there was no such agreement on the return of objects previously taken. Nonetheless, experts felt that it would be very valuable to co-operate to stop the current illicit trade.

One delegation however suggested that the inclusion of the clause suggested would imply “that an illegal act may become legal simply because it was

committed before the entry into force of the proposed Convention” or that the new Convention would “effectively declare an amnesty in respect of such illegal acts and set a seal of legitimacy upon them.”

It should be quite clear that the legal status of an act committed before the date of entry into force of the proposed Convention will not be changed: the simplified procedures provided by the Convention for the return of cultural objects to the country of theft or export will not, however, be applicable to them. Claimant States will remain free to pursue their remedies, as now, in private law, by diplomatic means, inter-institutional arrangements or through the procedures of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation.

The version of the article presented to the final session of governmental experts included the following additional clause:

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

It was pointed out that a provision as to retroactivity was not in fact necessary, since by old established custom in international law, treaties are not retrospective. This rule is enshrined in the *Vienna Convention on the Law of Treaties*, Article 28 of which provides:

##### *Non-retroactivity of treaties*

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.

The 1970 UNESCO Convention includes no express provision on retroactivity, but it has always been quite clear that it does not apply retrospectively

(although it does include a clause similarly to the additional clause quoted immediately above in its Article 15).

It has to be noted, here, that this question is of high political sensitivity. On the one hand there are States which have insurmountable legal problems with a solution which would apply retrospectively: it could create significant constitutional problems for some, interfering with guarantees of property rights or with general principles of non-retroactivity of legislation, and for others it would be contrary to fundamental provisions of their civil law which they would not be willing to alter in this context.

On the other hand many other States feel that their most important cultural objects were taken abroad in circumstances where they had no opportunity to resist the taking and that it would be impossible for them politically to accept any wording which implied the recognition or legitimisation of such prior transfers. The expression of the principle of non-retroactivity could, therefore, create for those States great political difficulty and might prevent them becoming party to the Convention.

In such circumstances the session of governmental experts decided to delete the express provision on non-retroactivity, being aware that the principle applies in any case. The second clause was also deleted. However UNESCO recommends the inclusion in the preamble of an appropriate clause which makes it clear that the Convention is neither retroactive nor legitimises prior transfers which remain to be settled by existing methods (see proposed text of preamble, operative para. 7).

It is in any event open to States to clarify these issues in their implementing legislation. States for whom non-retroactivity is essential can clearly include that in their law, since that is the normal interpretation of a treaty as clearly set out in the Vienna Convention. While States for whom the issue of cultural objects taken before the entry into force of the Convention is a significant political issue, cannot, of course, bind other States Parties to return these objects by virtue of this instrument, they can make it clear in their legislation that the instrument in no way changes the legal status of those objects.

#### Possible clause on reservations

A proposal was made by one delegation either to delete Chapter II or to allow reservations to it.

UNESCO strongly opposes deletion or the possibility of reservation.

The *raison d'être* of the whole UNESCO/Unidroit exercise was indeed to make changes to the private law of many States. Indeed if States were not prepared to change their law, there would be no point in having an Institute for the Unification of Private Law, nor conferences organised by it.

For many years, experts in cultural heritage law from different legal systems have emphasised that the only way substantially to hinder the illicit trade in cultural property is to ensure the return of cultural objects to the original holder after a theft, even at the cost of changing the rule in many European legal systems protecting the *bona fide* purchaser of stolen goods (Chatelain<sup>(14)</sup>, Rodotà<sup>(15)</sup>, O'Keefe and Prott<sup>(16)</sup>, Reichelt<sup>(17)</sup>, Fraoua<sup>(18)</sup>).

Provisions on illegally exported cultural objects already exist in the UNESCO Convention (Article 3) and are wider than those included in the draft Unidroit Convention. The restriction on the width of objects covered by Chapter III of the Unidroit draft is compensated for by the wider reach of the provisions

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(14) Châtelain, J. Means of Combatting the Theft of and Illegal Traffic in Works of Art in the Nine Countries of the EEC (Commission of the European Communities, Doc. XII/757/76-E (1976)) 114.

(15) Rodotà, S. "Explanatory Memorandum" in Council of Europe, *The Art Trade* (1988) 8.

(16) *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, Paris) (UNESCO Doc. CLT/83/WS/16 1983, 141 pp. 126-130); in French as *Mesures législatives et réglementaires nationales visant à lutter contre le trafic illicite de biens culturels* pp. 53-58; in Spanish as *Medidas legislativas y reglamentarias nacionales de lucha contra el tráfico ilícito de bienes culturales* pp. 53-57; *Law and the Cultural Heritage: Vol. III – Movement* (Butterworths, London) 1989, 648.

(17) 1988, 39, article mentioned above, note 1.

(18) *Le trafic illicite des biens culturels et leur restitution* (Editions universitaires, Fribourg) 1985, 179.

on stolen cultural objects (Chapter II of Unidroit, compared to Article 7 of the UNESCO Convention). If one or other Chapter is omitted, this balance will be destroyed, and many States would be unwilling to adopt the new instrument.

At the last session of the Committee of Governmental Experts, UNESCO proposed the addition of a clause preventing reservations to Chapter II. Time did not permit discussion of this draft article, which is set out below.

*Article 11 proposed*

No reservations shall be permitted to Chapter II [nor to Chapter III] of this Convention.

ANNEX

CASES ON PRESCRIPTION (see Article 3, note 11)

**Menzel v. List 253 N.Y.S.2d 43; 267 N.Y.S.2d 804 aff'd, 298 N.Y.S.2d 979 (1969)**

In 1932 Erna Menzel and her husband purchased a painting by Marc Chagall at an auction in Brussels. In 1941 they fled Belgium for the United States in the face of the German invasion, leaving the painting behind in their apartment. It was seized by the Einsatzstab der Dienststellen des Reichsleiters Rosenberg as "decadent Jewish art". A receipt was left stating that the painting had been taken into "safekeeping". The location of the painting for the period 1941 to 1955 was never established. In 1955, Klaus Perls and his wife, proprietors of a New York art gallery, purchased the Chagall from a Parisian art gallery for \$2,800. They knew nothing of the painting's previous history and made no enquiry regarding it. They were content to rely on the good repute of the Paris gallery as to authenticity and title. In October 1955, they sold the painting to List for \$4,000. Mr Menzel died in 1960. His wife, in 1962, noticed a reproduction of the Chagall in an art book accompanied by a statement that it was in List's possession. She thereupon demanded the painting from him but he refused to surrender it to her. She commenced action against him and he in turn impleaded the Perls. Both List and the Perls argued that

the actions were barred by the New York Statute of Limitations.

The court held that the cause of action against a person who lawfully comes by a chattel (i.e. a movable) arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the object upon demand.

**O'Keeffe v. Snyder 405 A.2d 840 (1979) rev'd, 416 A.2d 862 (1980)**

In this case the Supreme Court reversed a decision against the plaintiff who claimed a painting stolen in 1946 and located only 1976 in the gallery of the defendant. The Supreme Court decided that the operative date for the running of the limitation period should be the date of discovery and that "O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings". The court considered that, in deciding whether the owner exercised due diligence in attempting to recover her paintings, whether there was an effective means of alerting the art world to the theft and whether registering with an art theft archive would give a prudent purchaser notice of the theft.

**Kunstsammlungen zu Weimer v. Elicofon 536 F. supp. 829 (1981), aff'd, 678 F.2d 1150 (1982)**

The Weimar Art Collection sued in New York for the restitution of two unsigned portraits executed around 1499 by Albrecht Dürer which had been taken from safekeeping in a castle in Germany between 12 June and 19 July 1945, the date of the withdrawal of the temporary United States occupation forces. The theft was immediately reported and unsuccessful efforts made to locate them. In the Spring of 1946 Elicofon purchased the portraits for \$450 from a young United States ex-serviceman who claimed to have bought them in Germany. In 1966 they were identified through their listing in a recently published book describing art stolen during World War II. They were worth approximately \$6 million.

Elicofon claimed that the three year period of limitation under the New York statute had elapsed. The court held that the three years did not begin to run until the Weimar collection asked for the return of the paintings and Elicofon refused. An action begun in 1969 was therefore within the limitation period, and the paintings were eventually awarded by the court to the Weimar Collection.

**Solomon R. Guggenheim Foundation v. Lubell 569 N.E.2d 426 (Ct. App. N.Y. 1991)**

In this case, the most recently decided, the Court of Appeals of New York confirm that the limitation of action period begins to run when the theft victim makes a demand upon the current possessor for the return of the item.

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**PERMANENT BUREAU OF THE HAGUE  
CONFERENCE ON PRIVATE  
INTERNATIONAL LAW**

1. The Permanent Bureau believes that the draft Convention established by the committee of experts is of the greatest interest. This is indeed an ambitious project which seeks to resolve, in the same instrument, problems raised at international level by two very different situations, the first – the restitution of stolen cultural objects – falling squarely within the field of private law (even if the theft is to the detriment of a public body) and the other the sanctioning of the illegal export of cultural objects, which is purely a question of public law concerning the bringing of an action by one State on the territory of another, not against a thief (which is typically the former situation), but against the actual possessor.

*Article 3, paragraph 2*

2. The rule which assimilates to stolen objects those which originate in illegal excavations could give rise to a particular difficulty which should, perhaps, be more closely examined in the context of the question of the mechanism which will trigger the application of the Convention. On the assumption that the Convention

will apply to objects stolen after its entry into force, or after a given date, the question will arise as to the time at which the illegal excavation took place. The same is true for the determination of the limitation period. In the typical case of theft, it is relatively easy to prove the date on which the object was stolen, as statements will have been made to the police and, often, to insurance companies. The situation is different when it is claimed that the object was removed during illegal excavations. Any object belonging to past civilisations, be they Egyptian, Assyrian, Aztec or Maya, will necessarily be brought to light through excavations. For the excavation to have been illegal, it is necessary that it was conducted in a certain place and at a certain time when, on the territory in question, there already existed a prohibition on unauthorised excavations. It will be difficult to apply the rule and complications could arise if it were to be seen as systematically reversing the burden of proof so as to place it on the possessor at the time the claim is brought.

*Article 3, paragraph 4*

3. The Permanent Bureau of the Conference is of the belief that if a particular status is to be accorded to cultural objects belonging to a public collection by providing for longer limitation periods, no distinction should be drawn between State-owned property and that owned by a local or regional authority. It would likewise be wise to include within the notion of public collections those in the possession of the institutions mentioned in sub-paragraphs (ii) and (iii) irrespective of whether the financing or the recognition of the institution derives from a State or from a local or regional authority.

*Article 6, paragraph 1(a)*

4. The rules contained in this chapter are inspired by the mechanism to be found in the *Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980* which is today in force in over 40 States. The essential aim is to permit a return to the *status quo ante*. In that context, a parent responsible for the wrongful removal of a child must, in accordance with an order given by the local judge, return the child to the country from which he or she was wrongfully removed. In the draft under considera

tion, the present possessor of an object must return it to the country of origin, whether or not that possessor was responsible for the illegal export. Under the Hague Convention, the grounds for refusal to return the child are extremely limited. There must exist a grave risk that the return of the child will expose it to physical or psychological harm or otherwise place it in an intolerable situation. The only other case in which return may be refused is that where the child has attained a sufficient degree of maturity himself or herself to contest the return. Even if the child, or the parent responsible for its removal, are nationals of the State addressed, the court in that State must nevertheless order the return of the child. This rule was expressly adopted since the Convention would have lost much of its force had it been admitted that rules of public policy could be applied so as to prevent a national of one State being sent abroad.

5. It is for this reason that the Permanent Bureau is concerned by the rule contained in Article 6, paragraph 1(a). On the one hand, it gives rise to considerable uncertainty as culture becomes more and more universal. Many objects of Roman origin have been found in France, Germany and the Netherlands and objects of Greek origin discovered in Sicily and in Turkey, since at that time there was an extension of Roman and Greek civilisations into territories which bear no correspondence to today's frontiers. Does a Greek statue discovered in Ephesus have closer links with present-day Greece than with Turkey? Does a Byzantine school have a closer connection with the former Byzantium or with Athens? Does a Picasso have a closer connection with Spain, of which the painter was a national, than with France, where he resided and painted for the best part of his life? Is the work of Flemish painters who worked at the Court of Burgundy more closely connected with Dijon than with Ghent or Antwerp? National heritages assume many forms, and it is not easy to see why a work of a follower of Leonardo da Vinci painted at Amboise in Touraine, where the master was living at the time, should be the object of a refusal of return if it were to be illegally exported to Italy on the ground that it had a closer connection with today's Italian culture than with that of Renaissance France which was impregnated by Italian art.

6. The underlying danger of the rule is the risk of what one might term "cultural knights" seizing cultural objects in a country from which their export is prohibited, and taking them back to the country of origin in the knowledge that such objects would not have to be returned. The rule could also have the effect of giving rise to frequent incidents which could only harm good international relations. It is for this reason that the Hague Convention sought to avoid such conflicts in advance by not retaining the nationality of the child as a ground for refusing its return and it would be desirable for the present draft Convention to follow that example.

#### *Article 9*

7. Article 9 is a general provision which concerns claims for the restitution of stolen objects as well as claims for the return of illegally exported objects. Paragraph 1 is limited to laying down a uniform rule regarding jurisdiction, which is additional to those already to be found in Contracting States. Until now, from the angle of comparative law, there are few precedents for giving jurisdiction to the court where an object is located in a claim for its return. For the most part, the classic rules are applied, which give jurisdiction to the court of the domicile of the defendant, or, in Common Law jurisdictions, to the court of the place where the order to appear has been served on the defendant. The creation of an *ad hoc* ground of jurisdiction for cultural objects is most welcome, as it is in effect the object itself which has to be recovered and not its value. A claim for restitution or return will be much more likely to succeed if it is brought before the court of a place where the object is located since the enforcement of the judgment and the restitution or return of the object will take place under the internal rules of the State addressed, without the need for any *exequatur*. This would not be the case if it were necessary to bring an action in another country, for example that of the domicile of the defendant, with the subsequent need to seek enforcement of the judgment in a country other than that where the object is located.

8. In short, the rule will encourage claimants, whether individuals or public bodies, to bring their action before the court of the country where the object

is located. If this is impossible, for example because the object whose presence has been discovered through a catalogue of a collection or an exhibition has subsequently disappeared, it would of course be possible to bring an action before a court whose jurisdiction is generally recognised, such as that of the domicile of the defendant, or the place where the theft was committed. It would however then be necessary to secure enforcement of the judgment. The classic mechanism in private international law for the enforcement of judgments between Contracting States has not however been developed in the draft Convention. The Permanent Bureau is of the belief that this decision is, in the circumstances, reasonable. In point of fact, the introduction of rules governing the enforcement of foreign judgments already raises many technical difficulties under private international law and in the context of the draft Convention still others would have emerged.

9. A judgment concerning the restitution of stolen objects is most certainly one falling within the area of private law. Jurisdiction at such stages of the proceedings as enforcement of a judgment may therefore quite naturally fall within the scope of existing bilateral or multilateral treaties. This is for example the case of those treaties between the Member States of the European Union and of the European Free Trade Association (Brussels and Lugano Conventions) or the Latin American States. However, the claims contemplated in Chapter III concerning the return of illegally exported objects fall purely within the field of public law. In the majority of cases, bilateral or multilateral treaties concerning jurisdiction or the enforcement of judgments exclude from their scope public, administrative or customs law matters. The reason is that traditionally the rules governing such matters are of application only within those States which have promulgated them and they are not by their very nature suitable for international application through the rules governing conflict of laws or conflict of jurisdictions.

10. It can then be understood that it would be extremely difficult to draw up rules in relation to the enforcement of judgments concerning public law questions in a Convention dealing with a very specific subject, while there are at the same time scarcely any

precedents for this in international law. It may be argued that the draft Convention does not, in certain cases, ensure the enforcement of judgments handed down in application of the substantive rules contained in the Convention. If there is such a lacuna, its importance should not be exaggerated. If the identity of the possessor of the stolen or illegally exported object is known and judgment given against that person, the situation is the same whether the object be located in another country or hidden somewhere in that where the judgment is given. In both situations, the judge may, in accordance with the procedural rules applicable, put pressure upon the possessor to make restitution of the object or to return it by way of a fine or *subpoena* injunctions. In such cases, there would be no need for international enforcement of the judgment and it is of little importance whether such a judgment is given under Chapter II or Chapter III.

#### *Article 10*

11. The Permanent Bureau is in full agreement with the decision of the committee of governmental experts to replace the long list of situations enumerated in previous drafts by a general provision intended to ensure the safeguarding of rules more favourable to the restitution and return of stolen or illegally exported cultural objects.

#### *Transitional régime*

12. This problem is dealt with neither in the draft Convention itself nor in the paper prepared by the Secretariat concerning the draft final clauses. The question arises as to whether the Convention is applicable to theft or illegal export which took place before its entry into force for the State addressed. If nothing is said, it would seem that the principle of non-retroactivity would apply. However, silence on this matter in final clauses often gives rise to difficulties of interpretation which it would be preferable to avoid. As to the temporal application of the Convention, a flexible but nevertheless clear position could be adopted.

13. Such flexibility would consist in leaving it up to each Contracting State to decide whether it will apply the Convention, as a State addressed, to acts committed before the entry into force of the Conven

tion by giving it total or partial retroactive effect. Total retroactive effect would amount to applying the Convention to all acts committed before its entry into force, subject naturally to the limitation periods established by it, which would in any event necessarily limit the temporal effect of the Convention,

14. Another possibility would be to offer to States an intermediate position, namely to decide on the time as from which theft and illegal export prior to the entry into force of the Convention would be taken into consideration. One of the purposes of the Convention is to introduce a greater degree of morality into the trade in cultural objects by requiring professional dealers and those acquiring such objects to display a greater degree of caution. The day on which the negotiations leading up to the adoption of the Convention will have resulted in its signature, it is reasonable to assume that professional dealers and collectors will have been made fully aware of its existence and of a new trend in international relations. They could therefore be expected to give thought to the need to take special precautions. The fact that the Convention could suddenly enter into force as a result of the ratification by the State where they are located is not unforeseeable and could offer a healthy encouragement to prudence in their operations.

15. For these reasons, it might be worthwhile considering the possibility of making provision in the final clauses to the effect that a State which ratifies the Convention may make a declaration to the depositary specifying its intention to apply the Convention only for the future, or retroactively, or again as from a date that it will itself determine.

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## **INTERNATIONAL COUNCIL ON ARCHIVES**

The International Council on Archives (ICA) has noted with interest the draft Convention drawn up by Unidroit on the international return of stolen and illicitly exported cultural objects. Archives, whether public or private, are explicitly included in the field of competence of the draft, by reference to Article 1(j) of the 1970 UNESCO Convention concerning “archives,

including sound, photographic and cinematographic archives”.

The ICA, which has itself worked for over 40 years to help resolve disputed archival claims between States, on clear professional foundations, notes the willingness thus shown at the international level to avoid future multiplication of claims resulting from theft or illicit export.

While in no way questioning the fact that archives belong to the broader category of cultural assets, as expressed in the Report of the Director General of UNESCO to the 20th session of the General Conference in 1977, the International Council on Archives has however strong reservations with respect to the applicability of the text to public records.

In the first place, the majority of disputed archival claims affect relations between States, following events such as war, changes of frontier or decolonisation, and are therefore subject to international public law and not private law. In the second place, even in cases where international private law could be applied (in particular, the unwarranted keeping of public records by an individual from another State), the draft, drawn up with a legitimate concern for protecting the art market, seems scarcely suited to the specific characteristics of public records.

– It is in fact worth remembering that public records are not only important for history, art or science in the sense of Article 2 of the draft; their primary value is evidential, in particular allowing States to exercise their regality functions, if need be for the benefit of individuals over a very long period, for proving the status of both persons and property.

– Moreover, all countries recognise the principle that public archives, by their nature and from the moment of their creation, form part of the movable public property of the State concerned. The passage of records to the archives does not result from a process of acquisition under Common Law, as is the case in museums or libraries, but through compulsory transfer by public administrations to the archive service, with or without the transfer of property to the latter.

– as a result, archive services deal not with collections that have been voluntarily assembled on a

particular theme in the sense of Article 3(4) of the draft, but with *fonds* respecting the structural integrity of bodies of records which have been produced or received by the organisation concerned in the discharge of its functions.

In contrast to art or historic objects which can preserve a certain significance even when dealt with as single units (a situation which essentially occurs with archives only in the autograph market), archival *fonds* commonly cover tens, even hundreds of linear shelf metres.

*In these conditions,*

the very principle of a possible prescription for the recovery of public records appears incompatible with the inalienability and imprescriptibility accorded by States to their own archives, as a consequence of their fundamental evidential value and their belonging by nature in the domain of movable public property. It would in fact be unfortunate if the imprescriptibility of public records was to be attacked by a prescription opposable to an action for replevin.

The International Council of Archives therefore strongly suggests that the option of imprescriptibility be retained in Article 3 as regards thefts of public records. It would in addition be desirable to have a similar provision in Article 5, as regards illicit export; this point is however less essential since the illicit export of public records must necessarily be preceded by theft from the public archive service.

It will besides be noted that the 1970 UNESCO

Convention, to which the Unidroit draft is complementary, makes no mention at all of such a prescription. On the contrary, in Article 13(d) which recognises “the indefeasible right of each State Party to this Convention, to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate the recovery of such property by the State concerned in cases where it has been exported”.

The International Council on Archives in no way underestimates the value of the other parts of the draft Convention, such as the recognition in Article 3(4) of the special characteristics of assets of religious institutions, equally applicable to religious archives, or the principle of mutual recognition of national legislation which underlies the whole of the draft.

ICA also welcomes the possibility offered by Article 10 for applying the most favourable national arrangements.

It would be regrettable therefore, if the ambiguity introduced by a possible prescription of action for recovery of property introduced a factor of uncertainty in the settlement of disputed claims which are still unresolved between States including, among others, all the claims arising from transfers that occurred during the Second World War. It would also be most unfortunate if the idea of prescription, introduced into an international convention of private law, was in time extended by assimilation to agreements between States, in conflict with the principles which have up till now been accepted by the professional community.

## WORKING PAPERS SUBMITTED TO THE COMMITTEE OF THE WHOLE

CONF. 8/C.1/W.P. 1  
7 June 1995

*Proposals by the delegation of the Netherlands*

### *Title*

The title is not accurate, because the Convention uses the term “return” only in relation to Chapter III (illegally exported cultural objects) and not to Chapter II (stolen cultural objects), for which it uses the term “restitution”. Therefore, the title should read as follows: “The Unidroit Convention on the International Restitution of Stolen and the International Return of Illegally Exported Cultural Objects”.

### *Article 2*

The definition of cultural objects establishes a scope of application which is much too vague and uncertain. Such a scope of application seems to be too broad (especially in view of Chapter II (stolen cultural objects)) and should be limited. This could be established by putting in values as has been done in the Annex to Council Directive 93/7/EEC of 15 March 1993.

CONF. 8/C.1/W.P. 2  
7 June 1995

*Proposals by the delegation of the Netherlands*

### *Article 3*

In the text it should be made clear that the claim for return has to be made “before a court or other competent body” as is also done in the text of Chapter III (illegally exported cultural objects), *cf.* Article 5.

The text should also make it clear that the term “other competent authority” means “a judicial authority” such as a court and not an administrative authority or a minister, who never deals with questions of ownership, compensation etc.

### *Article 3(1)*

- To be in line with the title of Chapter II, the word “return” should be replaced by the word “restitute”. The same can be said of Article 4(1).

- The term “possessor” is too vague, since it has a different meaning in the various legal systems. The text of the Convention should be clear by itself. Probably therefore a definition is necessary, which could read as follows:

“ ‘Possessor’ shall mean the person physically holding the cultural object on his own account”.

In this connection, a definition of the term “holder” will also be necessary. This definition could read as follows:

“ ‘Holder’ shall mean the person physically holding the cultural object for third parties”.

In view of this, the term “possessor” in Article 3(1) should be replaced by “the possessor or, failing him, the holder”. Elsewhere in the text this replacement is not necessary. The same was done in Council Directive 93/7/EEC of 15 March 1993. If such clarification is necessary within the EEC where States are more familiar with each other’s legal systems, it is certainly necessary in a worldwide Convention.

### *Article 3(3)*

The Convention’s time limits should not be too broad and should be set in accordance with those mentioned in Council Directive 93/7/EEC of 15 March 1993.

### *Article 3(4)*

The term “public collection” is too broad and needs to be clarified further. Preferably, the term should be defined as has been done in Article 1(1), of Council Directive 93/7/EEC of 15 March 1993.

In the proposed text at least the words “accessible to the public” should be deleted as well as subparagraph (iii).

To specify no limitation period would be unacceptable.

*Article 4(1)*

- As mentioned above in respect of Article 3(1), the word “return” should be replaced by the word “restitute”.

- The burden of proof laid on the possessor in good faith in Chapter II (stolen cultural objects) is too onerous, especially in comparison with the burden of proof laid on the possessor in good faith in Chapter III (illegally exported cultural objects), *cf.* Article 8(1). Therefore the sentence “and can prove that it exercised due diligence when acquiring the object” should be deleted.

- An owner who seeks the return of his stolen cultural object has obligations as well. A new article could make that clear and could read as follows:

*“Article 3A*

Any claim made under Article 3 shall contain or be accompanied by information that within a period of [three] [six] months from the time of the theft of the cultural object:

(a) a report of the theft has been made to the police, and

(b) a uniform description and a picture of the cultural object have been recorded in any reasonably accessible register”.

The advantage of this article will not only be to make it clear from which date the limitation period starts to run but also, as regards the burden of proof, that the possessor in good faith cannot say that he could not know that the cultural object had been stolen by consulting any reasonably accessible register.

- A new article could be included in the text of the Convention stating that Member States shall cooperate to set up a worldwide register with uniform descriptions of stolen or illegally exported cultural objects, which could be consulted free of charge or at very low cost.

- Finally, a new article or paragraph could be included in the text of the Convention indicating which elements should be taken into account for the purpose of determining “fair and reasonable compensation”. An example of such an article or paragraph may be found in Article 4(2) regarding “due diligence”.

*Article 5(1)*

- As mentioned above in Article 5, the term “or other competent authority” should be defined.

- Article 5(1)(c) should be deleted. If a Member State wants protection of illegally excavated cultural objects within the framework of Chapter III, then such a State should regulate the matter in its own national legislation.

*Article 5(2)*

The words “or establishes” should be replaced by “and establishes”.

*Article 5(3)*

- As mentioned above in Article 4(1), and for the same reasons, a new article could be included in the text of Chapter III with regard to the obligations of the State which seeks the return of an illegally exported cultural object.

The new article could read as follows:

“The request shall also contain or be accompanied by information that within a period of [three] [six] months from the time of the illegal export of the cultural object

(a) a report of the illegal export has been made to the police, and

(b) a uniform description and a picture of the cultural object have been recorded in any reasonably accessible register”.

- With regard to a worldwide register, see above at Article 4(1).

*Article 5(4)*

See above at Article 3(4) with regard to time limits.

### Article 7(2)

This paragraph should be deleted completely.

Regarding sub-paragraph (a), the reason for deleting this provision is that during the lifetime of the person who created a cultural object, that object can be of outstanding cultural importance for a State.

If sub-paragraph (a) is kept, the words “or within a period of [five] years following the death of that person” should be deleted.

As regards deleting sub-paragraph (b), the reason for this is that it is too vague. Measuring the “zero point” is impossible.

If it is felt necessary to refer in the Convention to cultural objects of indigenous communities, then a clear definition of those objects should be included in the text.

### Other issues

- Retroactivity will be unacceptable, especially with regard to the burden of proof laid on a possessor in good faith.

This subject should be dealt with in the text of the Convention, because otherwise it will give rise to discussion and diverse interpretations in the future. Looking at Article 28 of the Vienna Convention on the Law of Treaties, an article dealing with the non-retroactivity of the Unidroit Convention might read as follows:

“The provisions of this Convention do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that party”.

CONF. 8/C.1/W.P. 3  
7 June 1995

### Proposals by the delegations of Australia and Canada

#### Article 2

- (i) The phrase “, on religious or secular grounds” should be deleted from the definition; and

- (ii) The phrase “are of importance for archaeology, prehistory, history, literature, art or science” should be replaced by the phrase “are of importance for archaeology, prehistory, history, literature, art, science or ethnology”.

CONF. 8/C.1/W.P. 4  
7 June 1995

### Comments of the delegation of the Czech Republic

1. In the proposed provisions concerning limitation of actions for the return of a stolen or illegally exported object of cultural value longer periods should be accepted for the implementation of rights to restitution from the variants given in the draft Convention.

2. In the text of the Convention there should be consistent differentiation of the concepts of “owner” and “holder” in the sense that the “owner” is the original proprietor from whom the object of cultural value was stolen and illegally exported, regardless of whether this is a legal entity or a physical person, and the “holder” is then the one who is illegally in possession of the object of cultural value.

3. Article 4 should read: “The holder of a stolen object who is requested to return the object has the right to demand compensation for damage caused in connection with the return of this object from the person from whom he bought or acquired this object, in accordance with the legislation of the Contracting State of the holder”.

4. The Convention should include the definition of “Public Collection” as proposed.

5. In Article 6, paragraph 1(a) and the whole of paragraph (2) should be omitted.

6. Article 7(2)(a): the deadline for export of an object should end with the death of the person who created it.

7. Article 8(3) should be omitted.

8. In Article 8(4) should be more clearly expressed or else omitted.

9. Returned stolen or illegally exported objects of cultural value should be exempt from the customs duty, taxes and payments usual on the import of such goods according to the legislation in force of the claimant on the occasion of their import within the framework of their return.

10. It should be unequivocally stipulated that the object will be returned to the "Owner", i.e. to a physical person or legal entity which is not a State, even if it is acting on his behalf as the applicant State before the court of another Contracting State.

CONF. 8/C.1/W.P. 5  
8 June 1995

*Proposal by the delegations of Greece and Turkey*

*Article 3(4)*

Paragraph (4) should read as follows:

"However, a claim for restitution of an object belonging to a Contracting State or a public collection in a Contracting State shall not be subject to prescription".

CONF. 8/C.1/W.P. 6  
7 June 1995

*Proposals by the delegation of Japan*

*Article 3*

(1) (unchanged).

(1bis) The question of who shall be entitled to bring a claim for restitution of a stolen cultural object shall be governed by (the law of the State in which the cultural object is located) (the law of the State in which the cultural object was stolen).

(2) (deleted).

(3) Any claim for restitution shall be brought within a period of three years 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 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 be brought within a time limit of 75 years.

For the purpose of this paragraph, a public collection is one which, at the time when an object belonging to that public collection was stolen, had been designated by a Contracting State as such and consisted of a collection of inventoried cultural objects accessible to the public on a regular basis, and was the property of

(i) to (iv) (unchanged).

*Explanation*

1. New paragraph (1bis) is proposed to address the question of who is entitled to bring a claim. Given the diversity of national laws, it would be more realistic for this Convention to take an approach of unifying rules of private international law rather than to attempt to unify the substantive laws on this question. Leaving this question open would give rise to disputes between the parties as well as between Contracting States.

2. Paragraph (2) should be deleted. We are of the same opinion as that stated in the comments by the Hague Conference on Private International Law in this respect.

3. The definition of a public collection in paragraph (4) in the present text needs further clarification. The purpose of the proposed amendment is to introduce a form requirement of designation by a Contracting State of a public collection. A stolen cultural object must belong to a public collection and be so designated at the time of the theft.

*Article 4*

Add the following new paragraphs to Article 4:

(4) Without prejudice to paragraph (1) of this Article, the possessor of a stolen cultural object required to return it shall be entitled at the time of restitution to reimbursement by the claimant for what he has spent for the preservation or repair of the cultural object to the extent permitted under the applicable law.

(5) Where the possessor of a stolen cultural object is entitled to payment by the claimant of fair and reasonable compensation and/or reimbursement for what he spent for the preservation or repair of the object in accordance with preceding paragraphs, the possessor may refuse to return the cultural object until he has received such compensation and/or reimbursement.

#### Explanation

1. New paragraph (4) would give an incentive to the possessor of a stolen cultural object to preserve or repair the cultural object while he is in possession of such an object, regardless of whether or not he knew or ought have known that the object was stolen. This paragraph will operate only where and to the extent that the applicable law (usually the law of a country where the object is currently located) permits the possessor to recover from the claimant such expenses as he spent for the preservation or repair of the object.

2. New paragraph (5) applies when the possessor is entitled to payment by the claimant under either paragraph (1) or new paragraph (4). Without the right to refuse to return the cultural object on the part of the possessor, it would be difficult for the possessor to secure payment by the claimant at the time of restitution.

CONF. 8/C.1/W.P. 7  
8 June 1995

#### *Proposals by the delegation of Japan*

##### *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) (unchanged); or
- (b) (unchanged)
- (c) (deleted).

(2) The requesting State shall be required to establish that the removal of the object from its terri-

tory significantly impairs one or more of the following interests:

(a) to (d) (unchanged).

(3) (unchanged)

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

(5) The effect of a request for the return of an illegally exported cultural object under this Article is limited to its physical return to the territory of the requesting State”.

#### Explanation

1. Paragraph (1)(c) should be deleted, since it is up to each State to impose export restrictions upon unlawfully excavated cultural objects.

2. The proposed change in paragraph (2) is mainly of a drafting nature. It is intended to avoid the impression that this paragraph interferes with the independence of the court and to express the same policy in the form of rules of substantive law by which the court is to be bound.

3. The purpose of the proposed new paragraph (5) is to make it clear that a request for the return of an illegally exported cultural object under this Convention does not affect the question of ownership. Of course, the requesting State is not prohibited from passing national legislation, if necessary, to confiscate the ownership of a cultural object which was exported in violation of export regulations of that State. However, the effect of a request for return under this Convention itself should not go beyond the physical return of such a cultural object to the territory of the requesting State and it should be clearly so stated in the Convention.

#### *Articles 6 and 7*

“(1) The provisions of paragraph (1) of Article 5 shall not apply where

(a) the cultural object (same as present subparagraph (a) of paragraph (1) of Article 6)

(b) the cultural object (same as present subparagraph (b) of paragraph (1) of Article 6), or

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

(2) (same as present paragraph (2) of Article 7).

(3) The provisions of paragraph (1)(a) of this Article shall not apply in the case of the cultural objects referred to in paragraph (1)(b) of Article 5”.

#### Explanation

This proposal is of a purely drafting nature. While Article 5 stipulates the situation giving rise to the right of the requesting State to the return of an illegally exported cultural object, Article 6 and Article 7 provide for exceptions to the principle stated in Article 5. If so, Articles 6 and 7 could be integrated into one Article stipulating exceptional situations blocking the right of the requesting State to return which would otherwise be permitted in Article 5.

#### Article 8

“(1) (unchanged)

(2) (deleted)

(3) (deleted)

(4) (unchanged)

(5) (unchanged)

(6) Without prejudice to paragraph (1) of this Article, the possessor of an illegally exported cultural object required to return it shall be entitled at the time of restitution to reimbursement by the requesting State of what he has spent for the preservation or repair of the cultural object to the extent permitted under the applicable law.

(7) Where the possessor of an illegally exported cultural object is entitled to payment by the requesting State of fair and reasonable compensation and/or

reimbursement of what he spent for the preservation or repair of the object in accordance with the preceding paragraphs, the possessor may refuse to return the cultural object until he has received such compensation and/or reimbursement.”

#### Explanation

1. Paragraph (2) should be deleted. Although the absence of an export certificate is one of the important factors to be taken into account in deciding the subjective requirements of the possessor, it should be left to the judge evaluating the evidence.

2. Paragraph (3) is unnecessary and should be deleted. With or without this paragraph, the possessor and the requesting State are free to agree on the terms and conditions of the return of the cultural object in question.

3. A new paragraph (6) is proposed to make it clear that the right of the possessor to the reimbursement of such expenses as he spent for the preservation or repair of the cultural object is not affected by this Convention, where such right exists under the applicable law.

4. A new paragraph (7) is proposed to secure the payment by the requesting State of what the possessor is entitled to under paragraphs (1) and (6). The right to refuse to return the cultural object by the possessor would thus serve as security for the possessor who is required to return the object in accordance with the request.

#### Article 9

Add the following new paragraph to this Article:

“(4) Any claim or request under this Convention shall be pursued in accordance with the procedural law of the forum State.”

#### Explanation

The proposed new paragraph is intended to confirm a widely accepted principle of private international law, that is, it is the law of the forum (*lex fori*) which governs matters of procedure.

*New article*

“This Convention does not apply to:

(a) cultural objects which are required to be retained by the competent authorities (including the administrative authorities) of a Contracting State or cultural objects which the possessor is required to retain by the order of such authorities in accordance with the criminal justice law or any other laws of that Contracting State concerning the maintenance of public security and order and the protection of private property;

(b) cultural objects which are required to be transferred from a Contracting State to another State in accordance with the domestic law of that Contracting State concerning international assistance in criminal justice and investigation;

(c) cultural objects which have been transferred from one State to another State for the purpose of international assistance in criminal justice and investigation and are required to be returned from the latter State to the former State in accordance with the terms and conditions of the initial transfer.”

Explanation

See paragraph 25 of the comments by the Government of Japan in CONF. 8/5 Add. 1.

CONF. 8/C.1/W.P. 8  
8 June 1995

*Proposals by the delegation of the Republic of Korea*

*Articles 3(3) and (4) and 5(3) and (4)*

As to the time limit, the provisions of Articles 3(3) and (4) and 5(3) and (4) should distinguish a possessor in good faith from a possessor in bad faith.

In the case of a bad faith possessor, the provision must contain either of the following:

(1) the time limit should be tolled in any period when the bad faith purchaser actively conceals the location of the object and the identity of the possessor;

(2) a much longer limitation period should be allowed than the text suggests.

*Article 4*

The provisions of Article 4(1) should allow the requesting party an option between fair and reasonable compensation and the price actually paid, whichever is the lower.

The provisions of Article 4 should address the cost of restitution of the stolen object as Article 8(4) does for the return of illegally exported objects.

*Article 6(1)*

Article 6(1) should distinguish the removal of the object in good faith from that in bad faith.

The court or other competent authority of the country addressed should refuse the return of the object mentioned in Article 5 only when the prior removal was made in good faith.

Article 6(1)(a) should indicate some objective criteria.

*Article 8(2) and (4)*

Article 8(2) should render the production of export certificates mandatory to determine good faith.

In Article 8(4) the cost of returning the object should be borne by the possessor if he (she) has acted in bad faith.

In the case of a possessor in good faith, the cost shall be borne by the requesting country without prejudice to the right of the requesting country to recover the cost from the third party.

*Preamble*

The preamble should declare that the adoption of provisions to control illicit trade in the future in no way legitimises theft or illegal exports which have taken place before their coming into force.

CONF. 8/C.1/W.P. 9  
8 June 1995

*Proposals by the delegation of Spain*

*Article 3(3)*

Amend Article 3(3) by deleting the words “or ought reasonably to have known”. The new text would read as follows:

“(3) Any claim for restitution shall be brought within a period of one year from the time when the claimant knew the location of the object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.”

If the language “or ought reasonably to have known” were to be retained, then the shorter period should be three years.

*Article 3(4)*

Amend the definition of “public collection” in Article 3(4) as follows:

“... collection of inventoried cultural objects in a general or specific inventory of the institution in question, and which is the property of:

(i) to (iii) (unchanged)

(iv) a religious institution, even if the stolen object does not appear in the inventory of the institution, on condition that it can be established by any means available under the law that the object belonged to that religious institution.”

CONF. 8/C.1/W.P. 10  
8 June 1995

*Proposal by the delegation of Lithuania*

*Article 3(4)*

(4) (Text in square brackets). The text between commas “which is accessible to the public on a substantial and regular basis” is not necessary and should be deleted.

(iii) a non profit institution which is recognised as such according to the legislation of the Contracting State,

CONF. 8/C.1/W.P. 11  
8 June 1995

*Proposals by the delegations of Australia and Canada*

*Article 3*

Add the following paragraph (5) to Article 3:

“(5) In addition, a claim for restitution of a sacred and secret object belonging to and used by a member or members of an indigenous community in a Contracting State as part of that community’s cultural practice [shall not be subject to prescription] [shall be brought within a time limit of [75] years].”

*Alternative Proposal*

In the alternative, paragraph (4) should be amended as follows :

“(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State, or a sacred and secret object belonging to and used by a member or members of an indigenous community in a Contracting State [shall not be subject to prescription][shall be brought within a time limit of [75] years].”

CONF. 8/C.1/W.P. 12  
8 June 1995

*Proposals by the delegation of Israel*

*Article 3(3) and (4)*

In Article 3(3) the words “and in any case within a period of [thirty] [fifty] years from the time of the theft” should be deleted.

Article 3(4) should read as follows:

“(4) Except to the extent provided for in paragraph (3), no claim for restitution of an object shall be subject to prescription”.

## Explanation

The text of the draft Convention gives the private owner a time-limit of a maximum of 50 years to find its property even if we know that thieves are able to hide it until they can be sure that nobody will sue them.

A public collection shall not be subject to rules of prescription. We suggest giving the same treatment to all owners so that everyone will be able to sue within one or three years from the date when he came to know or should have come to know the necessary details.

We see no harm in giving such a possibility, and because we think that we believe to use any relevant measures to defeat the phenomenon, we can clearly see that its benefits go in the right direction.

Since this Convention deals with future incidents, the purchaser will know that he might have to keep all the relevant documents for an unlimited time.

CONF. 8/C.1/W.P. 13  
8 June 1995

### *Proposal by the delegation of Canada*

#### *Article 3(4)*

Amend the second part of Article 3(4) as follows:

“(4) For the purposes of this paragraph, a “public collection” consists of a collection of cultural objects which is established for the benefit of the public and which is accessible to the public on a substantial and regular basis.”

CONF. 8/C.1/W.P. 14  
8 June 1995

### *Proposal by the delegation of Italy*

#### *Article 3*

Article 3(1) should clearly establish a general principle. The problem of distinguishing among owner, possessor, holder, claimant and defendant should be dealt with in other parts of the Convention (e.g. Article 4 and Article 9). We therefore submit the following amendment:

“(1) Cultural objects which have been stolen shall be returned.”

CONF. 8/C.1/W.P. 15  
9 June 1995

### *Proposals by the delegation of Poland*

#### *Article 3(3)*

After “or ought reasonably to have known”, the following phrase should be added: “and had the legal possibility to prove his/her right”.

Comment:

The validity of claims for restitution is limited by the interplay of two factors. First, any claim may be lodged within a period of [one] [three] year[s], that being related to the claimant’s knowledge, real or presumed, of the identity of the possessor of the object claimed. Secondly, no claim may be filed after [30] [50] years from the time of the theft. It may be, however, that the owner deprived of his/her property has had knowledge of the identity of the actual possessor (or holder) without having a legal remedy to establish his/her right. If such knowledge dates back more than [one] [three] year[s], the owner will not be able to avail himself/herself of the legal remedy granted under Article 9(1) of the draft Convention. This holds true especially in the situation where this self-executing provision forms the independent and sole legal basis for the claim for restitution. The suggested addition makes more flexible the too rigid and unqualified requirement concerning the limitation on filing claims for restitution.

#### *Article 6(1)(a)*

The words “culture of State” should be replaced by: “culture of Nation” or better: “national heritage”.

Comment:

This may be understood as a formal correction. “Culture of State” is rather associated with political culture – which we do not purport to discuss – while “culture of Nation” designates objects important for the cultural heritage of a Nation.

CONF. 8/C.1/W.P. 16  
9 June 1995

*Comments by the delegation of the  
Socialist People's Libyan Arab Jamahiriya*

The Libyan delegation would like to state and underline two points that it considers extremely important for the acceptance of this Convention:

- The right of all countries to have cultural objects which were stolen or illegally exported returned, and the Convention must clearly indicate that this right can never be subject to prescription.
- The return of stolen cultural objects to their original place and country.

CONF. 8/C.1/W.P. 17  
9 June 1995

*Proposal by the delegation of Croatia*

*Article 3(4)*

“(4) For the purposes of this paragraph, a “public collection” is a group, series or collection of identifiable cultural objects accessible in various ways to the public in order to use or enjoy evidence and the arts of the past in the present for the secular or religious benefit of the public.”

CONF. 8/C.1/W.P. 18  
9 June 1995

*Proposal by the delegation of Germany*

*Article 5(2)*

Article 5(2) should read as follows:

“(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 object concerned is unique or outstanding and thus of particular cultural importance for the requesting State.”

CONF. 8/C.1/W.P. 19  
9 June 1995

*Proposal by the delegation of the  
Islamic Republic of Iran*

*Article 3*

“(1) A Contracting State from where the cultural object was stolen may request the competent administrative or judicial authorities of another Contracting State to restitute them to the country of origin.

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

(3) The claims for restitution of the stolen cultural objects shall not be subject to prescription.

(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State shall not be subject to prescription.

For the purposes of this paragraph, public collections shall mean collections which are the property of a member State, local or regional authority within a member State or an institution and defined as public in accordance with the legislation of that member State, such institution being the property of, or significantly financed by, that member State or regional authority and the inventories of religious institutions.”

CONF. 8/C.1/W.P. 20  
9 June 1995

*Proposal by the delegation of Tunisia*

*Article 4(1)*

“(1) The possessor of a stolen cultural object who is required to return it shall only be entitled to payment of fair and reasonable compensation if he proves that he exercised all due diligence at the time of acquisition and that he never knew nor ought reasonably to have known that the object was stolen.”

CONF. 8/C.1/W.P. 21  
9 June 1995

*Proposals by the delegation of Lithuania*

*Article 5*

If the request for the return of the cultural object is made under the conditions indicated in Article 5(1)(b), the cultural object must be returned without any additional conditions. That is why we suggest a new paragraph 2 A which could be read as follows:

“In the case where a cultural object has 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, the court or other competent authority of the State addressed shall order the return of the object.”

*Article 6*

Article 6 should be deleted.

CONF. 8/C.1/W.P. 22  
9 June 1995

*Proposal by the delegation of the  
Islamic Republic of Iran*

*Article 4*

“(1) The possessor of a stolen cultural object is not entitled to any compensation from the Contracting State from which the object has been stolen.

(2) The cost of the restoration, preservation and maintenance of a stolen cultural object can be payable to the possessor, as fair compensation.”

CONF. 8/C.1/W.P. 23 Corr.  
12 June 1995

*Proposals by the delegation of Peru*

*Article 3(3)*

Any claim for the restitution of cultural objects shall be brought within a period of three years from the time when the theft was known.

Such a claim may be brought within a period of fifty years from the time of the theft.

*Article 3(4)*

A claim for the restitution of objects belonging to public collections of Contracting States shall not be subject to prescription.

We do not feel it is necessary to introduce the word “significant” in the definition of a *public collection*.

In sub-paragraphs (i) and (ii) the words “or local or regional authority” should be included.

In sub-paragraph (iii) both the words “or local or regional authority” and the words “national” and “public” should also be included.

In sub-paragraph (iv) religious institutions should be included.

*Article 5(1)(c) and (4)*

Sub-paragraph (1)(c) should be retained. This sub-paragraph is of particular importance by reason of the increase in illegal excavations and the resulting smuggling of objects of archaeological interest. The first tomb of Señor de Sipán in Peru – which was desecrated – bears eloquent witness to this problem.

Paragraph (4): the same limitation period should be provided for as those we are proposing for Article 3(3).

*Article 6(1)(a) and (b)*

We do not believe it is right that sub-paragraph (1)(a) should be included in the text of this article, as it would enable the judges of other States to reject a claim for the restitution of an object on the ground that this object had a connection with the culture of the State addressed.

In sub-paragraph (1)(b) the fact that the cultural object stolen from the requesting State was subsequently unlawfully removed from the acquiring State and was as a result in a third State should not as a rule enable a court or other competent authority to deny the return of the cultural object.

*Article 7(1)*

In order to clarify the meaning of paragraph (1) the words “in accordance with the terms of paragraph (4) of the aforesaid article” should be added at the end of this paragraph.

*Article 8(3)(b)*

In sub-paragraph (3)(b) it should be possible for ownership to be transferred not only to a person but also to an *institution*.

*Article F*

We feel it is important to underline that this article gives the possibility to apply Article C and States Parties will accordingly in future be able to apply rules more favourable to the restitution of cultural objects stolen or unlawfully removed from national territory than those provided for by the Convention.

CONF. 8/C.1/W.P. 24 Corr.  
12 June 1995

*Proposal by the delegation of Greece*

*Article 4(1)*

“(1) A person who has obtained a stolen cultural object for value and is required to return it shall be entitled to be compensated by the transferor provided that it 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. Where, independently of default by the possessor, compensation cannot be obtained, the claimant shall provide [fair and reasonable] compensation.

CONF. 8/C.1/W.P. 25  
12 June 1995

*Proposals by the delegation of the  
Socialist People’s Libyan Arab Jamahiriya*

*Article 4(1)*

The Libyan delegation considers that there can be no question of paying compensation in respect of

stolen and illegally exported cultural objects, whatever may be the reasons and the circumstances.

*Article 4(2)*

Article 4(2) should be completed by a requirement that the person who has acquired the cultural object prove that the latter was acquired in the State from which it was removed whilst on sale to the public, that the person acquiring it has contacted the said State with a view to obtaining an export licence and that he has obtained a written export licence.

*Article 5(4)*

This paragraph should be changed to reflect the fact that there must be no time-limits for the presentation of requests for the return of cultural objects because the right is not subject to prescription.

*Article 6(1)(a)*

This sub-paragraph should be deleted.

The Convention must be retroactive in effect: Libya suffered damage during the Second World War and was the victim of aggression, which continues to be perpetrated at the present time by organised groups. Moreover, the importance of the national heritage is not sufficiently recognised in the country. Consequently Libya is particularly affected by the loss of cultural objects.

CONF. 8/C.1/W.P. 26 Corr.  
14 June 1995

*Report of the Working Group on Article 3(3) and (4)*

A working group on Article 3(3) and (4) met on 10 June 1995. It comprised members of the delegations of Cameroon, Canada, France, Greece, the Islamic Republic of Iran, Japan, Mexico, the Netherlands, the Republic of Korea, Switzerland and the United States of America. The representative of Mexico took the chair.

The working group considered its terms of reference as being to examine the question of public collections dealt with Article 3(4) of the draft Convention and the impact of this on the question of

prescription dealt with in Article 3(3). The working group proposes for consideration by the Committee of the Whole the following text:

*“Article 3(4), (5) (new) and (6) (new)”*

(4) However a claim for restitution of an object that is part of a public collection [shall not be subject to prescription] [shall be brought within 75 years].

(5) For the purposes of this Convention, a “public collection “ consists of a group of [inventoried] cultural objects owned by:

- (a) a Contracting State,
- (b) a regional or local authority of a Contracting State,
- (c) a religious institution in a Contracting State, or
- (d) an institution in a Contracting State recognised in that State as serving a public interest.

[(6) In addition, a claim for restitution of a sacred and secret object [, inventoried and] belonging to and used by a member or members of an indigenous community in a Contracting State as part of that community’s cultural practice [, shall not be subject to prescription] [, shall be brought within [75] years]. ]”

In addition, the working group took a decision that it was not part of its terms of reference to deal with the question of special protection for cultural objects belonging to a Contracting State but not part of a public collection (cf. CONF 8/C.1/W.P. 5: proposal by the delegations of Greece and Turkey) as well as the question raised in document CONF. 8/C1/W.P. 12 (proposal by the delegation of Israel).

CONF. 8/C.1/W.P. 27  
12 June 1995

*Proposals by the delegation of Bulgaria*

*Article 3(3)*

“(3) Any claim for restitution shall be brought

within a period of 3 (three) years 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 50 (fifty) years from the time of the theft.”

*Article 3(4)*

“(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State, shall be brought within a time limit of 50 (fifty) years.”

The scope of the term “public collection” is proposed to be widened. (wider definition)

*Article 5(1)(a - c)*

Include more items in paragraph (1) (not yet defined).

*Article 5(2)(a - d)*

Include more items like “the integrity of a collection” as paragraph (2)(e).

*Article 6(1)(a)*

Narrow the scope of paragraph (1)(a) and define it as follows:

“(a) the object has a closer connection with the culture of the State addressed in terms of its origin.”

*Article 8(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.”

*Article 8(3)*

Article 8(3) should not be applied in cases when the cultural object has been included in a public collection on the territory of the requesting State.

CONF. 8/C.1/W.P. 28  
13 June 1995

*Proposals by the delegation of the  
United States of America*

*New article*

*Applicable law*

“For purposes of interpreting and applying the provisions of this Convention, and except where otherwise provided for in the Convention, the law applicable shall be that of the forum State, which as appropriate may take into account the laws of the State from which an object has been stolen or illegally exported.”

CONF. 8/C.1/W.P. 29  
16 June 1995

*Proposal by the delegations of Turkey, Lithuania,  
Peru, China, the Republic of Korea,  
the Islamic Republic of Iran and Egypt*

Add a new article drafted as follows:

*Retroactivity*

*New article*

“Without prejudice to the provisions set forth in Article 3(3) and Article 5(4), this Convention shall apply to transfers of stolen and illegally exported cultural objects that occur after the effective date of the Convention with respect to cultural objects stolen or illegally exported prior to the effective date of the Convention.”

CONF. 8/C.1/W.P. 30 Corr.  
12 June 1995

*Proposal by the delegation of Israel*

*Article 6, new paragraph (3)*

In Article 6, after paragraph (2), add a new paragraph (3):

“(3) Notwithstanding the provisions of paragraphs 1 and 2, the court or other competent

authority of the State addressed may, if there are other legal proceedings pending in respect of the same object, either defer its decision until those proceedings are completed, or refuse the return of the object until the other proceedings are completed.”

CONF. 8/C.1/W.P. 31  
12 June 1995

*Proposal by the delegation of Poland*

*Article 9*

The following should be added to Article 9 as paragraph (2) or (4):

“The Contracting States may consider revising their court procedure regulations, if need be, so as to provide for either a general waiver or a significant reduction of any court fee (and/or costs) in cases concerning looted, stolen, or illegally exported cultural objects.”

*Commentary*

The combined effect of the general rule set out in Article 3 and the rule providing for the submission of a claim to the jurisdiction of the country where the object has been found (according to Article 9) may privilege holders or possessors (contrary to Article 4(3)).

The court fees and costs of due process may, depending on the evaluation of the object, surpass its real value, to say nothing of the financial means of the claimant.

Hence, the Convention seems to offer a good opportunity to encourage the laying down in the laws of Contracting States of appropriate regulations to govern this question.

CONF. 8/C.1/W.P. 32  
12 June 1995

*Proposals by the delegation of Lithuania*

*Article 7(2)*

Article 7(2) should be deleted.

If Article 7(2) is not deleted, we suggest the following:

– the text in square brackets in Article 7(2)(a) should be deleted;

– a new paragraph (3) should be inserted in Article 7 and could read as follows:

“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 8(1)*

The term “possessor” in the Article 8 should be replaced by the term “owner”. It is impossible for the “possessor” to “retain ownership of the object” (Article 8(3)(a)) or “to transfer ownership”(Article 8(3)(b)) if the possessor is not the owner.

*Article 8(2)*

Article 8(2) should be deleted.

*Article 8(5)*

If the replacement of the term “possessor” by the term “owner” (Article 8) is accepted, then Article 8(5) should be deleted.

CONF. 8/C.1/W.P. 33  
12 June 1995

*Proposals by the delegation of Tunisia*

*Article 5*

“(1) (a) (b) (c) (unchanged).

(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 object was removed from its territory contrary to its law regulating the export of cultural objects or that the retention of the object would be contrary to this law.

(3) (deleted).

(4) Any request for return shall be brought within a period of three years 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 fifty years from the date of its illegal export.

However, a request for the return of objects owned by the requesting State shall be subject to prescription.”

*Article 6*

(deleted).

*Article 7*

(deleted).

*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 shall only be entitled to payment of fair and reasonable compensation if it proves that it neither never knew nor ought reasonably to have known that the object had been unlawfully removed or retained.

(2) (unchanged).

(3) (unchanged).

(4) (unchanged).

(5) (unchanged).”

CONF. 8/C.1/W.P. 34  
12 June 1995

*Proposal by the delegation of Italy*

*Article 5(2)*

Article 5(2) should be amended as follows:

“(2) The court of 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 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 significant cultural importance for the requesting State.”

Commentary

The term “significant” is deleted from the second line of this paragraph and replaces the term “outstanding” in the last line of this paragraph.

CONF. 8/C.1/W.P. 35  
12 June 1995

*Proposal by the delegation of Canada*

*Article 7(2)*

Article 7(2) should be amended as follows:

- “(2) Neither shall they apply where  
(a) (unchanged)  
(b) (unchanged)

except where the object was made by a member *or members* of an indigenous community for use by that community *and the object will be returned to that community.*”

CONF. 8/C.1/W.P. 36  
13 June 1995

*Proposal by the delegation of Switzerland*

*Articles 6 and 7*

“(1) The provisions of Article 5 shall not apply where:

- (a) the object has a closer connection with the culture of the State addressed;  
(b) the export of the cultural object is no longer illegal at the time the claim is brought; or

(c) the 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.

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

CONF. 8/C.1/W.P. 37  
13 June 1995

*Proposals by the delegation of Spain*

*Article 8(2)*

The Spanish delegation proposes, in respect of the drafting of Article 8(2), the following options:

*Alternative A*

“(2) ... it is presumed, subject to proof to the contrary, that in the absence of an export certificate for an object for which it is required, the possessor had notice that the object had been illegally exported.”

*Alternative B*

“(2) Where a Contracting State has instituted a system of export certificates, the absence of such a certificate for an object for which it is required shall put the purchaser on notice that the object has been illegally exported, when it is known that the object came from that country.”

If neither of these proposals is accepted, this paragraph should be deleted.

*Article 8(3)*

The Spanish delegation proposes the deletion of this paragraph or, alternatively, the following wording:

“Instead of requiring compensation, and with the express and prior agreement of the requesting State, the possessor may, when returning the object to that State ...”.

CONF. 8/C.1/W.P. 38  
12 June 1995

*Proposal by the delegation of Switzerland*

*Article 1*

Article 1 should be amended as follows:

“This Convention applies to claims for:

(a) the restitution of cultural objects stolen from:

(i) a Contracting State;

(ii) an institution, whether public or private, established, at the time of the theft, in a Contracting State; or

(iii) a person having, at the time of the theft, its habitual residence in a Contracting State.

(b) the return ... (the rest of this paragraph remaining unchanged)”.

CONF. 8/C.1/W.P. 39  
12 June 1995

*Proposal by the delegations of Cameroon, Cyprus, Egypt, Greece, Mexico and Turkey*

*Article 3(4)*

Replace the first sentence of Article 3(4) by one of the following alternatives:

*Alternative A*

“However, a claim for restitution of an object *belonging to a Contracting State* or a public collection in a Contracting State shall not be subject to prescription”.

*Alternative B*

“However, a claim for restitution of an object *forming an integral part of an archaeological or historical monument or site or belonging to a public collection* shall not be subject to prescription”.

CONF. 8/C.1/W.P. 40  
12 June 1995

*Proposal by the delegations of Croatia and Kuwait*

*Article 10*

Article 10 should be amended to read as follows:

“Nothing in this Convention shall prevent a Contracting State from applying national laws or provisions of other Conventions more favourable to the restitution or the return of a stolen or illegally exported cultural object than provided for by this Convention.”

CONF. 8/C.1/W.P. 41  
12 June 1995

*Proposal by the delegation of Cameroon*

*Article 5(4)*

Article 5(4) should be amended to read as follows:

“Any request for return shall be brought within a period of three years 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 fifty years from the date of the export.”

*Comment*

Long time-limits will give the requesting State the time to take all the necessary steps, a time limit of one year being excessively short for the lengthy procedure that is normally involved in the taking of official action at international level.

CONF. 8/C.1/W.P. 42  
12 June 1995

*Comments by the delegation of India*

*Article 1*

As theft is an act which is condemned and punished under all national laws, the scope of the Convention

should be general and not limited to stolen cultural objects removed from a Contracting State only. The restriction in sub-paragraph (a) would only encourage the theft of cultural property on the territory on non-Contracting States.

#### *Article 2*

The prescription of the nature and type of cultural and other objects which a State considers as being of such importance as to warrant the prohibition of their export is essentially a matter for each State to decide. Thus, any enumeration in an international Convention can only be illustrative and not exhaustive. Accordingly, India favours the text of this article as drafted as it is an inclusive definition which takes into account the definition in the 1970 UNESCO Convention to which India is a party and which also permits parties flexibility in defining cultural objects under their national laws.

#### *Article 3*

Under paragraph (3), claims for specific restitution of stolen cultural objects are subject to a time limitation of one or three years from the time when the claimant knew or ought reasonably to have known the location of the object and the identity of the possessor and, in any case, within 30 or 50 years of the theft.

This is an uncertain period as it will be difficult to establish when an owner should have known the whereabouts of the object as there are no commonly acceptable legal criteria regarding when a person should have known a particular fact. This provision places an unreasonable burden on owners. It is open to different interpretations and is ambiguous and contrary to the interests of the developing countries from where cultural objects are most often stolen. This provision creates a serious obstacle to the realisation of the aims of the Convention, namely facilitating the return of a cultural object to its owner or to its country of origin. Apart from knowledge of the whereabouts of a stolen object, other factors, such as the costs to be incurred, may also affect the time within which a State may initiate an action for its recovery and the Convention should suitably take into account and provide for this.

Paragraph (4) also provides a further limit of 75 years from the time of theft for bringing a suit for restitution of a stolen object belonging to a public collection.

It appears to be unreasonable that genuine owners should be excluded from recovering stolen goods simply because the possessor has been efficient in hiding them. Stolen cultural objects can easily be concealed and returned to the market after the expiry of the limitation period. If the principle of acquisition by prescription is admitted, this would encourage the practice whereby cultural objects are concealed for long periods after the theft. Accordingly, India supports the option in square brackets to the effect that such objects shall not be subject to prescription.

India also supports the inclusion of the definition of the term “public collection” on the lines proposed in the draft and the removal of all the square brackets so as to have a wider definition of the term.

#### *Article 4*

The principle of the rightful owner having to compensate the possessor of a stolen cultural object to secure its return may, in practice, discourage the lawful owners of cultural property from seeking their restitution, particularly in view of the high prices commanded by such objects in the West European and American countries. The payment of such a compensation would only encourage the market in stolen cultural objects since an object passes through several hands at higher and higher prices before its location is discovered by the true owner and each successive transaction may be used to justify the execution of due diligence. Since a seller of goods cannot transfer to the buyer a better title than he himself has, **compensation to the holder, if any, should be payable not by the genuine owner, but by the person who had earlier sold him the stolen object.** Only by providing for the liability of dealers in stolen cultural objects, could the Convention effectively provide any controls of the illegal trade in such objects.

Apart from the provisions of paragraph (2) regarding the matter to be considered in determining whether the possessor exercised due diligence, another paragraph on the lines of Article 8(2) may be included in this article also.

#### *Article 5*

Under the proposed formulation, the State of origin is placed under the additional burden of establishing the impairment of its interests relating to preservation of the object or its cultural and historical importance apart from establishing that the object has been illegally exported from its territory. Such a requirement does not appear to be necessary once it is established that the object is of *such* importance to the State of origin that its export has been prohibited. It is essentially for the State of origin to determine the objects or categories of objects which it considers as fundamental to its cultural identity or of such historical importance as to prohibit their export or to provide for its regulation through necessary licensing. The Indian delegation would not like to have the conditions mentioned in sub-paragraph (2). Further, the fact that the requesting State has taken the trouble and expense of initiating the procedure under the Convention should in itself be sufficient indication of the importance which it attaches to the return of the object.

The Indian delegation supports the removal of the square brackets in Article 5(1)(c).

#### *Article 6*

The question whether the return of a cultural object by its transportation or otherwise would impair its physical preservation should be a matter for ultimate decision of the State of origin, and the State where it is found after illegal export should not have the final say in the matter. Similarly, where a cultural object, once removed unlawfully from the State of origin, has subsequently been illegally exported to several countries, the ultimate claim for its return should lie with the State from where the object originated and its claim cannot be overridden by the claims of any State through which it had passed before discovery. Further, the fact that the State where a cultural object is found after its illegal export from the country of origin considers it to be of outstanding cultural importance can not affect the legitimate claims of the State of origin for its return. The inclusion of such further conditions would only frustrate the purpose of the Convention and make it totally ineffective and incapable of realisation

and would affect its acceptability to the developing States.

#### *Article 8*

As expressed under Article 4, India feels that the principle of the rightful owner having to compensate for an illegally exported cultural object to secure its return, may, in practice, discourage the lawful owner from seeking its restitution. India feels that only by providing for the liability of dealers in the illegal trade in cultural objects, could the Convention provide any effective controls on such illegal trade.

India supports the inclusion of Article 8(2) by removal of the square brackets.

CONF. 8/C.1/W.P. 43  
13 June 1995

#### *Proposals by the delegation of Croatia*

##### *General comments*

The terms "possessor" and "fair compensation" as used in this Convention should be defined.

##### *General comments on the interpretation of Articles 1 and 2*

Cultural objects taken from a country as a result of armed conflict should be considered stolen and exported cultural objects under Articles 1 and 2 of the draft Convention.

#### *Article 2*

The definition of cultural objects should be amended to read as follows:

“, as well as integral and valuable collections of art objects and furniture items older than fifty years.”

#### *Article 3(3) and (4)*

The suggested limitation periods should be prolonged, so that paragraphs (3) and (4) respectively would read as follows:

“(3) Any claim for restitution shall be brought within a period of three years 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 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.”

*Article 5(2)*

The words “*or collection*” should be added in paragraph (2)(b) after the word “object”.

*Article 7(3) (new)*

A new paragraph (3) should be added, to read as follows:

“The provisions of paragraph 2 shall not refer to cultural objects of particular cultural significance for the requesting State.”

*Article 8(1)*

The following words should be inserted in paragraph (1) after the word “acquisition”: “or during the period of its possession”.

CONF. 8/C.1/W.P. 44  
13 June 1995

*Proposal by the delegations of Angola, France  
and Portugal*

*Article 6*

Article 6 should be amended to read as follows:

“(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 if:

(a) the return of the cultural object would impair to an intolerable degree the integrity of the cultural heritage of the State addressed,

(b) restitution was likely to pose a serious risk to the integrity or the preservation of the object,

(c) the object had been illegally exported from the State addressed prior to its illegal removal from the territory of the requesting State.

(2) (unchanged).”

CONF. 8/C.1/W.P. 45  
13 June 1995

*Proposal by the observer of the Hague Conference  
on Private International Law*

*Article 6*

The Hague Conference favours the deletion of Article 6(1)(a).

However, should this sub-paragraph be retained, the Hague Conference would propose that it be re-drafted as follows:

“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 return of the object would impair to an intolerable degree the integrity of the cultural heritage of the State addressed.”

CONF. 8/C.1/W.P. 46  
13 June 1995

*Proposal by the delegation of the  
Islamic Republic of Iran*

*Article 9(1)*

The following sentence should be added at the end of Article 9(1):

“In such cases the courts or other competent authorities shall decide on the merits of the case with due regard to the relevant laws of the requesting State.”

CONF. 8/C.1/W.P. 47  
13 June 1995

*Proposal by the delegation of Switzerland*

*Article 8(2)*

“(2) In determining whether the possessor exercised due diligence, the court or other competent authority shall have regard to the circumstances of the acquisition, including the character of the parties, the price paid and the requirement, in the specific case, of an export certificate under the legislation of the requesting State.”

CONF. 8/C.1/W.P. 48  
13 June 1995

*Proposal by the delegation of the  
Islamic Republic of Iran*

*Article 5(1)*

Regarding Article 5(1), while it is possible and imaginable that a cultural object which has been illegally exported, may in course of its exportation legitimately pass through the territories of various Contracting States and finally reach the possessor who is the defendant in a claim for return, in such cases the determination of which of those Contracting States should be considered to be “the defendant Contracting State” is not clear; therefore, for purposes of clarification, we propose modifying the content and purport of the article as follows:

“A Contracting State may request the court or other competent authority of another State acting under Article 9 on whose territory a cultural object is lawfully situated but which has been removed unlawfully to order the return of a cultural object which has:”

CONF. 8/C.1/W.P. 49  
13 June 1995

*Proposal by the delegation of Finland*

*Article 6*

If the Committee considers that Article 6(1)(a)

should be retained, it is proposed that the provision should be redrafted as follows:

“(a) the object has a closer connection with [the culture of ] the State addressed and the return of the object would be manifestly contrary to the fundamental principles relating to the protection of the cultural heritage of that State.”

CONF. 8/C.1/W.P. 50  
14 June 1995

*Proposal by the delegation of Cameroon*

*Article 6(1)*

It is proposed that Article 6(1) be redrafted as follows:

“(1) When one of the requirements of Article 5, paragraph 2 has 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) an appraisal duly carried out by an international expert has established that the object has a closer connection with the culture of the State addressed,

(b) (unchanged)”.

CONF. 8/C.1/W.P. 51  
13 June 1995

*Proposal by the delegation of Italy*

*Article 8(2)*

The wording of Article 8(2) should be amended as follows:

“(2) In determining whether the possessor ought reasonably to have known that the object had been illegally exported, regard shall be had to the circumstance that the cultural object is to be accompanied by an export certificate under the legislation of the requesting State.”

CONF. 8/C.1/W.P. 52  
13 June 1995

*Proposal by the delegation of the  
Socialist People's Libyan Arab Jamahiriya*

*Article 8(2)*

The Libyan delegation is in favour of removing the brackets in Article 8(2) and of maintaining the paragraph as in the text.

The Libyan delegation does not agree to the deletion of Article 8(2).

CONF. 8/C.1/W.P. 53  
13 June 1995

*Proposals by the delegation of Switzerland*

The Swiss delegation proposes a new drafting with no change to the substance for Article 5(2) and for Article 9(1). The texts would read as follows:

*Article 5(2)*

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

(a) the removal of the object significantly impairs one or more of the following interests:

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

(ii) the integrity of a complex object,

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

(iv) the use of the object by a living culture, or

(b) the object is of outstanding cultural importance for the requesting State.”

*Article 9(1)*

“(1) In addition to the rules concerning jurisdiction in force in Contracting States, the claimant may 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.”

CONF. 8/C.1/W.P. 54  
13 June 1995

*Proposal by the delegation of Cyprus*

*Article 9(1)*

Article 9(1) should be amended to read as follows:

“(1) Notwithstanding 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.”

CONF. 8/C.1/W.P. 55  
13 June 1995

*Proposals by the delegation of the  
United States of America*

*Comments on the substance of  
additional paragraphs for Article 9*

“(1) “International character” for purposes of Article 1 is established

(a) when an object is stolen in and removed from or illegally exported from a Contracting State, or

(b) where under Article 1(a) a claim is brought by an owner who is a Contracting State or a habitual resident of a Contracting State for return of an object which has been removed from that State.

(2) Paragraph (1) shall not apply where

(a) the claimant is not a Contracting State or a habitual resident of any Contracting State;

(b) the theft of an object occurs in a Contracting State, and the object after moving out of the Contracting State, returns to that Contracting State;

(c) a habitual resident of a Contracting State brings a claim against a habitual resident of the same Contracting State.”

Alternatively, another approach would be:

*Article 9*

“An “international character” for the purposes of Article 1 exists when a cultural object whose restitution or return is requested has been stolen or otherwise removed from, and at the time the action is commenced is located outside, the Contracting State of the claimant, provided that the possessor is not the same Contracting State or habitual resident of such Contracting State.”

CONF. 8/C.1/W.P. 56  
13 June 1995

*Proposal by the delegation of the  
United States of America*

CHAPTER IV – CLAIMS AND ACTIONS

*New article*

“(1) Parties entitled to bring a claim under this Convention shall include:

(a) for purposes of Chapter II, the person or entity from whom a cultural object was stolen, or the successor in interest of such a person or entity, provided that such claimant is a Contracting State or, at the time the cultural object was stolen, was a habitual resident of a Contracting State; or

(b) for purposes of Chapter III, the Contracting State from which the cultural object was unlawfully exported.

(2) Parties who may be ordered to return a cultural object pursuant to this Convention shall be limited to:

(a) a person or entity who has a good faith claim of title or similar rights to a stolen or illegally exported cultural object; or

(b) a person or entity who has physical possession of a stolen or illegally exported cultural object, provided that if such possessor does not have a good faith claim of title or similar rights to the cultural object, any person or entity who claims title or similar rights to the property, and whose identity and location

is known to the claimant or to the possessor, shall be given notice of the request for return of the cultural object and an adequate opportunity to defend his claim to the cultural object.”

CONF. 8/C.1/W.P. 57  
13 June 1995

*Proposal by the delegations of France and Portugal*

*Article 9(1)*

In Article 9(1), the words “without prejudice” should be replaced by “whatever” and the words “in all cases” by “always”.

Comment

The discussions in the Committee of the Whole have indicated all the arguments justifying this form of wording.

CONF. 8/C.1/W.P. 58  
13 June 1995

*Proposal by the delegation of France*

*Article 8(1)*

The following words should be added at the end of Article 8(1):

“or was responsible for the illegal export”.

Comment

The present text describes in a restrictive manner those cases in which the possessor must be considered as being in good or bad faith. The detailed language of the text presents a drawback since, on a literal reading, it would not prevent a possessor from claiming compensation in cases where it was responsible for the illegal export of an object in any other situation which is highly likely to arise. In effect, a possessor may, for example, have inherited an object which will never have left the territory of a State and remove it illegally. The words “at the time of the acquisition that the object had been unlawfully removed” does not cover this type of case.

CONF. 8/C.1/W.P. 59  
14 June 1995

*Proposal by the delegation of Tunisia*

*Article 9(3)*

“(3) The Contracting State where the object is located shall, in conformity with the legislation and the claim of the requesting State, take provisional, including protective, measures regarding the object on its territory, even when a claim on the merits for restitution or return of the object is brought before the courts or other competent authorities of another Contracting State.”

*Article 10*

(unchanged)

CONF. 8/C.1/W.P. 60  
14 June 1995

*General comments and proposals by the delegation of Slovenia*

*Article 3*

“(1) (unchanged)

(2) (unchanged)

(3) Any claim for restitution shall be brought within a period of three years 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 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.

(5) For the purposes of this Convention, a “public collection” consists of a group of inventoried cultural objects owned by:

- (a) a Contracting State,
- (b) a regional or local authority of a Contracting State,
- (c) a religious institution in a Contracting State, or
- (d) an institution in a Contracting State recognised in that State as serving a public interest.”

Comment:

The wording of paragraph (5) is the text as it resulted from the working group on Article 3(3) and (4) except that the square brackets which were around the word “inventoried” in the *chapeau* have been deleted (CONF. 8/C.1/W.P. 26 Corr., para 5).

*Article 5*

“(1), (2) and (3) (unchanged)

(4) Any request for return shall be brought within a period of three years 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 fifty years from the date of the export.”

*Article 8(2)*

The delegation of Slovenia supports the inclusion of Article 8(2) in the proposed wording.

Comment:

We consider the Unidroit Convention on Stolen or Illegally Exported Cultural Objects as a continuation of the 1970 UNESCO Convention and that it renders the UNESCO Convention effective in the field of international private law. The 1970 UNESCO Convention provides for export certificates and in fact many States, both Contracting and non-Contracting States to the 1970 UNESCO Convention, request export certificates. This should be considered in the Unidroit Convention when judging due diligence of the possessor.

CONF. 8/C.1/W.P. 61  
16 June 1995

*Proposal by the delegations of Greece, the Islamic Republic of Iran, Syria, Tunisia and Egypt*

*Retroactivity*

*Proposed new article*

“This Convention shall apply to the restitution of objects which are the result of illegal excavations, where the date of the excavations or the date of their removal from a Contracting State is not proven.”

CONF. 8/C.1/W.P. 62  
15 June 1995

*Proposals by the delegation of Morocco*

*General remark*

The term “holder” should replace the term “possessor” in the body of the Convention.

*Article 1*

Regarding paragraph (b), the words “its law regulating” should be replaced by the words “its national legislation regarding”.

*Article 3(2), (3) and (4)*

It is suggested that Article 3(2) be amended as follows:

“(2) an object resulting from unlawful excavation shall be deemed ...”.

As regards paragraph (3) the time limits should be longer. The provision should therefore be amended as follows:

“(3) Any claim for restitution shall be brought within a period of three years 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 fifty years from the time when the cultural object was exported”.

Remarks:

The longer the time limits the more chances there are that the stolen object will be returned.

So as to avoid the danger of conflicting interpretations of paragraph (4), it is proposed that the words “of a Contracting State” be replaced by the words “of a requesting State”.

The Moroccan delegation supports the idea that objects which form part of a public collection should not be subject to prescription.

Paragraph (4) might be redrafted as follows:

“(4) However, a claim for restitution of an object belonging to a public collection of a requesting State shall not be subject to prescription.”

Apart from the term “substantial”, which would appear to be ambiguous, the Moroccan delegation favours maintaining the definition of the term “public collection” provided for in the Convention and deleting all the square brackets.

However, regarding sub-paragraphs (ii) and (iii), it would propose the following amendments:

“(ii) an institution substantially financed by the Contracting State in which it is located or by a local or regional authority,

(iii) a non profit institution which is recognised by the Contracting State in which it is located or by a local or regional authority ...”.

*Article 5(1) and (3)*

Sub-paragraph (1)(a) might be redrafted as follows:

“(a) been removed from the territory ... contrary to its national law regarding the export ... significance”

on the lines of the amendment proposed to Article 1(b).

Chapter III deals with the return of cultural objects which have been illegally exported. Article 5(1)(b) talks about a cultural object having been temporarily exported under permit. In this case the object has therefore been removed legally with the necessary licence and therefore falls outside the scope of application of Chapter III unless the drafters of the proposed

Convention take the view that a cultural object which has been legally exported temporarily and which has not been returned to the possessor in conformity with the export licence is an illegally exported cultural object.

For this reason it is proposed that paragraph (1)(b) be amended to make it more explicit.

In paragraph (3) it is proposed that the same time limits be used as those chosen in Article 3(3).

#### *Article 6*

It is not necessary to retain Article 6. Illegally exported cultural objects should be returned to their State of origin in accordance with the spirit of this Convention, which is moving in the direction of protecting the right of the lawful owner deprived of its cultural object which has been illegally exported.

#### *Article 8*

The Moroccan delegation would support the principle of a system of export certificates and is accordingly in favour of retaining paragraph (2) and of deleting the square brackets around this paragraph.

It is proposed that paragraph (3)(b) should be completed by the addition of the following words:

“(b) to transfer ownership against payment or gratuitously to a person of its choice, whether a natural or a legal person or a public or private person, residing in the requesting State and who provides the necessary guarantees.”

CONF. 8/C.1/W.P. 63  
15 June 1995

#### *Proposals by the delegation of Pakistan*

##### *Article 3(2)*

The retention of this article is of central importance. Its possible inclusion in a general chapter preamble, (as has been suggested by some delegations), would vitiate one of the primary objectives of the Convention. In our view, the indicative vote on this question in the Committee of the Whole also demonstrated the importance assigned to this question by most delegations.

##### *Article 3(3)*

The Pakistan delegation noted that the Unidroit Explanatory Report states that many “delegations argued against any limitation period on the ground that it would legitimise a situation which was from the beginning tainted with illegality”. The Explanatory Report also reports that there were delegations who were in favour of “introducing no limitation period whatsoever”. As the document submitted by UNESCO points out, “the 1970 UNESCO Convention does not include a reference to any limitation period”.

Pakistan fully recognises the importance of reaching a reasonable compromise on this issue. It is in this spirit that our delegation has decided *not* to press our observations on Article 5, as circulated in document CONF. 8/5 Add. 4. (These related to illegal events in the colonial period of the history of Asian, African and other States).

It is in this spirit of compromise that Pakistan proposes the following formulation for Article 3(3):

“Any claim for restitution shall be brought within a period of three years 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 one hundred years from the time of the theft.”

##### *Article 3(4)*

Pakistan attaches great importance to the principle that no arbitrary time limit should be imposed for the lodging of claims under this clause. We therefore support the following formulation, also proposed by Greece and Turkey in document CONF. 8/C.1/W.P. 5:

“However, a claim for restitution of an object belonging to a Contracting State or a public collection in a Contracting State shall not be subject to prescription.”

##### *Article 3(5)*

##### *New article proposed by the Working Group*

Pakistan would oppose the word “inventoried”, which appears in brackets before the words “cultural objects” in the Working Group proposal. The inclusion

of the word “inventoried” would place at a serious disadvantage source – poor or recently independent – Contracting States.

*Article 6*

If the majority view (or consensus) favours the deletion of Article 6, Pakistan would support this position. However, if it is decided to retain Article 6, we would propose the following formulation of Article 6(1)(a):

“The object has a manifestly closer connection with the culture of the State addressed”.

Pakistan would propose the complete deletion of Article 6(1)(b). As pointed out in the UNESCO note on the draft Convention, “the addition of any other exception, such as that in Article 6(1)(b), clearly weakens the efforts to limit refusal to return”.

CONF. 8/C.1/W.P. 64 Corr.  
16 June 1995

*Proposal by the delegation of the  
United States of America*

*Retroactivity*

*New article*

“This Convention shall apply only under the following conditions:

(a) for purposes of Chapter II, when the theft of a cultural object and its removal from a Contracting State have occurred after the date that this Convention enters into force for the Contracting State of the claimant and the Contracting State where the claim is brought;

(b) for purposes of Chapter III, when a cultural object is illegally exported from a Contracting State after the date that this Convention enters into force for the Contracting State requesting return of the cultural object and the requested Contracting State where the claim is brought.”

CONF. 8/C.1/W.P. 65 Corr.  
16 June 1995

*Proposal by the delegation of France*

*Article 10*

Article 10 should be amended to read as follows:

“Nothing in this Convention shall prevent a Contracting State from applying to the restitution or the return of a stolen or illegally exported cultural object rules more favourable than those provided for by this Convention provided that such rules do not affect the application of the principles established in the Convention.”

CONF. 8/C.1/W.P. 66  
15 June 1995

*Proposal by the delegations of Turkey, Egypt,  
Mexico and Greece*

*Article 10*

There is a great concern that certain States may not take advantage of the option in Article 10 as in the present draft (CONF. 8/3). Under this Convention, States will agree to adopt rules more favourable to the person dispossessed of a cultural object than they now have. It seems no less onerous, in the same spirit, for States to agree to maintain more favourable rules.

Turkey, Egypt, Mexico and Greece therefore propose that Article 10 be made mandatory and read as follows:

“A Contracting State shall apply its national law to the extent that it is more favourable to the restitution and return of a stolen or illegally exported cultural object than provided for by the Convention.”

CONF. 8/C.1/W.P. 67  
15 June 1995

*Proposal by the delegations of Australia, Canada  
and the United States of America*

*Article 3(6) (new)*

The delegations of Australia, Canada and the United States of America propose the following amendments to draft Article 3(6) (new) proposed in CONF. 8/C.1/W.P. 26 Corr.

“In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a member or members of an indigenous community in a Contracting State as part of that community’s traditional or ritual use [ , shall not be subject to prescription ] [ , shall be brought within [ 75 ] years ].”

Commentary:

In order to address the concerns of some delegations in the Working Group on Articles 3(3) and (4) that met on 10 June 1995, the following text is suggested for the Explanatory Notes on this sub-paragraph:

“The terms, “sacred or communally important cultural objects”, will include a limited number of objects known to and used by members of an indigenous community. Sacred cultural objects are those needed for the practice of traditional religions. Communally important cultural objects are those with significant historical, traditional or cultural importance to an indigenous community.”

CONF. 8/C.1/W.P. 68  
16 June 1995

*Proposal by the delegations of Mexico, Ecuador,  
Argentina, Honduras and Peru*

*Retroactivity*

“For the purpose of this Convention, each Contracting State, when ratifying this Convention, shall

make a declaration in which it states whether it accepts retroactivity and to what extent.”

CONF. 8/C.1/W.P. 69  
17 June 1995

*Proposal by the delegations of Canada, France,  
Mexico, the Netherlands, Switzerland and  
the United States of America*

*Article 3(5)(d)*

In regard to the report submitted by the Working Group on Article 3(3) and (4), the above delegations would like to propose that Article 3(5)(d) be amended as follows:

“(d) an institution that is established for an essentially cultural or educational purpose in a Contracting State and is recognised in that State as serving the public interest.”

CONF. 8/C.1/W.P. 70 Corr.  
16 June 1995

*Proposal by the delegations of Greece, the Republic  
of Korea, Cameroon, Guinea and Côte d’Ivoire*

*Article 4*

Additional paragraph:

“The *mala fide* possessor of a cultural object who has been obliged to return it, shall bear the judicial expenses and pay punitive damages.

CONF. 8/C.1/W.P. 71  
17 June 1995

*Proposal by the delegation of the Russian Federation*

*Article 7*

This delegation proposes replacing sub-paragraph (b) by the following text:

“(b) the object was exported by a person duly authorised by the person who created it or by that person itself;”

and to add a new paragraph (3) as follows:

“(3) The provisions of sub-paragraphs (b) and (c) of paragraph 1 of this Article shall not apply in the case of objects referred to in Article 5, paragraph (1bis).”

CONF. 8/C.1/W.P. 72 Corr.  
17 June 1995

*Proposal by the delegations of Albania, Bulgaria, China, Egypt, Greece, Hungary, the Islamic Republic of Iran, Mexico, Pakistan, Peru and Turkey*

*Article 4*

“(1) The possessor of a stolen cultural object who obtained it for value and is required to return it may seek fair and reasonable compensation. The possessor will not be entitled to any compensation unless it can prove that it neither knew nor ought reasonably to have known that the object was stolen, that it exercised due diligence when acquiring the object and that it has no available legal or other remedy against its transferor or any prior transferor. In determining the request for compensation, other relevant factors shall also be considered.

(2) In determining whether the possessor exercised due diligence, all relevant circumstances shall be considered, including the character and conduct of the parties, the provisions of the contract and the circumstances in which it was concluded, the price paid, the value of the object, its provenance, the absence of an export certificate, any special circumstances concerning the transferor’s acquisition known to the possessor; and whether the possessor took all reasonable steps to protect itself (such as securing indemnification and insurance, consulting all reasonably accessible registers or databases and appropriate agencies, requesting and obtaining all reasonably available documentation and information, and making all reasonable efforts to ascertain the accuracy and authenticity of such documentation and information).

(3) (unchanged)”

CONF. 8/C.1/W.P. 73  
17 June 1995

*Proposal by the delegations of Cameroon, Côte d’Ivoire, Ghana, Nigeria, Angola, Tunisia, Guinea, Kuwait, Jordan and Italy*

*Article 3(5)*

“(5) For the purposes of this Convention, a “public collection” consists of a group of inventoried or otherwise identified cultural objects owned by:

- (a) a Contracting State,
- (b) a regional or local authority of a Contracting State,
- (c) (unchanged)
- (d) (unchanged).”

CONF. 8/C.1/W.P. 74  
17 June 1995

*Proposal by the delegation of Switzerland*

*Article 3(4)*

“(4) However, a claim for restitution of an object belonging to a public collection of a Contracting State shall be brought within a period of 75 years, unless the law of the Contracting State where the claim is brought provides that a claim brought in respect of its own public collections is not subject to prescription.

For the purpose of this Convention (... unchanged).”

CONF. 8/C.1/W.P. 75  
17 June 1995

*Proposal by the delegation of the Russian Federation referring to document CONF. 8/D.C./Doc. 1 Corr.*

*Article 5(2)*

Amend Article 5(2) as follows:

“(2) The court or other competent authority of

the State addressed shall order the return of an object when the requesting State proves that the object is of cultural importance to it or that the export of the object impairs one or more of the following interests:

- (a) (unchanged)
- (b) delete the words “of a collection”
- (c) (unchanged)
- (d) (unchanged).”

CONF. 8/C.1/W.P. 76  
19 June 1995

*Proposal by the delegations of Angola, Belgium,  
Croatia and Portugal*

*Article 6*

“When the requirements of Article 5(2) have been satisfied, the court or other competent authority of the State addressed may only refuse to return a cultural object if such a return would be manifestly contrary to the public policy of that State.”

CONF. 8/C.1/W.P. 77  
19 June 1995

*Proposal by the delegation of Tunisia*

*Article 3(4)*

“However, a claim for restitution of an object belonging to a Contracting State or to a public collection of a Contracting State shall be brought within a period of 75 years, unless the law of the requesting State provides that such claims shall not be subject to prescription.”

CONF. 8/C.1/W.P. 78  
19 June 1995

*Proposal by the delegations of Bulgaria, France, Italy,  
Mexico, the Netherlands and Turkey*

*New article*

“The President of the International Institute for the Unification of Private Law (Unidroit) shall at regular

intervals convene a Special Commission in order to review the practical operation of the Convention.”

CONF. 8/C.1/W.P. 79  
19 June 1995

*Proposal by the delegation of the  
United States of America*

*Article 3*

Add to either variant,

“... in accordance with the terms of this Convention.”

CONF. 8/C.1/W.P. 80  
19 June 1995

*Comments by the observer of the  
International Bar Association*

The Convention, to have the effect which its authors intended, must be ratified by as many States as possible, and in particular by those States which have a long tradition of art collecting, and where the most active elements in the art market have carried on business for many generations.

Failure to obtain the support of those States will condemn the Convention to the same degree of non-ratification as the 1970 UNESCO Convention and this would mean that the opportunity to make claims under the Unidroit Convention, for the return of stolen or illegally exported cultural objects, through the Courts or other procedures of those States would not be available.

Having followed attentively the debates of Committee I during the last week, and having spoken to delegates from some of the “importing” States, it is my clear impression (and I expect that most delegates have reached the same conclusion) that amongst all the matters that still have to be resolved, there are currently three points of principle (and no more), the rejection of which could make it constitutionally or politically impossible for those States to ratify the Convention.

The dividing line (in real terms) between success and failure of this diplomatic Conference is therefore a

narrow one. Its success will depend entirely on how the majority (representing States for which it may be desirable in the future to have instant access to the Courts or other procedures of “importing” States under the Convention) actually cast their final votes on these three issues, which can be summarised as follows:

1. No retroactivity.
2. No claims without time limit (75 years maximum).
3. No change (apart from the minor amendment to sub-paragraph (d) in the latest Drafting Committee text – Doc. 2 19-6-1995) to the wording of Article 5(2) as it appears in the original Conference text (CONF. 8/3).

There is of course nothing to prevent any State, including an “importing” State, applying voluntarily a more favourable regime in regard to any of these matters, either by reference to Article 10 or by Declaration at the time of ratification. However as regards the text of the Convention, a Conference vote which recognises these concerns of “importing” States is the key which can open the door to ratification (if the political will exists) by those States, whose support is needed for the effective implementation of the Convention.

Herein lies the essence of the “Compromise”, so far as the Convention is concerned. I cannot see any other route to a successful conclusion of the Conference.

CONF. 8/C.1/W.P. 81  
20 June 1995

*Proposal by the delegation of the  
United States of America*

*(Final Clauses)*

*New paragraph or additional paragraph for Article H*

“When depositing its instrument of ratification, acceptance, approval or accession, a State may make a declaration that it will not implement Chapter III of this Convention.”

CONF. 8/C.1/W.P. 82  
20 June 1995

*Proposal by the delegations of the United States of  
America, Canada and Mexico*

*Final Clauses*

*Article D*

In order to achieve balance, such an article should either be general in its terms, or must be considerably expanded. The latter approach, suggested below, may become difficult and perhaps a general article is preferable:

“In their relations with each other, Contracting States which are Members of organisations such as the European Union or regional or other intergovernmental bodies such as the Organization of American States, the Organization of African Unity, the Association of South-East Asian Nations, the Commonwealth, the European Economic Area, the Southern African Development Community, the North American Free Trade Agreement, the Asian Pacific Economic Commission, MERCOSUR, ... (further organisations to be added by delegates) may declare that they will apply the internal rules of those organisations or bodies and will not therefore apply between their member States the provisions of this Convention the scope of application of which coincides with that of those regulations.”

**TEXTS SUBMITTED TO THE COMMITTEE OF THE WHOLE  
BY THE DRAFTING COMMITTEE**

CONF. 8/D.C./Doc. 1 Corr.  
16 June 1995

*Text of Articles 1 to 7*

CHAPTER I – SCOPE OF APPLICATION AND  
DEFINITION

*Article 1*

This Convention applies to claims of an international character for

*Variant I*

- (a) the restitution of stolen cultural objects,
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage.

*Variant II*

- (a) the restitution of objects stolen *in, and* removed from, the territory of, a Contracting State.
- (b) (as in Variant I).

*Variant III*

- (a) the restitution of stolen cultural objects moved to the territory of a Contracting State,
- (b) (as in Variant I).

*Article 2*

*Variant I*

For the purposes of this Convention, cultural objects are those [, whether of a religious or a secular character,] belonging to one of the categories listed in the ANNEX to this Convention.

*Variant II*

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] [and belong] to one of the categories listed in the ANNEX to this Convention.

CHAPTER II – RESTITUTION OF STOLEN CULTURAL  
OBJECTS

*Article 3*

*Variant I*

- (1) The possessor of a cultural object which has been stolen shall return it.
- (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be deemed to have been stolen.

*Variant II*

- (1) Cultural objects which have been stolen shall be returned.
- (2) (As in Variant I).

*Article 4*

*Variant I*

- (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.

#### *Variant II*

(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 can prove that it neither knew nor ought reasonably to have known that the object was stolen and that it exercised due diligence when acquiring the object.

(2) (as in Variant I).

(3) (as in Variant I).

### 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 to order the return of a cultural object removed from the territory of the requesting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage.

(1bis) A cultural object which has been temporarily exported from the territory of the requesting State [, for purposes such as exhibition, research or restoration, ] under a permit [ issued according to its law regulating its export for the purpose of protecting its cultural heritage ] and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

[(1ter) A cultural object which has 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 shall be deemed to have been illegally exported. ]

(2) The court or other competent authority of the State addressed shall order the return of an illegally exported 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 [or of a collection] ,

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

(d) [the use of the object by a living culture] [the traditional or ritual use of the object by a tribal or indigenous community] ,

[or] [and] 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 or from the date on which the object should have been returned.

#### *Article 7*

(1) This Chapter shall not apply where

(a) the export of the cultural object is no longer illegal at the time at which the return is requested;

(b) 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

(c) the creator is not known, if the object was less than [twenty] years old at the time of export.

(2) Notwithstanding the provisions of subparagraphs (b) and (c) of the preceding paragraph, the provisions of Chapter III shall apply where the object was made by a member or members of a[n] [tribal or] indigenous community for [traditional or ritual] use by that community and the object will be returned to that community.

CONF. 8/D.C./Doc. 2  
19 June 1995

*Text of Articles 1 to 9*

CHAPTER I – SCOPE OF APPLICATION  
AND DEFINITION

*Article 1*

This Convention applies to claims of an international character for

*Variant I*

(a) the restitution of stolen cultural objects,

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter “illegally exported cultural objects”).

*Variant II*

(a) the restitution of cultural objects stolen in, and removed from, the territory of, a Contracting State.

(b) (as in Variant I).

*Variant III*

(a) the restitution of stolen cultural objects moved to the territory of a Contracting State,

(b) (as in Variant I).

*Article 2*

*Variant I*

For the purposes of this Convention, cultural objects are those [,whether of a religious or a secular character,] belonging to one of the categories listed in the ANNEX to this Convention.

*Variant II*

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] [and belong] to one of the categories listed in the ANNEX to this Convention.

CHAPTER II – RESTITUTION OF STOLEN  
CULTURAL OBJECTS

*Article 3*

*Paragraph 1*

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

*or*

(1) A cultural object which has been stolen shall be returned.

*Paragraph 2*

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

*Paragraphs 3 and 4*

(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 cultural 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 a cultural object belonging to a public collection of a Contracting State shall not be subject to time limitations.

*or*

(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 cultural object and the identity of its possessor.

(4) In any case, a claim for restitution shall be brought within a period of [thirty] [fifty] years from the time of the theft. However, a claim for restitution of a cultural object belonging to a public collection shall not be subject to the time limitation provided for in this paragraph.

#### *Paragraph 5*

(5) For the purposes of this Convention, a “public collection “ consists of a group of inventoried or otherwise [documented] [identified] cultural objects owned by:

- (a) a Contracting State,
- (b) a regional or local authority of a Contracting State,
- (c) a religious institution in a Contracting State, or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

#### *Paragraph 6*

(6) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a member or members of an indigenous community in a Contracting State as part of that community’s traditional or ritual use [, shall not be subject to time limitations ] [, shall be subject to the time limitation applicable to public collections].”

#### *Article 4*

##### *Variant I*

(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 cultural object by inheritance or otherwise gratuitously.

##### *Variant II*

(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 can prove that it neither knew nor ought reasonably to have known that the object was stolen and that it exercised due diligence when acquiring the object.

(2) (as in Variant I).

(3) (as in Variant I).

### 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 to order the return of a cultural object exported from the territory of the requesting State.

(1bis) A cultural object which has been temporarily exported from the territory of the requesting State [, for purposes such as exhibition, research or restoration,] under a permit [ issued according to its law regulating its export for the purpose of protecting its cultural heritage ] and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

[(1ter) A cultural object which has 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 shall be deemed to have been illegally exported. ]

(2) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural 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 [or of a collection] ,

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

(d) [ the use of the object by a living culture ] [the traditional or ritual use of the object by a tribal or indigenous community] ,

[or] [and] 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 cultural object and the identity of its possessor, and in any case within a period of [thirty] [fifty] years from the date of the export or from the date on which the object should have been returned.

#### *Article 6*

(deleted by the Committee of the Whole)

#### *Article 7*

(1) The provisions of Chapter III shall not apply where

(a) the export of a cultural object is no longer illegal at the time at which the return is requested;

(b) 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

(c) the creator is not known, if the object was less than [twenty] years old at the time of export.

(2) Notwithstanding the provisions of sub-paragraphs (b) and (c) of the preceding paragraph, the provisions of Chapter III shall apply where a cultural object was made by a member or members of a[n] [tribal or] indigenous community for [traditional or ritual] use by that community and the object will be returned to that community.

#### *Article 8*

(1) The possessor of a cultural object who acquired the object after it was illegally exported 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 illegally exported.

[(2) In determining whether the possessor knew or reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State. ]

(3) Instead of requiring compensation, and in agreement with the requesting State, the possessor may, when returning the cultural 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 cultural 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 cultural object by inheritance or otherwise gratuitously.

#### CHAPTER IV – JURISDICTION

##### *Article 9*

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority 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.

CONF. 8/D.C./Doc. 2 Corr.  
20 June 1995

##### *Article 8(2)*

(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.]

*or*

(2) [In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.]

CONF. 8/D.C./Doc. 2 Add.  
20 June 1995

##### *Article 10*

###### *Variant I*

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

###### *Variant II*

Nothing in this Convention shall prevent a Contracting State from applying to the restitution or the return of stolen or illegally exported cultural objects rules more favourable than those provided for by this Convention provided that such rules do not affect the application of the principles established in the Convention.

###### *Variant III*

A Contracting State shall maintain its law to the extent that it is more favourable to the restitution and return of stolen or illegally exported cultural objects than provided for by the Convention.

## SUMMARY RECORDS OF THE MEETINGS OF THE COMMITTEE OF THE WHOLE (COMMITTEE I)

CONF. 8/C.1/S.R. 1  
13 June 1995

### FIRST MEETING

Wednesday, 7 June 1995, 3.10 p.m.

*Chairman* : Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED OBJECTS** (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/5; CONF. 8/5 Add. 1 and 3; CONF. 8/6; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 1 and 3)

The CHAIRMAN thanked the Italian Government for having convened in Rome the important diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects. He expressed his gratitude to the delegations of France, Mexico, Portugal and Tunisia for having moved his election to the Chair of the Committee of the Whole and stated his appreciation of the trust that delegations had placed in him. Before giving the floor to the Secretary-General of the Conference for an introduction to the debate on the title of the draft Convention and Article 1, he made some preliminary observations and noted, as had Mr Ferrari Bravo the President of Unidroit, Mr Federico Mayor the Director-General of UNESCO (whose speech had been read by Ms Lyndel Prott) and Mr Walter Gardini, Ambassador and Head of the Italian delegation, that the draft Unidroit Convention was the fruit of ten years work culminating in the organisation of the diplomatic Conference. As the Director-General of UNESCO had said, it had been ten years of hard and dogged work which had begun with the UNESCO request that Unidroit consider the rules applicable to the illegal traffic of cultural objects with a view to completing the 1970 Convention. Two comparative law studies on the transfer of ownership had been made by Ms Gerte Reichelt; a preliminary draft Convention

on the restitution of cultural objects had been drawn up by a study group and discussed and revised over four meetings by a committee of governmental experts. The final outcome should be the adoption of the draft Convention at the close of the diplomatic Conference.

In order to avoid any misunderstandings, the Chairman made it clear that the adoption of the draft Convention would have no bearing on the application of the 1970 UNESCO Convention, contrary to the doubts expressed on this subject by certain delegations at the first meetings of the committee of governmental experts. He noted that there was nothing extraordinary in ten years of preparation if a comparison were drawn with codification in other areas, such as the sale of goods and the adoption of the Vienna Convention. It was also due to the specific nature and aim of the draft Convention; the transfer of ownership of cultural objects was a very complex legal subject, on which there were very distinct opposing interests which were dealt with differently in the various legal systems. The draft Convention put into question the domestic law of different countries in relation to contracts of sale, the transfer of ownership and acquisition in good faith, private international law, the public law of foreign States and public international law.

He raised two problems posed by the drawing up of the draft Convention: that of the legal methods and techniques used in the unification of law which was a problem inevitably encountered in the drafting of any international private law convention and secondly a difficulty which hung on the very aim of the draft Convention, namely the international return of stolen and illegally exported cultural objects, which laid obligations on a certain number of States only. In this field a scheme based on reciprocity could not be established unless it had a basis in international solidarity; States which imported cultural objects could not accord reciprocity to exporting States.

The Chairman joined Ambassador Gardini in welcoming the numerous delegations participating in the diplomatic Conference, and particularly those which had not taken part in the preparatory work on the draft Convention. Aware of the difficulties which

could be encountered, he pledged himself to provide delegations with all the information necessary to the understanding of the debates, with the aid of the Secretary-General and the Executive Secretary of the Conference and of Ms Prutt. In conclusion, he declared that all the participants were mindful of the importance of the task represented by the drawing up and adoption of the draft Convention for which they bore a heavy responsibility but which he was sure they would be able to accomplish.

Mr EVANS (Secretary-General of the Conference) raised three points. First, the Conference had postponed until Friday afternoon, 9 June, consideration of the election of the following officers: (a) the five Vice-Chairpersons of the Conference; (b) the Chairperson of the Drafting Committee; (c) the nine members of the Drafting Committee and (d) the five members of the Credentials Committee. He expressed the hope that the appropriate consultations would be carried out to allow the elections to proceed as planned. The Final Clauses Committee would elect its own Chairperson. Second, the Conference had already elected the Chairman of the Committee of the Whole. However, pursuant to Rule 51 of the Rules of Procedure for the Conference (CONF. 8/2 Corr.), the Committee of the Whole would be called upon to elect two Vice-Chairpersons. Third, a procedural question had arisen concerning the division of competence between the Committee of the Whole and the Final Clauses Committee. Article 10 of the current draft Convention (CONF. 8/3) contained a provision which left open to States the possibility of according more favourable treatment than that allowed under the draft Convention. He explained that normally this type of provision was included in the final clauses of a private law convention. Thus the provision was also included in CONF. 8/4 as Article C. To clarify this provision the Secretariat had introduced Article F into the final clauses. The Committee of the Whole might consider whether its Chairman should request at the next session of the Conference that Articles C and F be considered by the Committee of the Whole rather than by the Final Clauses Committee insofar as they went to a matter of substance.

The CHAIRMAN proposed, after consultation with the Secretary-General, that the title and Articles 1 and

2 should be discussed. He specified that the normal procedure would be to give the floor first to those delegations that had made written comments. However, the Cambodian and French delegations had expressed the wish to make preliminary observations and could therefore take the floor.

Mr VANN MOLYVANN (Cambodia) made the following statement:

“Mr Foreign Minister,  
Mr Chairman of the Conference,  
Ministers,  
Madam Representative of the Director General of UNESCO,  
Mr Secretary-General of Unidroit,  
Excellencies,  
Ladies and Gentlemen:

Firstly, may I congratulate Mr Gardini on his election as President of the Conference and thank the Government of the Italian Republic and His Excellency the Minister for Foreign Affairs for having invited the Kingdom of Cambodia to participate in the diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects.

The Royal Government of Cambodia is aware that the draft text which is laid before us today is the result of long discussions and studies which have, at the initiative of UNESCO, brought together over the past ten years numerous experts and lawyers of international renown.

This draft, the origin of which is to be found in the UNESCO Convention of 1970 concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property to which more than eighty States are party, aims at completing some of the provisions of that Convention which are considered by certain States traditionally known as “importing States” as unacceptable.

We are aware that we are dealing with a draft drawn up after long discussions and that as such it is already subject to virulent press campaigns on behalf of the art market “establishment”.

However, we would like to take the opportunity to make a solemn appeal to the international community.

Cambodia, ravaged by two decades of war, has seen and is still seeing its cultural heritage pillaged and

illegally exported. This pillage began in the early nineteen-seventies; numerous works of art, which because of the general situation had not been inventoried, were stolen; clandestine searches developed and our temples and monuments were plundered.

The recent resumption of cataloguing the objects at the *Conservation d'Angkor* has enabled us to establish that of the five thousand, four hundred pieces inventoried before the events, one twentieth had disappeared. The *Conservation d'Angkor* was itself subject to numerous attacks during the mandate of UNPTAC.

The Kingdom of Cambodia supports the application of the provisions of the 1970 UNESCO Convention concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and has made an official call for assistance to the Secretariat of UNESCO, depository of the aforementioned Convention. In this connection it is particularly important to gather together all the available information on the discovery of stolen objects and to advise the Cambodian authorities on the appropriate methods of recovery according to the restitution mechanisms which are laid down by the Convention, and equally the possibilities offered by the UNESCO Intergovernmental Committee to encourage the return of cultural objects to their country of origin or their restitution in the event of illegal appropriation.

Our monuments and archaeological sites have been classified and the site at Angkor is on the UNESCO World Heritage List. A Decision on the Protection of Cultural Heritage, drawn up with the aid of UNESCO, was approved by the Cambodian National Supreme Council on 10 February 1993. This text has recently been reviewed and has been submitted for governmental approval prior to a parliamentary vote to give it the force of law in accordance with our Constitution.

The international community, meeting at Tokyo on 12 and 13 October 1993, launched an appeal for all countries to support Cambodia in its struggle against the plunder and illegal traffic of cultural objects to which our heritage remains subject.

We call on all States party to the 1970 UNESCO Convention, on Member States of the International Committee for the Co-ordination of the Preservation of the Site at Angkor, on all the States represented here and in UNESCO to help us assert our rights and to recover our stolen and illegally exported cultural

objects which are part of our national cultural heritage, which is not transferable and to which limitation periods cannot be applied.

We would like to be able to deal as one State to another, through diplomatic channels, in order to bring claims for restitution before the court or competent authority of the State addressed, on condition that the latter has ratified, accepted or approved the future Unidroit Convention in a manner which permits such an action to be brought. In some cases we may be obliged to request financial assistance from the State concerned; our country, its resources exhausted after twenty years of war, needs to dedicate its means to the task of reconstruction.

It should be recalled that States party to the 1970 Convention are bound by Article 7; however we are concerned that certain States which may sign the future Convention may be tempted to give it priority over the 1970 Convention. We would also like to see any provision that could be more favourable to the possessors of a stolen cultural object removed from the present draft.

Our country has suffered more than two decades of war during which our cultural heritage has been pillaged, and the plunder continues. We know that all works of Khmer art originate in Cambodia, and that those which are currently (or have been over the past decades) the object of transactions have been stolen and illegally exported and could not have been acquired in good faith.

We appeal to the conscience and solidarity of the international community.

This heritage is not only that of the Cambodian people but it is the timeless and inalienable heritage of all humanity.

Thank you for your kind attention.”.

Ms THEVENIN (France) thanked the organisers of the diplomatic Conference and particularly the Italian Government and Unidroit. She shared the views expressed by the Italian Minister of Culture, Mr Paolucci, and stressed the importance of the adoption of an international instrument providing the means effectively to fight against the illegal traffic in works of art. She stated that her delegation shared the aims of the draft Convention and that France, as President of the European Union, would work to co-ordinate the positions of

the fifteen member States in order to achieve a balance between the necessary compensation of the *bona fide* possessor and the return of stolen or illegally exported cultural objects.

### *Title*

The CHAIRMAN, before calling upon the delegation of the Netherlands to introduce its working paper (CONF. 8/C.1/W.P. 1), asked whether it wished to begin with a discussion of the title of the draft Convention or rather to discuss the articles first and then to return to the title later.

Ms HUEBER (Netherlands) stated that she had no fixed preference but that it was important that both the title and the text of the draft Convention be clear.

The CHAIRMAN agreed that the title was not clear.

Ms HUEBER (Netherlands) observed that the title was inaccurate because the draft Convention used the term “return” only in relation to Chapter III (illegally exported cultural objects) and the term “restitution” in relation to Chapter II (stolen cultural objects). She suggested that the following title be adopted: “The Unidroit Convention on the International Restitution of Stolen and the International Return of Illegally Exported Cultural Objects”. She admitted that the suggested title was somewhat clumsy but it accurately reflected the purpose of the draft Convention.

The CHAIRMAN questioned whether the word “international” was needed in the title.

Mr YIFAH (Israel) stated that his delegation agreed with the UNESCO formulation of the title as follows: “The Unidroit Convention on Stolen and Illegally Exported Cultural Objects” (CONF. 8/6).

Ms PROTT (UNESCO) noted that she had reservations concerning the present title and confirmed UNESCO’s support for the title that the Israeli delegation had read. She also agreed with the delegation of the Netherlands that the term “international return” was not accurate because Chapter II of the draft Convention spoke only of restitution and Chapter III only of return. Moreover, she expressed the view that the word “international” appearing before the word “return” was

redundant because logically, if an object was exported, the return would necessarily be international. This was not always the case with stolen objects. Accordingly, she proposed that the title of the draft Convention be amended to read “The Unidroit Convention on Stolen and Illegally Exported Cultural Objects”.

The CHAIRMAN agreed that the phrase “international return” was unnecessary and observed that the UNESCO proposal was an admirable way of describing the purpose of the future Convention.

Mr MARQUES DOS SANTOS (Portugal) proposed that the provisional title suggested by UNESCO be retained for the time being and that the question be re-examined at the end of the Conference.

The CHAIRMAN felt that the preliminary discussion on the title had been useful but that, as the Portuguese delegation had suggested, it could be reviewed at the end of the Conference and that discussion could now begin on Articles 1 and 2.

Mr SAVOLAINEN (Finland) substantially agreed with the UNESCO proposal. In particular, he observed that the word “international” was inaccurate because the return might be national. However, he agreed with the delegation of the Netherlands that the title should reflect the two aspects of the proposed Convention which related first to the restitution of stolen cultural objects and second to the return of illegally exported cultural objects. He admitted that he did not have a specific drafting proposal, but hoped that whatever title was adopted would incorporate those two aspects of the purpose of the future Convention.

Ms BALKIN (Australia) agreed that the title must be simplified. However, she expressed the fear that removal of the word “international” from the title might create the impression that the draft Convention extended to situations that were not international in character. While this danger did not arise with respect to exports which were always international, it did arise in relation to stolen property which might have a purely national incidence.

The CHAIRMAN shared the concern expressed by the representative of Australia but observed that the issue would be better dealt with in Article 1 than in the

title and he requested the Committee to turn its attention to Article 1 of the draft Convention.

#### CHAPTER I – SCOPE OF APPLICATION AND DEFINITION

##### *Article 1*

Mr BURMAN (United States of America) noted, by way of a preliminary remark, that the object of the draft Convention was the protection and preservation of cultural property and national and world heritage. In his view, the most important task facing delegations was to clarify the terms and definitions in the future Convention so that it could be effectively implemented at national level. The United States was one of the few so-called art market States that was a party to the 1970 UNESCO Convention. The United States had adopted legislation to apply the régime at national level and recently it had taken action under the UNESCO Convention to protect sites in El Salvador and objects coming from sites in that country. He welcomed comments to the effect that the draft Unidroit Convention did not seek to replace or modify the UNESCO Convention and expressed the hope that States would accede to the UNESCO Convention and ultimately to the Unidroit Convention under discussion.

Mr PERL (Argentina) expressed the hope that the future Convention would protect the interests of non-Contracting States whose cultural objects had been stolen.

Mr FRIETSCH (Germany) stated that his authorities generally supported the restitution and return of cultural objects exported in violation of laws regulating the export of cultural objects of outstanding cultural significance. Germany respected the desire of the State of origin to protect objects of cultural significance from export abroad by means of appropriate regulation. On the other hand, global cultural diversity promoted cross-border relations between peoples and nations and thus the draft Convention should not attempt to restrict international trade in those objects. He noted that Germany had no objections to Article 1 provided that two conditions were satisfied. First, it should be made clear that the future Convention would apply only to cross-border situations by retention of the words “claims of an international character.” Second, a claim

for return should be permissible under the future Convention only where the removal violated a provision that was designed to protect national cultural objects.

Mr NOMURA (Japan) expressed the view that the draft Convention should apply only to cultural objects that had a connection with a Contracting State. He also stated that a cultural object should be designated as such by a Contracting State before it received the protection of the future Convention.

The CHAIRMAN questioned whether the draft Convention applied to a cultural object that had been removed from the territory of a non-Contracting State and transferred to a Contracting State. Moreover, he saw little need for an international instrument to protect cultural objects that were removed from a State but ultimately returned to the territory of the same State. He therefore suggested that the words “removed from the territory of a Contracting State” appearing in Article 1(a) should be replaced by the words “located in a Contracting State and stolen outside the territory of that Contracting State.” In this regard, he drew attention to the differences between the French and English texts. He noted that the word “exporté” appearing in the French text might have to be deleted because, as indicated by some delegations, it was inconsistent with the next Chapter. Apart from this difficulty, he observed that the English text could be amended to conform with the French text as follows: “restitution of cultural objects stolen in or on the territory of a Contracting State and removed from the territory of that State.” This formulation would answer the question posed by the Argentine delegation: “stolen where?”

He stated that the question was whether the draft Convention covered a cultural object that was stolen in a non-Contracting State and removed to a Contracting State. One argument against such coverage was that it would confer on non-Contracting States the benefit of the future Convention without imposing the burdens that membership entailed and would consequently remove the incentive for States to ratify it.

Mr SHIMIZU (Japan) proposed that the words “of an international character” appearing in the *chapeau* should be deleted. He stated that the international character of the draft Convention should be achieved by indicating that it applied only to cultural objects

stolen outside a Contracting State and later brought into that Contracting State. In this respect, he noted that Japan aligned itself with Germany's position that the future Convention should apply only to cross-border activities.

Mr SAVOLAINEN (Finland) stated that he did not wish to enter into a discussion of the technical difficulties associated with Article 1(a) at this stage but merely to raise some general issues concerning the shape that his delegation would like the prospective Convention to assume. First, as pointed out by the Finnish delegation at one of the sessions of the committee of governmental experts, the reference to "international character" in the *chapeau* sufficed to indicate the international character of the draft Convention. He observed that it was problematic to describe in an international convention every possible situation that was international in character. He would therefore prefer Article 1(a) to refer simply to stolen cultural objects without reference to whether they were removed or stolen from the territory of a Contracting State. Second, to allay the concerns of some of the speakers and of the Chairman, the future Convention should include a direct rule or reservation to indicate that Chapter II of the draft Convention ("Restitution of Stolen Cultural Objects") would not apply in cases where the law applicable to the acquisition of such a cultural object would be the law of a non-Contracting State.

The CHAIRMAN asked the representative of Finland whether he wished the future Convention to benefit non-Contracting States.

Mr SAVOLAINEN (Finland) responded that the issue was complicated and related to Chapter II. It was not clear whether Chapter II necessarily benefited any particular State because it concerned issues between private parties relating to title. He suggested that it might be universal but that States could consider restricting its application by refusing to apply Chapter II where the law of a non-Contracting State governed under ordinary choice of law rules.

Mr WICHENCHAROEN (Thailand) suggested that Chapter I should, either in Article 1 or Article 2, deal with the definition of certain terms such as theft and cultural objects. Theft should be defined in its

broadest sense and the meaning of cultural objects should be in line with the 1970 UNESCO Convention.

The CHAIRMAN recalled that, during the preparatory work leading up to the Conference, delegations had expressed the view that the term "theft" should be understood in its broadest possible sense. He noted that under rules applicable to uniform law conventions, the term "theft" would be given a broad meaning bearing in mind the international purpose of the future Convention. He also pointed to the difficulty of defining theft exhaustively in the Convention. He considered that the matter could be further discussed if delegations believed it to be one of technical importance and he called upon the Executive Secretary of the Conference to confirm his recollection of the discussion of the issue in the preparatory meetings before the Conference.

Ms SCHNEIDER (Executive Secretary of the Conference) declared the remarks of the Chairman to be absolutely correct, that the committee of governmental experts had frequently considered the question of the notion of theft in the draft Convention and that it appeared from the debates that the interpretation of theft was to be very wide. She recalled that the experts had also referred in this connection to Article 10 of the draft Convention which enabled States to apply rules more favourable to the restitution or the return of a stolen or illegally exported cultural object than those provided for by the future Convention. It would always be for the court or competent authority to determine the illegal nature of the act, and consequently to interpret the notion of theft.

Mr LEANZA (Italy) observed that the use of the expression "claims of an international character" in Article 1 of the draft Convention rendered the term "exported" in sub-paragraph (a) of that article redundant. The text could simply read "restitution of stolen cultural objects".

The CHAIRMAN considered the wording of Article 1 proposed by the Italian delegation to be preferable to that retained by the committee of governmental experts.

Mr FRAOUA (Switzerland) commented on the *chapeau* and on sub-paragraph (a) of Article 1. Firstly,

he insisted that the words “of an international character” were unnecessary in the *chapeau*. It seemed evident to him that the aim here was to create rules applicable to an unsatisfactory international situation and that the different delegations had no power to create rules governing domestic situations. Consequently he was in favour of the deletion of the phrase. As to sub-paragraph (a), he shared the views of the Italian representative and of the Chairman and considered that one could simply say “restitution of stolen cultural objects” without specifying the place of the theft. In his view, the essence was that objects benefiting from the restitution procedure belonged to the heritage of a Contracting State; whether they were stolen from the territory of a Contracting or non-Contracting State was of little importance.

Mr MAURER (United States of America) suggested that the definition of the subject matter of the treaty would be more appropriately dealt with in Article 9 with the addition in Article 1 of the words “restitution of stolen cultural property in an international situation as defined in Article 9”. He agreed with the representative of Finland that the law of a non-Contracting State applied where the cultural objects were stolen in the territory of that non-Contracting State. He also agreed with the Swiss delegation that the future Convention should not extend to benefit non-Contracting States. He suggested that Article 9 should contain a definition of “international character” which should either exclude situations where the theft occurred in the territory of a non-Contracting State or exclude situations where an habitual resident of a Contracting State was suing another habitual resident of that Contracting State. He stated that his delegation might have other refinements to make at a later stage to the definition of “international character”.

Mr MARQUES DOS SANTOS (Portugal) recalled that during the preparatory work the question of the need to retain the expression “of an international character” in Article 1 had already been discussed. Equally he noted that it went without saying that the régime established by the future Convention would apply to international claims but he considered that it was preferable to mention this specifically. He then remarked that in view of the very wide interpretation given to the notion of theft in the draft Convention, some might

imagine that it could be used as a basis to sanction purely domestic situations. That would be going too far in the interpretation of the proposed Convention. Similarly, it would be unacceptable to impose the application of the future Convention on non-Contracting States. Finally, he considered that it was very difficult to define an international situation but that it was nonetheless preferable to give a restrictive definition of this idea in the future Convention in order to guarantee uniform interpretation.

The CHAIRMAN remarked that the Committee of the Whole did not have to take an immediate decision on the matter and that a solution would surely be found by the Drafting Committee.

Mr WICHENCHAROEN (Thailand) stated that the drafters of the proposed Convention might have intended that the word “theft” be given the broadest possible interpretation but ultimately it was for national courts and authorities to construe its meaning. Under well-established principles of criminal law, interpretation was restrictive in order to give the accused the benefit of the doubt. Thus, he saw a danger that the range of activities involving theft and leading to the transfer of property and export that the expression was designed to cover under the draft Convention would not be covered under a more restrictive national definition of courts before which redress for violation of the future Convention would ultimately be sought. Moreover, he stated that Article 1 should contain a definition of theft which would answer such questions as “stolen from where?”. He noted that international conventions normally began with a definition section. He also considered that the word “international” was unnecessary because the draft Convention clearly dealt with an international situation of illegally obtained and transferred property.

Ms PROTT (UNESCO) sought to clarify two points. First, she noted that the draft Convention would not benefit States where the claimant was not a State but rather a private citizen or a religious foundation or private museum seeking the return of a stolen cultural object. Second, she observed that Article 5 was not related to Article 1(a). It was Article 1(b) which dealt with the provisions on illegal exports and therefore with claims by States. Article 1(a) dealt only with

stolen cultural objects and she emphasised the importance of not confusing the two frameworks: one dealt with claims by owners and the other with claims by States.

The CHAIRMAN, in response to the representative of Thailand, expressed the hope that, in applying the future Convention, national courts would examine the Explanatory Report of the Secretariat and the *travaux préparatoires* in order to divine its meaning. Second, the issue of theft in the draft Convention had nothing to do with criminal sanctions but was concerned rather with the return of stolen cultural objects. The general principles of interpretation of international conventions were based upon the overall purpose (“l’interprétation téléologique”) of a convention and methods of interpretation prevailing in domestic courts had no application.

Mr FRIETSCH (Germany) suggested that the words “removed from the territory of a Contracting State” be deleted from the text of Article 1(a). He opposed deletion of the words “international character” from Article 1 because the phrase made it clear that the draft Convention did not seek to interfere with the application of national laws.

Mr MAURER (United States of America) opposed the extension of the prospective Convention to theft occurring in a non-Contracting State.

The CHAIRMAN considered that all the questions that could be raised relating to the introduction and to Article 1(a) had been dealt with, and that it was for the Drafting Committee to find a satisfactory solution. Discussion of paragraph (b) could therefore begin.

Mr SHI (China) proposed that Article 1(b) should include a reference to “regulations” and not simply “laws” because in some States laws and regulations might be two separate concepts.

The CHAIRMAN noted that in the French text “le droit” referred to both laws and regulations. He invited the representative of China to refer the matter to the Drafting Committee.

Mr MAROTTA RANGEL (Brazil) underlined the important difference between sub-paragraphs (a) and (b) of Article 1. Sub-paragraph (a) concerned stolen

cultural objects and theft was an act which was subject to universal condemnation in criminal law. In this connection it was not necessary to enquire as to whether stolen objects were exported from the territory of a Contracting State as treaties operating as legislation (*traités-lois*) were applicable. He reminded delegations that “*traités-lois*” were applicable independently of whether States participated in the future Convention. However, in relation to the illegal export of cultural objects, the condition laid down by the draft Convention (that the objects be exported from the territory of a Contracting State) was relevant as what was at issue here was a subject concerning treaties which operated contractually (*traités-contrats*).

The CHAIRMAN stated that the remarks of the Brazilian delegation were of the same nature as the written comments submitted by Japan (CONF. 8/5 Add. 1) and by the Hague Conference on Private International Law (CONF. 8/6 Add. 1).

Mr IDIL (Turkey) proposed, in connection with Article 1(b), that in order to avoid any future misunderstanding the following words be deleted: “because of their cultural significance”.

The CHAIRMAN observed that this question had frequently been discussed by the committee of governmental experts. A majority of States had been favourable to the retention of the phrase, the effective aim of the draft Convention not being the application of regulations concerning the export of goods based on financial or customs interests and having no connection with the preservation of cultural heritage.

Mr EVANS (Secretary-General of the Conference), so as to complete the Chairman’s explanation, referred delegations to paragraph 26 of the Explanatory Report (CONF. 8/3).

Ms SREMIC (Croatia) proposed that the additional issue of cultural objects acquired by armed conflict be included within a separate sub-paragraph (c) of Article 1.

The CHAIRMAN saw two difficulties in the Croatian proposal. First, it would be difficult at this late stage to introduce changes to the draft Convention that profoundly altered its scope. Second, he expressed the belief that the future Convention might already

apply to the acquisition of cultural objects as a result of or during armed conflict.

Ms PROT (UNESCO) observed that the issue was already covered by the Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict to which seventy-three States were parties. She noted that any such inclusion in the Convention should be consistent with the provisions of the Protocol although the raising of the matter at such a late stage might unsettle the régime of the future Convention.

Mr BURMAN (United States of America) recalled that the United States had already included in its written comments (CONF. 8/5 Add. 3) a request for clarification on the issue of whether the future Convention would cover cultural objects acquired in time of hostilities. He noted that increasing attention had been paid to the subject in a number of States, particularly in the last year. He observed that the issue was covered in part in the Protocol to the Hague Convention but many States, including the United States, were not parties to that Convention. Moreover, the issue was also regulated in part by the customary rules of the law of war. In his judgment, it was probably better to exclude the matter from the scope of the future Convention because it raised essentially public law considerations. Additionally, it would be difficult to include the issue in the draft Convention at this late stage.

Mr FRAOUA (Switzerland) considered the concerns of the Croatian delegation to be legitimate. However he felt that the draft Convention under discussion, a uniform private law, should not deal with a question of this nature. Moreover, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the additional Protocol were legal instruments which applied to such questions. If the scope of application of the proposed Convention were thus extended greater difficulties of drafting and application might be encountered. The draft Convention would have to be extensively modified and its provisions co-ordinated with those of the 1954 Convention. He further pointed out that a rapporteur had recently been designated by UNESCO to take stock of the application of the 1954 Hague

Convention, that this rapporteur was to make proposals for its possible revision and that a committee of experts was soon to be convened in that connection. The proposals of the Croatian delegation could more easily be considered in the context of the revision of the Hague Convention. Nevertheless it should be noted, as the Chairman had mentioned, that the future Unidroit Convention could also be applicable to the case of armed conflict. It would however be preferable, as the United States delegation had proposed, explicitly to exclude this hypothesis from the scope of application of the draft Convention.

Mr SAVOLAINEN (Finland) proposed that the issue of cultural objects acquired during armed conflict would best be dealt with in the Final Clauses. The Final Clauses could refer to the panoply of Security Council resolutions, international conventions and protocols that governed the issue and state that they, and not this Convention, would apply. He also pointed out that the Statute of the International Tribunal for War Crimes in the Former Yugoslavia in the Hague allowed the Tribunal to order the restoration of cultural objects and that Member States of the United Nations were bound by those orders.

Ms BALKIN (Australia) suggested that the future Convention did not exclude from its scope cultural property acquired during armed conflict. If the other delegations agreed, she proposed that an additional article be added to the draft Convention which would explicitly exclude the issue from the scope of the proposed Convention and list the international agreements, protocols, instruments, etc. that did govern the matter.

Mr AL NOURI (Kuwait) stated that his delegation had studied the Croatian proposals and he reminded the Committee that during the recent invasion Kuwait also had lost a great number of cultural objects through theft. Consequently coverage by the draft Convention of the theft and illegal export of cultural objects in time of war seemed to him to be a very relevant proposal. He requested that the question be subject to discussion in the Conference and that it be the object of a specific provision of the future Convention.

*The meeting was adjourned at 5.10 p.m.  
and resumed at 6.10 p.m.*

## Article 2

The CHAIRMAN announced the beginning of the discussion of Article 2 of the draft Convention, which concerned the definition of cultural objects. Written comments on Article 2 had been submitted by Colombia (CONF. 8/5), Japan (CONF. 8/5 Add. 1), the United States of America and France (CONF. 8/5 Add. 3).

Mr NOMURA (Japan) stressed the importance of having a clear definition of “cultural object” in Article 2. He also stated that the future Convention should protect only cultural objects of Contracting States. He considered that a discretion should be vested in a Contracting State to define what was meant by a cultural object so that national courts would be permitted to decide on a discretionary basis which cultural objects merited protection under the future Convention. Thus, the definition should have both a substantive element as in the present text and a procedural requirement of designation by the Contracting State. He therefore proposed that the text of Article 2 be amended as suggested by his delegation.

The CHAIRMAN foresaw that the Japanese proposal would provoke a number of comments because it introduced a system different to that proposed in the draft Convention. He noted that during the recess a number of representatives had complained that the present definition contained a reference to another convention rather than being self-contained.

Mr FRIETSCH (Germany) stated that his delegation wished to limit the future Convention to cultural objects of “outstanding cultural importance”. He feared that vesting the discretion in States to define what constituted a cultural object would substantially impair the art trade. He considered that the range of objects contained in Article 1 of the 1970 UNESCO Convention was too wide and expressed his disappointment at seeing the reference in the draft Convention.

The CHAIRMAN called upon the representative of UNESCO to refresh the memories of delegations on the evolution of the various definitions of cultural objects in the preparatory meetings.

Ms PROT (UNESCO) observed that the issue had been raised at every meeting on the draft Convention.

Until the final meeting, the definition had been very broad and included “objects of a cultural, historic and scientific significance” or a formula of that kind. At the final session of the committee of governmental experts, several delegations had requested that the definition be made more precise. On that occasion, UNESCO had observed that if a more precise definition were adopted, it must remain faithful to the 1970 UNESCO Convention. Some eighty States had acceded to that Convention and many wished to be a party to both Conventions but would find it difficult to do so if they offered different definitions of the subject matter. It had also been considered important at the early stages of discussion that all cultural objects covered by the return provisions, i.e. objects that were in private ownership and not designated by a State, would still be recoverable if they were stolen and subsequently turned up in another State. A number of States did not accept the concept of State designation. She gave as a possible reason for this a special arrangement that the State might have with religious groups or private owners such as museums. It had been observed at the final session that the use of State designation might deter those States from acceding to the future Convention. Consequently, as a compromise, it had been decided to include a general definition together with a reference to the UNESCO definition and to exclude a reference to designation. She expressed the view that the Conference might perhaps consider the inclusion of the wider definition that had appeared in the draft text before the final meeting of the governmental experts.

The CHAIRMAN stated that although he was aware that general definitions were more acceptable in Civil Law systems than in Common Law systems, he considered the general formula provisionally adopted up until the last session to be practicable, although the present formula represented a good compromise.

Mr BURMAN (United States of America) disagreed with the distinction that the Chairman had drawn between Civil and Common law drafting styles and cited in support the recent European Union legislation which was very detailed and was a product more of Civil Law than of Common Law drafting technique.

He proposed that the words “such as” be removed from the text of Article 2 and that the article should adopt in substance the terms of the definition in

Article 1 of the UNESCO Convention which could be included as an Annex to the future Convention. He agreed that not every State had ratified the UNESCO Convention but the definition of cultural objects that it contained was easily the most widely accepted internationally. The inclusion of the words "such as" would leave the draft Convention with a general definition because, as stated in the Secretariat's Explanatory Report (CONF. 8/3), the phrase placed no restriction on the meaning of "cultural object." He predicted that the continued presence of the words "such as" in the draft Convention would mean that the definition would lack precise focus, would reduce the number of ratifications and create an imbalance in the ratification process between source and market States.

Ms BALKIN (Australia) proposed the addition of the category of "ethnology" to the list of general categories in Article 2 as already suggested by Australia and Canada in their joint submission to the Conference (CONF. 8/C.1/W.P. 3). She observed that indigenous peoples were an integral part of both States and that it was important that the future Convention afford protection to the heritage of indigenous peoples. She noted that although Article 1 of the UNESCO Convention contained a reference to ethnology, the use of the words "such as" in Article 2 meant that the UNESCO definition was merely illustrative and not a part of the definition of cultural objects contained in Article 2 of the draft Convention. She observed that many States had already incorporated the UNESCO definition in their national legislation and that the difference in definition might create difficulties. She also proposed the deletion of the words "religious or secular" from Article 2 because those categories were covered by other categories and therefore redundant.

Ms HUGHES (Canada) agreed with the statement of the representative of Australia as reflected in the joint submission of Australia and Canada that "ethnology" be added to the categories in Article 2. She observed that Canada would have preferred a State designation system but in the face of opposition she would no longer insist on the matter. She also called for the deletion of "religious or secular" because the words added nothing to the meaning of the term "cultural object" and indeed when added at the last

session had provoked a discussion only as to the order in which they should appear.

Mr MAROEVIC (Croatia) supported the proposal of Australia and Canada to insert "ethnology" in the list of categories in Article 2. He observed that Article 1 of the UNESCO Convention listed under the heading of "cultural property" collections that more properly belonged under the designation "cultural objects." He gave as examples manuscripts, old books and rare collections of postage, revenue and similar stamps. He noted that if those collections were not objects then the category had to be expanded to include more collections. He also objected to the categorisation in Article 1(k) of the UNESCO Convention of furniture as a cultural object only if it was more than 100 years old and observed that in the modern world other categories of furniture that merited equal protection such as *art deco* and *art nouveau* fell outside the definition. He therefore suggested that the age limit be reduced from 100 to fifty years.

The CHAIRMAN noted that the last three interventions illustrated clearly the difficulties encountered in framing any definition based on a list. A general provision would, on the other hand, avoid those interminable discussions which sprang from reasoning *a contrario*, as it would leave no room for doubt that all categories of cultural objects fell within the definition.

Mr STURLESE (France) considered that while too much time should not be spent on Article 2 the definition was of capital importance. The most precise definition possible of the scope of application of the draft Convention would ensure the greatest legal certainty and enable the effective application of the future Convention's innovative mechanisms which departed from domestic law. The art trade must know what was the scope of application of the proposed Convention. Arriving at a definition was of course difficult, but he considered the proposal under examination to be a step in the right direction and the reference to the categories contained in the UNESCO definition to be an effective solution. Although some might advise using the European Union definition, he did not consider it possible to base a definition on such a legal instrument in a universal forum. He suggested that the list of cultural objects laid down by Article 1 of the 1970 UNESCO

Convention should be the point of reference in the drafting of a definition, but found the reference in Article 2 of the draft Unidroit Convention to other categories to be problematic. Such a reference should therefore be deleted.

The CHAIRMAN asked the French representative if he was in favour of the proposal of the United States of America envisaging that the UNESCO definition be annexed to the draft Convention or whether he preferred that a specific reference be made in Article 2 itself.

Mr STURLESE (France) stated that he was open to any proposal that could be the object of the widest possible consensus.

Mr WICHENCHAROEN (Thailand) stated that the definition of cultural objects in Article 2 was wider than the definition in Article 1 of the UNESCO Convention. He noted that his country had made efforts to enact the measures necessary to implement and ratify the UNESCO Convention. In particular, very recently, Thailand had taken final steps to prohibit the import of cultural objects. Thailand would find it difficult to ratify a Convention that incorporated a wider definition. In his view, Article 2 contained only a general definition and should be made more specific by deleting the phrase beginning with the word "which" in the first line and the whole of the second line, thereby providing a direct incorporation of the UNESCO definition in the draft Convention. Such an amendment to the draft text would further reinforce the link between the two Conventions.

The CHAIRMAN stated that the Conference had no intention of creating contradictory conventions, but he had noted considerable opposition at the last meeting to introducing the UNESCO definition wholesale into Article 2.

Ms HUEBER (Netherlands) professed a preference for a definition that would guarantee legal certainty and in this regard she proposed that the words "such as" should be deleted from Article 2.

Mr IDIL (Turkey) noted that there were two different currents of opinion on the subject of the definition of the concept of cultural objects. He wished to associate himself with the previous declarations of certain

delegations and considered that in fact the link between the UNESCO and Unidroit Conventions should not be broken. The present text seemed to be balanced and should only be the object of minor modifications such as the replacement of the words "such as" by the term "including".

The CHAIRMAN affirmed that the text of Article 2 would be more balanced if, rather than incorporating a simple reference to Article 1 of the UNESCO Convention, a list of cultural objects was given. He did not think that the Turkish proposal to replace "such as" by "including" changed the definition greatly or that it would satisfy delegations arguing for the deletion of the expression "such as".

Ms PROTT (UNESCO) warned against adopting any amendments that would tinker with the UNESCO definition. She stated that "ethnology" and "religious or secular grounds" already appeared in the UNESCO definition. She explained that the requirement that furniture be 100 years old before it was considered a cultural object had historical reasons and might not be inserted if the Convention were to be drafted today. However, changes to the definition would restrict the ability to ratify the present treaty of States that had tailored their legislation to the UNESCO definition.

Mr FRAOUA (Switzerland) recalled that the study group had discussed at length the problems of the definition of categories, age and the pecuniary value of cultural objects. At the stage of the diplomatic Conference it was necessary to arrive at a consensus. In his opinion, Article 2 reflected a balance between the opinions of States wishing to limit the application of the future Convention and consequently to give a restrictive definition of the concept of cultural objects and the opinions of those arguing for precisely the opposite. He felt that States wishing to reinforce public international law through the Convention could not then be asked to accept a definition of cultural objects that would be solely dependent on the requesting State. The removal of the term "such as" from Article 2 added a difficulty for States which were not parties to the 1970 Convention and which might wish to accede to the future Unidroit Convention. By these terms the non-exhaustive character of the definition was made clear and the purely illustrative nature of the list was stressed.

In conclusion, the deletion of the words “such as” would render the reference to the 1970 Convention static and exhaustive and it would be impossible for States not parties to it to accede to the Unidroit instrument.

Mr YIFHAR (Israel) proposed the deletion of the words “religious or secular” because the words added nothing to the definition. He also objected to the inclusion of “ethnology” in Article 2 because the term already appeared in Article 1 of the UNESCO Convention and he did not consider it appropriate to confer on ethnology the prominent status that archaeology, history or art enjoyed.

Mr CAHN (International Association of Dealers in Ancient Art – I.A.D.A.A.) proposed that the word “outstanding” be added before the word “importance” in Article 2.

Mr FOROUTAN (Islamic Republic of Iran) expressed the wish that “religious or secular” be retained in Article 2 because of the religious attachment in some States to objects removed from their territory. He stated that he had no objection to the inclusion of the category “ethnology” in Article 2. He observed that it was unusual for one convention to make cross-references to another but he was of the opinion that in this case the best approach was to include in Article 2 a reference to the list in Article 1 of the UNESCO Convention.

Mr MARQUES DOS SANTOS (Portugal) stated that he was in total disagreement with the proposal to add the word “outstanding” to the text of Article 2 as it would constitute a restriction of the scope of application of the future Convention. However, he declared himself favourable to the deletion of the words “such as”, since the definition of a cultural object was large enough without this possibility of further extension.

The CHAIRMAN agreed that the UNESCO definition could neither be completed nor improved and that it covered all the hypotheses imaginable. His impression was that a majority of delegations was favourable to the deletion of the term “such as” from Article 2, and he agreed with the representative of the Islamic Republic of Iran that reference to another convention was not good legal method. However he trusted that

the Drafting Committee would find a satisfactory solution.

Ms RAIDL (UNESCO) suggested that the Drafting Committee consider making no specific reference in Article 2 to the 1970 Convention, deleting the words “such as” and listing in an Annex the categories set out in Article 1 of the UNESCO Convention. The article would read as follows: “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 and which belong to one of the categories listed in the Annex to this Convention”.

The CHAIRMAN agreed with the suggestion put forward by the UNESCO representative.

Mr WICHENCHAROEN (Thailand) observed that it was not unusual for one treaty to refer to another and cited the example of the 1954 Hague Convention which contained references to other conventions and treaties. He suggested that Article 2 could incorporate the UNESCO definition by reference and that the reference to cultural objects in general could be deleted. In such circumstances, there would be no need for an Annex to the future Convention.

The CHAIRMAN questioned whether the reference of the representative of Thailand to the 1954 Hague Convention was apposite because it dealt with the laws of war and therefore to a very specialised area of international law. However, the debate did not answer the specific question of whether a reference to the UNESCO Convention would deter States not parties to it from ratifying the future Unidroit Convention. He expressed his gratitude to the UNESCO representative for suggesting a skilful way of resolving the difficulty.

Mr MAURO (Holy See) joined the representative of the Islamic Republic of Iran in underlining the importance of the expression “on religious or secular grounds”, which certain delegations had suggested be deleted, in the definition of the notion of cultural objects. As for the reference to Article 1 of the 1970 UNESCO Convention, it was in his opinion superfluous as the first part of Article 2 was sufficient for a definition of “cultural objects” for the purposes of the Convention.

The CHAIRMAN did not see any opposition to maintaining the expression “on religious or secular grounds” despite certain interventions in favour of the deletion of the phrase from the text of Article 2.

*The meeting rose at 7.15 p.m.*

CONF. 8/C.1/S.R. 2  
13 June 1995

## SECOND MEETING

Thursday, 8 June 1995, 9.45 a.m.

*Chairman* : Mr Lalive (Switzerland)

### **AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/C.1/W.P. 2)**

#### CHAPTER II – RESTITUTION OF STOLEN CULTURAL OBJECTS

##### *Article 3*

The CHAIRMAN stated that the Committee would proceed to the examination of Article 3 of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/3), underlining the fact that this article was an essential component of the draft Convention.

Before beginning the examination of paragraph (1) of Article 3, he gave the floor to the representative of Cameroon for a general statement.

Mr TOKO MANGAN (Cameroon) congratulated the Italian Government for its perfect organisation of the Conference as well as Unidroit and UNESCO for their hard work, not forgetting all the experts who had contributed in an invaluable way towards the success of this Conference.

He stated that, along with other States which export cultural objects, Cameroon appreciated the efforts undertaken towards the elaboration of an international Convention regarding this crucial problem and the definition of constraining yet sound regulations for the traffic of objects whose importance was never

sufficiently emphasised. He stressed the awareness of Cameroon regarding the difficulties of such an undertaking, given the multiplicity of national legislations and the work undertaken for many years to reach a compromise acceptable to all.

He recalled that because of the unlawful and uncontrolled removal of objects belonging to his country’s cultural heritage, his delegation was obliged to draw attention to certain elements that had not been solved by negotiation or been taken sufficiently into account.

The first of these concerned the very notion of objects of cultural significance, which was fundamentally a question of values. Furthermore, Cameroon was concerned by the ideological and historical value of a claim which would *a posteriori* be considered within a framework that was unequal due to the distinction between on the one hand, the exporting countries and the poor or economically dominated countries, and on the other the importing countries which were economically strong.

These reasons had lead Cameroon to consider that attempts to reach a solution to the question of the return of stolen or illegally exported cultural objects could not be based on purely legal considerations alone.

He underlined that because the movement of cultural objects was strictly in one direction and of a unilateral character, this should be taken into account as a pattern of South/North traffic to the detriment of North/South traffic.

With regard to the concept of cultural objects, he underlined that Cameroon was taken aback by the manner in which value was attributed by the countries which imported cultural objects, in a discriminatory way, thus legitimising the export of objects judged to be “minor” and whose artistic, historical or scientific importance was in fact deliberately under-estimated. Such an approach rendered exports almost legal when otherwise they would not be.

He stated that the concept of value covered partially or totally different grounds depending on the cultures, the intention of the societies that produced them or even the different functions of those objects. Cameroon therefore wished to emphasise the following points:

– the need explicitly to recognise different value systems in existence at the same time;

– the global character of any one culture’s production, whereby any one object cannot be separated from the others without damaging the integrality of the overall cultural system;

– the impossibility of discriminating between different cultural objects, that is there should be equal value attributed to objects be they a sculpted throne or wickerwork.

He continued that it seemed essential to eliminate the importance attributed to cultural objects according to their assumed antiquity, as ancient objects were not necessarily of greater value than objects more recently produced, given that all of them had a function within the society that produced them. The shady area between the definitions of terms of art and crafts also contributed to certain abuses. In the same way, distinguishing between categories of art, history and science reflected an essentially western epistemology rather than the polysemic functions of a large part of Cameroon’s cultural objects.

Regarding the specific history of Cameroon, he stated that even though his country appreciated the diplomatic importance of such a draft Convention as well as the work aimed at reaching a more just international law in this field, it would seem abnormal to him not to take into consideration his country’s own particular history and especially to pass over the thefts or the “presents” given under a system of domination and more generally speaking to erase the past at a single stroke.

He stated that the practice set up prior to independence was still in use, not under the cover of a political domination, but through an economic domination, and this would surely give rise to controversy. In the absence of a solution to these difficulties, Cameroon wished that the draft Convention be retroactive in order to limit the damage.

He was of the opinion that it was necessary to establish at least a threshold limit as from when the Convention would apply. Apart from its deterrent nature, this measure would restore a certain equity between the rights and the duties of all concerned.

He declared that even though it had been necessary to state certain key problems from the beginning, Cameroon was not unaware of the severe challenges faced by the draft Convention, for which there were great expectations. He stated that he faced the meetings

with an open mind, willing to discuss all the controversial points in order for a genuine compromise to be reached, that was to say a real consensus that respected the rights of all those involved.

The CHAIRMAN thanked the representative of Cameroon for his important statement. Most of his comments had always been taken into account by the members of the study group as well as the governmental experts during all four of their sessions. He fully understood the comments made by the representative of Cameroon, who had not been able to participate in the previous meetings. He believed that even if the draft Convention could not be based on legal arguments alone, it was necessary all the same to find support from legal structures, in the same manner as a house could be conceived not only from an aesthetic point of view but needed to be built according to architectural laws. Finally, he did not consider it possible at this stage to re-open a general debate that had already been carried on for some ten years.

#### *Paragraph (1)*

The CHAIRMAN proposed consideration of paragraph (1) of Article 3 which read: “[t]he possessor of a cultural object which has been stolen shall return it” without referring back to the relevant developments in the Explanatory Report. He noted that written comments had been submitted by the delegations of the Netherlands (CONF. 8/C.1/W.P. 2), China and Japan (CONF. 8/5 Add. 1) and the United States (CONF. 8/5 Add. 3).

Ms HUEBER (Netherlands) stated that her delegation had studied the Explanatory Report very thoroughly and had come to the conclusion that the draft text of Article 3(1), was not sufficiently clear. For the necessary amendments she referred to CONF. 8/C.1/W.P. 2 drawn up by the Netherlands delegation. She drew attention especially to the word “return” in Article 3(1) which should be replaced by the word “restitute”. She also noted that from her delegation’s point of view the word “possessor” should be replaced by another expression or at the very least be clearly defined if it were to be included in the future Convention since the term “possessor” had a different connotation in different legal systems. In this regard she also

drew attention to EEC Council Directive 93/7/EEC of 15 March 1993 where the term “possessor” had been expressly defined. This had proved necessary for States which were more familiar with each other’s legal systems and was more necessary still in a worldwide Convention. For her detailed proposals she again referred to document CONF. 8/C.1/W.P. 2.

The CHAIRMAN noted that some of the questions raised by the Netherlands delegation concerned drafting and that a distinction should be drawn between matters of drafting and matters of substance. He recalled that the term “possessor” had already been referred to by the Chinese delegation and been the subject of discussion.

Mr SHI (China) suggested that instead of the word “possessor” the word “holder” should be used in Article 3(1). This wording would, from his point of view, be broader and clearer than the current wording.

The CHAIRMAN noted that the Drafting Committee would certainly take care of this point and come up with a suggestion to resolve the problem. He then asked whether there were any further remarks as to the general principle contained in Article 3(1).

Mr SAVOLAINEN (Finland) stated that he had no objections to the principle contained in Article 3(1). He then referred back to the proposal made by the Chinese delegation explaining that it should be made clear whether the word “possessor” or the word “holder” referred only to a question of fact or whether those words imported legal implications concerning title to the object.

The CHAIRMAN drew attention to paragraph 42 of the Explanatory Report which read: “... The first of these related to the term ‘possessor’ which some delegations would have preferred to replace by another word such as ‘holder’, or alternatively to define the term more precisely. In fact, some legal systems draw a distinction between possession and the holding of an object (possession in one’s own name or in the name or on behalf of another person) while such a distinction is unknown in others. The prevailing view was that the text of the future Convention should be as neutral as possible and that with a view to determining the person against whom a claim for return of an object should be

brought the term ‘possessor’ should be retained on the understanding that the notion must be understood in a wide sense, ...”. The Chairman then stressed that the words beginning with “on the understanding ...” were the most important words in this passage. He then quoted the remainder of paragraph 42 of the Explanatory Report: “... in accordance with the aim of the Convention which was to facilitate the return of cultural objects, even though this broad notion might not necessarily correspond in every case with the national law of all the Contracting States”.

Mr NOMURA (Japan) expressed the view that it was not so much a question of title that might cause problems in Article 3(1). The question rather was, as already indicated in paragraph 43 of the Explanatory Report, which national law should be applied to determine the person to whom the objects would have to be returned, since different national laws might take different views on the question of who could bring a claim for restitution. He therefore suggested including a provision of private international law in the draft Convention for the purpose of indicating the applicable national law that would govern the question. The same was true of the interpretation of the word “theft”.

The CHAIRMAN recalled that this question was already addressed in paragraph 43 of the Explanatory Report.

Ms JOHNSTON (United States of America) also took the view that a precise definition of the word “possessor” needed to be included in the draft Convention, perhaps in Chapter IV. She agreed, however, with the principle contained in Article 3(1) and went on to suggest that its wording should be amended by adding the words “in accordance with the procedure and in the circumstances provided for in this Convention”. This would give the provision the same wording as that of Article 2 of the EEC Directive.

The CHAIRMAN noted that this suggestion would destroy the whole impact of the provision since it owed its attraction to its brevity. He also warned against overburdening the article.

Mr WICHENCHAROEN (Thailand) agreed that the word “possessor” was sufficiently clear and understandable. Although accepting that Article 3(1)

only contained a statement of principle he found it to be too short for an international convention especially since it did not indicate which person might be entitled to make the claim. Having regard to Articles 5 and 9, this could either be the owner or a State. He stated that the delegation of Thailand was satisfied with the proposal made by the United States delegation.

Mr VRELLIS (Greece) stated that Article 3(1) clearly set out the fundamental question of the obligation to return the stolen object and consequently was perfectly acceptable to the Greek Government, since definitions of all known types of possession recognised by different legal systems could certainly be added to the text. The same applied to the notions of theft. The Greek Government would have preferred the use of additional terms as set out by the International Law Institute, but would not insist as it wished to avoid endless discussions that might risk compromising the content of the article in the existing text.

Mr MARQUES DOS SANTOS (Portugal) found Article 3(1) to be incisive, clear and totally satisfactory. He also stated that he was at ease with the term “possessor” which he had supported already in 1991 and concluded that although the text was not perfect, it was clear-cut and should be retained in its entirety.

Mr BURMAN (United States of America), referring back to the proposal made earlier by his delegation, explained that this proposal did not weaken the effect of the provision at all. This was most certainly not the intention of his delegation since the internal laws of his country already provided for a stronger protection than did the draft Convention. The proposal was simply aimed at building up a legal structure and remained on the table.

Mr FRAOUA (Switzerland) considered it necessary to recall the aim of the study group (of which he had been a member) during the preparation of Article 3 and the whole of the draft Convention. The study group had quickly realised that it was impossible for its members to agree on an overall set of uniform regulations, in conformity with the legal systems of all States, and also on such terminology as “theft”, “possessor”, “owner” and “claimant”. They had therefore agreed to draft a minimum set of uniform rules enabling the concerns of both the importing countries and exporting

countries to be met, without aiming to make the criminal, civil or private law uniform. He stated that the Swiss delegation agreed to the text of Article 3(1) as drafted. It was an illusion to believe that it was possible to reach an agreement on a definition of such notions as “possessor”, “theft” or “claimant”. He underlined the fact that the Explanatory Report stressed this difficulty and explained the meaning of the paragraph, which was in his view all that was necessary.

Mr ADENSAMER (Austria) suggested that Article 3(1) should be construed in the light of its international character. He had no problem in accepting the language of the provision although he would welcome clarification as to which persons were entitled to make claims thereunder. He further stated that from the preparatory work it was clear that not only could a State make a claim but also the dispossessed person. This should be made clear in the text of the Convention. He also expressed his agreement with the United States proposal.

Mr GIACALONE (Italy) stressed that it was important to keep the impact of Article 3(1) as it stood. Therefore the problem of the identification of the claimant should be dealt with in another place. The word “possessor” should also be left unchanged. He added that the identification of the claimant was more important in the context of Article 4 and when it came to determining which courts had jurisdiction over claims under Article 9 of the future Convention. To emphasise still further the importance of Article 3(1) and to avoid the problem of identifying the claimant, the Italian delegation suggested striking out the words “[T]he possessor of” at the beginning of Article 3(1). A rule to identify the claimant should therefore be taken up at another place.

Mr ZIMBA CHABALA (Zambia) stated that his delegation preferred Article 3(1) to be left as drafted since its attractiveness lay in its simplicity. He therefore supported the proposal of the Italian delegation.

The CHAIRMAN agreed that any amendments should be included at some later place in the Convention.

Mr CAHN (International Association of Dealers in Ancient Art) expressed the view that the principle laid

down in Article 3(1) was acceptable but that the word “possessor” should be replaced by the word “owner”. He argued that the word “possessor” would also include cases where for instance a museum had simply borrowed an art object. Under the current wording such a museum could face a claim under the Convention. Since the financial risks necessarily associated with such a claim would be far too high for any museum to bear the consequence would be that museums would refrain from borrowing objects in the future. This would ultimately hinder any substantial exchange in works and for these reasons he would prefer to employ the word “owner”.

Mr AL NOURI (Kuwait) declared that, according to Kuwaiti civil law the distinction between the terms “possessor” and “holder” was clear. The first paragraph of Article 3 set out a general obligation or disposition and Kuwait wished the text to remain as drafted.

Mr HUBBARD (Mexico) stated that his delegation believed that a person who stole something could never become the owner of it. He would therefore not be able to support the proposal made by the I.A.D.A.A.

The CHAIRMAN added that using the word “owner” rather than “possessor” would inevitably cause a vicious circle. Since there were no further delegations wishing to speak on this subject he then moved on to Article 3(2), explaining that the wording of this draft provision had been subject to lengthy discussions in the earlier committees, especially with regard to the words “unlawfully excavated” in the English text.

*Paragraph (2)*

Mr NOMURA (Japan) made a proposal to delete Article 3(2). According to the Japanese delegation, such objects should be dealt with in Chapter III of the future Convention. In addition he suggested that the words “unlawfully retained” were too broad to delimit the scope of application of the Convention.

The CHAIRMAN noted that in all prior meetings there had always been a clear majority in favour of the retention of the provision.

Mr WICHENCHAROEN (Thailand) disagreed with the Japanese delegation since Article 3(2) would

be very useful in underlining the position laid down in the internal law of Thailand and most certainly in many other countries as well.

Mr IDIL (Turkey) felt comfortable with Article 3(2) as it stood. He argued that the provision dealt only with stolen objects whereas the question of the illegal export of cultural objects would be addressed in Article 5.

Mr BURMAN (United States of America) agreed with the view taken by the Japanese delegation. After carefully considering the observations of UNESCO on this provision the United States delegation had come to the conclusion that the deletion of Article 3(2) would increase the likelihood of a larger number of countries ratifying the Convention. This was partly due to the fact that theft would anyway be covered by the Convention and that most cases covered by the provision would be regarded as theft under the internal laws of many countries. In addition, a large majority of situations involving illegal excavations would be caught by national laws governing illegal export and would therefore be covered by Chapter III.

Mr ADENSAMER (Austria) considered that Article 3(2) was of no particular importance for the operation of the draft Convention and therefore the Austrian delegation could agree to its deletion. He further suggested that it should be made clear that the State had no right to make a claim in respect of illegally excavated objects under Article 3 unless it was the owner. He further asked for clarification regarding whether the land owner who permitted an unlawful excavation would have a right to make a claim under the provision. If therefore it were to be retained he proposed amending the text so that it read “... which has been unlawfully excavated without the consent of the landowner or lawfully ...”.

Ms PROTT (UNESCO) recalled that these points had been under discussion from the very beginning of the work. In her view, cases that currently fell within the scope of Article 3(2) should be dealt with in Chapter II as far as stolen objects were concerned and in Chapter III as far as cases of illicit export were concerned. For this reason it was also important to ensure that the periods of limitation in both parts of the

Convention were identical. She finally underlined again that, for the reasons previously stated, the current Article 3(2) should be deleted.

The CHAIRMAN suggested that any further discussion of the provision should be limited to interventions regarding either the general principle or the contents of the provision.

Mr VRELLIS (Greece) declared that Greece was very interested in this question as clandestine excavations were the most important source of losses that his country had suffered. Consequently, he expressed the view that the degree of protection should in this connection be set at the highest level. He further expressed the view that the draft Convention drew a distinction between stolen objects and illegally exported objects that did not benefit from the same measure of protection. He reaffirmed the fact that Greece had opposed this difference in treatment but as most of the States now preferred the distinction his delegation would not oppose it. However, Greece still insisted that clandestine excavations be assimilated to theft.

Mr FOROUTAN (Islamic Republic of Iran) declared the delegation's agreement with the view taken by the Greek delegation. He therefore preferred to keep Article 3(2) in the future Convention.

Mr ZIMBA CHABALA (Zambia) noted that this matter had been subject to legislative measures in his country and he therefore preferred that the provision be retained as drafted. He further argued that this was the better place to deal with the issue since Chapter III dealt with the export of cultural objects.

Mr MARQUES DOS SANTOS (Portugal) pointed out for the benefit of the Drafting Committee that the French and English versions of Article 3(2) were not entirely in conformity and he asked for efforts to be made to that end.

Ms SCHNEIDER (Executive Secretary of the Conference) stated that great attention had been paid to rendering the two versions in conformity with each other. She pointed out that the French words "illicitement issu de fouilles" covered both unlawful excavations and lawful excavations whose product was retained, whereas the English language did not allow for such a brief formula.

Mr RENOLD (Switzerland) declared his support for the proposal to delete Article 3(2) as put forward by Japan, the United States, Austria and UNESCO. He explained that the article created a specific category and could therefore provoke further difficulties with regard to the definitions. Furthermore, he found the provision to be superfluous since each State's national law would define what was an unlawful excavation or not. In fact, if national law considered that unlawful excavation constituted a theft then Chapter II of the Convention would be applicable. Otherwise, Chapter III would apply and Article 3(2) was therefore otiose. The aim of the future Convention was to assist in the return of stolen and illegally exported cultural objects and not to fill the gaps in the internal law of each State, and Article 3(2) led only to the confusion of those aims.

The CHAIRMAN asked whether the Swiss delegation agreed that the reference made to unlawful excavations in Article 5(1)(c) should be retained.

Mr RENOLD (Switzerland) answered that the reference in Article 5(1)(c) should also be deleted.

Mr WICHENCHAROEN (Thailand) argued in favour of the retention of Article 3(2) since cases might arise where, under the applicable national law, excavated objects would not be treated under any other provision. He added that leaving the provision where it was would cause no harm.

Mr HOSAIN (Pakistan) expressed the strong support of his delegation for the view taken by the Turkish and Greek delegations that Article 3(2) be retained as it stood.

Mr STURLESE (France) stated that it seemed reasonable to propose the deletion of Article 3(2) as the problem, certainly serious, of unlawful excavations was already covered by the draft Convention, in that an object from an unlawful excavation was both a stolen object as well as an illegally retained or exported object. He inquired why a controversial paragraph which caused difficulties to a number of States should be introduced when the situation was already covered by the draft Convention. It was in his view important to delete the paragraph, all the more so as it seemed that Greece was not hostile to its removal on legal grounds.

The CHAIRMAN stated that he understood the position of those States which favoured the deletion of the paragraph as it contained certain disturbing elements but he strongly recommended keeping in mind the psychological importance that the issue of excavations held for many States and suggested that unlawful excavations be mentioned elsewhere in the text, for instance in Article 5(1)(c) or in the preamble.

Ms HUEBER (Netherlands) argued in favour of the original 1990 proposal and therefore pleaded in favour of the deletion of Article 3(2). She added that as a compromise the provision might be included, for instance in the preamble or in Chapter III.

Ms GARCIA VILLEGAS (Mexico) argued that since under the internal laws of Mexico the State was the sole owner of excavated objects she strongly supported Article 3(2). She further argued that this was the appropriate way to discourage trade in cultural objects that had been illegally retained from excavations.

Mr CHATTI (Tunisia) stated that his delegation was in favour of Article 3(2) as it stood, not only for psychological reasons but also on account of the seriousness of the problem.

Mr IDIL (Turkey) supported, in the French version of the draft, either the phrase “*illicitement issu de fouilles*” or “*de fouilles illicites*”. He stated that Turkey agreed to the text as drafted, but in order to reach an agreement with the States opposing it he proposed retaining the first half of the text of Article 3 and including the second half of the text in Article 5.

Mr FRIETSCH (Germany) agreed with the view taken by the Japanese delegation. He nevertheless indicated that he might be prepared to accept the inclusion of the provision, for instance in the preamble, as a compromise.

Mr FRAOUA (Switzerland) explained that the study group’s intention had been to leave to the claimant the choice of proceeding under either Chapter II or Chapter III depending on the case in question, especially for the exporting countries, given that it was difficult to foresee which of those chapters would be more favourable to them. He declared that while Switzerland favoured the deletion of Article 3(2), he was at the same time sympathetic to the idea of

explaining the importance of the problem of clandestine excavations either in the preamble, or in Article 5, given that for States which already had legislation defining unlawful excavations as theft, Article 10 of the draft Convention would enable them specifically to apply their own legislation.

Mr LAZAROU (Cyprus) agreed with the view taken by the Greek delegation, thus favouring the retention of Article 3(2).

Mr VRELLIS (Greece) stated that he wished to avoid any misunderstanding on the part of the French delegation in case it believed that the Greek delegation was in favour of the deletion of Article 3(2). Greece wished to retain this paragraph. He explained that the protection afforded to cultural objects by Chapter II was broader than that provided for by Chapter III. Because the loss suffered by his country due to illicit excavations was great, he felt that cultural objects coming from excavations should be protected as broadly as possible. Article 10 offered protection only if the applicable law foresaw an assimilation to theft. If that was not the case, Greece did not want to take the risk of seeing another country, in the absence of theft being thus assimilated, referring back to the protection afforded in Chapter III. Paragraph (2) satisfied the concerns of Greece which therefore wished its retention.

The CHAIRMAN agreed with the opinion expressed by the Greek delegation with reference to Article 10 which, he pointed out, had not yet been discussed.

Mr SHI (China) argued strongly in favour of Article 3(2), recalling that it had been supported by many delegations and that it had been the subject of much lengthy discussion in the preparatory phase. He declared however that from the Chinese point of view the words “lawful” and “unlawful” were ambiguous.

The CHAIRMAN stated that the Drafting Committee would certainly take notice of those remarks.

Mr LEANZA (Italy) expressed the view that the general principle of assimilating unlawful excavations to theft was important enough to be retained somewhere in the draft Convention although Article 5(1)(c) seemed insufficient in this regard.

Ms KIM (Republic of Korea) doubted whether the deletion of Article 3(2) would make a real difference. She added, however, that in the event that it would, then she would strongly object to its deletion.

Mr EVANS (Secretary-General of the Conference) stated in reply to the Korean intervention that in his view the result of the deletion of Article 3(2) would be that the number of cases now falling within the realm of Chapter II might be reduced without their necessarily being covered by Article 5.

Mr CREWDSON (International Bar Association – I.B.A.) recalled that most of the States favouring the retention of Article 3(2) had provisions in their internal law whereby unlawful excavations were to be regarded as theft of State property. This would then give rise to a claim by the State under Chapter II. For those countries with internal laws different from those he had described, he recommended that the internal laws be changed. For these reasons he pleaded for the deletion of Article 3(2).

Mr FALL (Guinea) saw the problem of Article 3(2) as being its location in the text as drafted. The explanation of the text put forward by the Executive Secretary perfectly met the concerns of Guinea in distinguishing unlawful excavations and the abuse of lawful excavations. Furthermore he pointed out that paragraph (2) did not cover restitution and should therefore be considered with Article 1, which laid out the general principles of the draft Convention, whereas Article 5(1)(c) should be retained as both clandestine excavations as well as lawful excavations from which objects had been illegally removed or retained should be covered.

Ms PROTT (UNESCO) expressed the view that it was universally agreed that the Convention should cover illegally excavated cultural objects or cultural objects that were legally excavated but then misappropriated. The question was where in the future Convention the matter should be dealt with and she remained convinced that this was done adequately in Article 3(1) and in Article 5(1).

The CHAIRMAN noted that there seemed to be an overall agreement regarding the seriousness of the problem and that the discussion boiled down to a

technical drafting problem, namely the place in the future Convention at which the matter should be dealt with.

*The meeting was adjourned at 11.30 a.m.  
and resumed at 12.15 p.m.*

#### *Paragraph (3)*

The CHAIRMAN proposed that the Committee proceed to Article 3(3), suggesting that a distinction be drawn between the general problem of limitation periods and their starting point, it being understood that the two questions were obviously linked.

Ms BUIXO (Spain) stated that Spain was in favour of a limit of one year which seemed sufficient in relation to important cultural objects. The need for a longer limitation period appeared to be evidence not only of negligence but also lack of concern for the object in question. She further proposed that the expression “or ought reasonably to have known” should be deleted as it was too broad in scope and created the difficulty of defining “reasonable knowledge”. In fact appearance in a newspaper or a publication could seem sufficient to attribute knowledge to a claimant. So, while that might be true for a State, it could be more difficult to sustain it in regard to an individual. The language therefore weakened Article 3(3).

Ms KIM (Republic of Korea) proposed that Article 3(3) and (4) distinguish between possessors in good faith and possessors in bad faith. She based her proposal on the idea that the possessor in bad faith could be regarded in a similar way to the thief and thus be made subject to criminal law. As to the limitation periods, she favoured the lengthier of the suggested periods if still longer periods could not be included in the future Convention.

Mr MARQUES DOS SANTOS (Portugal) stated his support for the relative limitation period of one year and the absolute limitation period of thirty years. He explained this choice on grounds of legal certainty, as legal situations must be clearer after a certain lapse of time. He furthermore indicated that the cumulative conditions concerning the location of the object and the identity of the possessor which had both to be satisfied before the period began to run allowed the absolute

limitation period to be lengthened and also rendered the short limitation period acceptable. He expressed his disagreement with the deletion of the phrase “or ought reasonably to have known” as the use of an indeterminate legal concept required that it be the organ applying the law, in this case the court, which was to decide on what was reasonable knowledge. Without this objective factor, the relative limitation period could be too long and he therefore proposed that the phrase be maintained.

The CHAIRMAN referred to the explanations of the expression as set out in the Explanatory Report (CONF. 8/3) and also to the UNESCO comments (CONF. 8/6). The deletion or the retention of the phrase had also to be borne in mind in relation to Article 8.

Mr ZIMBA CHABALA (Zambia) supported an approach providing maximum protection for claimants as far as limitation periods were concerned and in this perspective Article 3(3) as it now stood did not meet the expectations of his country as searching for the objects might be very time consuming. He thus favoured a more flexible approach. He also emphasised that it was very important that the limitation period did not begin before both the location of the object and the identity of the current possessor were known. To ensure that not too heavy a burden was put upon the claimant he suggested a relative limitation period longer than one to three years and an absolute limitation period of more than fifty years, while indicating a willingness to compromise on the period of fifty years.

The CHAIRMAN stated that since the limitation period did not begin to run until both the location of the object and the identity of the current possessor were known, the draft already provided for a very long limitation period. He added that the provision contained in the draft was in line with the internal laws of many countries.

Mr HOSAIN (Pakistan) remarked that this question had already been the subject of highly controversial discussions in the previous committees and that neither the 1970 UNESCO Convention nor the London Declaration contained any limitation periods.

Mr MAROEVIC (Croatia) pleaded in favour of a relative limitation period of three years and an absolute limitation period of fifty years although his delegation would have preferred even longer periods since they would not exclude making the claim at an earlier point in time.

Ms BALKIN (Australia) recalled that the period of limitation in the Scheme for the Protection of Cultural Heritage within the Commonwealth, adopted in Mauritius in November 1993, was five years instead of three years. She therefore suggested including a five year period of limitation in the future Convention to parallel the Commonwealth Scheme. If this were not agreeable to the majority she pleaded for the longest possible limitation period. To underline the importance of such a long period of limitation she described a case that had recently occurred in Australia where the return of an object that was part of the collection of the Australian National Gallery had been claimed by the Peruvian Government. It had taken the Peruvian Government approximately three years, if not more, after it had knowledge of both the location of the object and the identity of the possessor, to collect all the evidence necessary. For this reason she also strongly supported the draft insofar as it required both prerequisites for the period of limitation to start. She also favoured the retention of the words “or ought reasonably to have known” as, in the Australian view, this clause could not possibly cause any problems since the concept was already well known to courts.

Mr SAVOLAINEN (Finland) supported the position taken by the delegations of Portugal, Australia, and others. He argued in particular in favour of the retention of the phrase “or ought reasonably to have known”. Further, he expressed doubts whether it would be wise to leave it to the internal law of each State to determine at what time a claim would have to be regarded as being brought. He took the view that this question should be dealt with in the future Convention and that the relevant point in time should not be that at which service was effected on the defendant but rather the time at which the suit was filed.

The CHAIRMAN suggested that the deletion of the words “or ought reasonably to have known” would not

necessarily make any difference since the courts would presumably construe the provision in this way anyway.

Mr WEIBULL (Sweden) agreed with the Portuguese proposal to include the short periods of limitation of one and thirty years respectively. He also argued in favour of the retention of the phrase “or ought reasonably to have known”.

Mr IDIL (Turkey) observed that the article was aimed at protecting the interests of owners and not of possessors. He consequently supported the position of the Spanish delegation but with periods as long as possible, emphasising that experience had taught how long it took for such procedures to be initiated.

The CHAIRMAN stated that the Drafting Committee should take this remark into account as well as the question put by the representative of Finland following the observation of the Australian delegation.

Mr KOBAYASHI (Japan) considered that the time limitation of one year was not sufficient for a private individual to initiate proceedings abroad. The distance between Japan and the United States as well as Europe should not be forgotten. A time limit of three years seemed therefore to be more appropriate. He also favoured a thirty year limitation period in order to avoid putting the possessor in an uncertain legal situation and with the aim of guaranteeing the legal certainty of transactions, especially having regard to the difficulty of conserving proof concerning those actions.

Mr BURMAN (United States of America) expressed his preference for a limitation period of three years, arguing against any longer limitation period since it was important to determine the legal situation within a reasonably short time.

Mr FRIETSCH (Germany) did not think that any differentiation between cases in which the possessor held the object in good or in bad faith was necessary since any possible claim originated with the claimant and not with the possessor. As far as the periods of limitation were concerned, he favoured periods of one and thirty years respectively. For the cases in which the object belonged to a public collection he thought that a period of limitation of seventy-five years would be appropriate. As to the wish of some delegations that

there be no limitation period in connection with public collections, he considered it possible to allow Contracting States to declare that a claim should not be subject to prescription under national law and in this context he referred to Article 7(1) of EEC Council Directive 93/7.

Ms HUEBER (Netherlands) drew attention to CONF. 8/C.1/W.P. 2, submitted by the Netherlands delegation and accordingly argued, for the purpose of legal certainty, in favour of the respective shorter limitation periods of one year (because of the cumulative condition) and an absolute period of thirty years so as to keep as close as possible to the EEC Directive. She also supported retaining the words “or ought reasonably to have known” as they would have the effect of rendering claimants more diligent in searching for objects that had been stolen from them. She further proposed the inclusion of new language in Article 3(3): “... shall be brought before a court or a competent authority within a period ...” and agreed with the view expressed by the Finish delegation that the words “be brought” needed to be clarified.

The CHAIRMAN repeated that the relative limitation period would not begin at the time of the theft but rather at the time at which the dispossessed person acquired knowledge or at which he ought reasonably to have acquired knowledge as to the location of the object and the identity of the possessor.

Ms MEKHEMAR (Egypt) saw the main aim of the future Convention as being the protection of cultural objects. As this was of the utmost importance for Egypt it would always favour the longer of the periods under discussion. Furthermore, she underlined the fact that the expression “from the time of the theft” was unclear and left open the question of the burden of proof.

Mr HE (China) regarded the limitation periods of three and fifty years respectively to be better for an effective protection of the cultural heritage. He also stated that the starting point for the limitation period was rather unclear. The period of limitation should start with the unlawful retention or excavation of the object.

Mr HUBBARD (Mexico) doubted whether it was at all possible to analyse Article 3(3) without at the same

time looking at Article 3(4). He also explained that the laws of Mexico would distinguish between archaeological and artistic objects. He also doubted whether it was reasonable to legalise the theft of cultural objects by setting any periods of limitation for the bringing of claims and therefore argued strongly in favour of the longer periods of limitation.

The CHAIRMAN agreed with the Mexican delegation that the link between Article 3(3) and (4) had to be kept in mind. He strongly objected, however, to the implication that delegations arguing in favour of the inclusion of a limitation period in the draft Convention intended thereby to legalise the theft of cultural objects.

Mr LEANZA (Italy) declared that even though the reasons for introducing a presumption of knowledge were understandable, his delegation preferred to substitute it by actual knowledge as the starting point of the limitation period.

Ms BUNGO (Albania) agreed with the views expressed by the delegations of Spain and Turkey. A three year period would be necessary and sufficient. It would be necessary because it was very difficult particularly for private persons to retrieve the relevant information. It was sufficient, however, since the period of limitation only started after both the location of the object and the identity of the current possessor were known. As far as the absolute period of limitation was concerned, she preferred the period of fifty years because it might well take a considerable time to recover the relevant information.

Mr FRAOUA (Switzerland) stated that he wished to avoid any misunderstandings regarding the aim of the future Convention. He stressed that it was not to ensure a better protection of cultural objects which fell within the limits of each State's national law, but to establish minimum rules that took into account the respective national systems of law of the importing and exporting States in order to establish a protective mechanism. He recalled that Article 3(3) had been discussed at length by the committee of governmental experts as well as by the study group because of the difference between the concerns of the exporting States which were in favour of longer limitation periods and the importing States which were in favour of shorter

periods. This difference had shown the need to reach a compromise agreement between the concern of the exporters for the protection of their objects and that of the importing art market States which sought the security of commercial transactions.

In this regard, he reminded delegations that the principle of legal security was a fundamental principle of law. The longer the limitation periods the greater the legal uncertainty, which was something unacceptable to the importing States and which could make it difficult for them to adopt the future Convention. The ratification of the text by all States required a consensus that the study group believed it had reached when proposing paragraph (3). Ratification of the future Convention only by the exporting States to the exclusion of the importing States would be pointless and would not solve the problem of stolen or illegally exported objects. He therefore suggested that both paragraphs (3) and (4) be kept, the latter establishing a longer time limitation which could be applied by States which recognised the concept of property belonging to the public domain, so that the time limitation set out by paragraph (3) would not constitute an absolute period. He also suggested that the starting point of the limitation period as set out by paragraph (3), even though short, would of necessity be lengthened by the cumulative nature of the two criteria that affected it. Switzerland was therefore in favour of the shorter periods.

The CHAIRMAN considered that the opposing arguments were not so diverse. Even if the aim of the draft Convention was not the protection of cultural objects the fight against theft was, and consequently it was an integral part of that protection. Nor was it advisable to exaggerate the opposing positions of importing States and exporting States and the North/South divide. This opposition was undeniable as the committee of governmental experts had revealed, but it had to be noted that many States would, even if not at the present time, at least later be both importers and exporters. In fact, the countries that were the victims of unlawful traffic soon became importers for their museums to possess objects from other States, whereas the importing countries quickly became exporting countries. He felt that there was no insurmountable opposition to reaching agreement and therefore suggested that a small working group be set up to offer

alternative compromise solutions between the different interests at stake.

Mr FOROUTAN (Islamic Republic of Iran) supported the view of the Pakistani and other delegations in favour of substantially longer periods of limitation. As far as the phrase “or ought reasonably to have known” was concerned, he favoured its deletion as its meaning was unclear.

Mr AL NOURI (Kuwait) stated that his delegation was in favour of the longer time limitations set out in Article 3(3). The theft of cultural objects during armed conflict had also to be taken into account and, in particular, theft during periods of occupation of one State by another, as this constituted a war crime or a crime against humanity, neither of which was subject to prescription. In consequence, a double system of time limitations had to be established according to which the theft of cultural objects during normal times would have a set limitation period and theft during war would not be subject to limitation. Otherwise the future Convention would contradict the system of international instruments applicable in matters of war crimes and crimes against humanity.

The CHAIRMAN suggested that the future Convention could neither change customary nor treaty law and specifically could not affect the regime of war crimes or crimes against humanity. He therefore suggested that the Committee return to the matter at a later stage of its examination of the text.

Mr LAZAROU (Cyprus) envisaged cases in which the claimant might be hindered from bringing suit by reason of *force majeure*. He therefore favoured longer limitation periods.

*The meeting rose at 1.10 p.m.*

CONF. 8/C.1/S.R. 3  
14 June 1995

### **THIRD MEETING**

Thursday, 8 June 1995, 3.20 p.m.

*Chairman* : Mr Lalive (Switzerland)

### **AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE**

### **INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 6 and 9-13)

*Article 3 (continued)*

*Paragraph (3) (continued)*

The CHAIRMAN proposed that the remaining questions on paragraph (3) be discussed before passing to paragraph (4).

Mr YIFAH (Israel) noted that a close connection existed between paragraphs (3) and (4) of Article 3. He referred to CONF. 8/C.1/W.P. 12 submitted by the Israeli delegation proposing the amendment of Article 3(3) in the sense that the words “and in any case within a period of [thirty] [fifty] years from the time of the theft” should be deleted. As to the limitation period he considered that the five year term suggested by the Australian delegation was probably appropriate. The precise term should however be determined when discussing paragraph (4).

Ms PROT (UNESCO) stressed the fact that the cultural objects contemplated by the draft Convention were very rarely to be found in the thief’s possession as the thief would most probably have passed the objects over to a third person who would as a rule be granted the benefit of good faith possession. Therefore discussion should not focus exclusively on the distinction in the limitation periods between criminal and civil claims. Experience generally showed that a delay of one year was too short to assemble the necessary evidence.

The CHAIRMAN agreed with the point made by the representative of UNESCO and suggested proceeding to discussion of paragraph (4), as no other delegation had asked for the floor.

*Paragraph (4)*

Mr MARQUES DOS SANTOS (Portugal) underlined the existence of a link between the question of the length of limitation periods and the notion of “public collection”, whether extensive or restrictive. More specifically, although it was possible on the one hand to affirm the principle of a complete absence of

limitation periods coupled with a strict definition of “public collection”, on the other a time limit of about seventy-five years should be retained if a wide conception of “public collection” were to be agreed upon.

The CHAIRMAN, while sharing the view that such a connection existed, suggested that the notion of “public collection” be dealt with first and that the régime to be applied to objects belonging to those collections be debated subsequently.

Ms HUEBER (Netherlands) believed that the definition appearing in the draft was far too broad. She suggested providing a better defined notion of a public collection, and reminded delegations that a possible model could have been that set out in Article 1 of EEC Council Directive 93/7 of 15 March 1993. If the notion had to be maintained, she proposed deleting the requirement concerning accessibility to the public and sub-paragraph (iii). Furthermore, she specified that the absence of any limitation period at all would be unacceptable to the Netherlands.

The CHAIRMAN recalled that the prescription issue had already been discussed on many occasions. He stressed the importance of the element of accessibility to the public and invited further consideration of the question of maintaining or deleting that requirement.

Ms TRIGO PAZ (Bolivia) stated that she shared fully the concerns expressed in the proposals made by the Australian and Canadian delegations and stressed that paragraph (4) seemed to have overlooked indigenous peoples, who were, particularly in Bolivia, a great source of spontaneous production of cultural objects.

Mr SHIMIZU (Japan) stated that his delegation objected to the absence of a limitation period. Furthermore, the definition of a public collection as it appeared in the draft was too vague to justify special protection for cultural objects belonging to that category under the future Convention, as it contained terms that were far too ambiguous. As suggested in his delegation’s proposal in CONF. 8/C.1/W.P. 6, the definition should be clarified in the sense that each Contracting State should designate what would be considered to be a public collection. A stolen cultural object would have to belong to a public collection so designated at the time of the theft. Introducing this formal requirement of designation was intended to assist prospective

purchasers in ascertaining the status of the object in question. Moreover, this would contribute to combating illegal trade.

Mr YIFahr (Israel) recalled that the text of Article 3(4) as proposed by his delegation in CONF. 8/C.1/W.P. 12 would read as follows: “Except to the extent provided for in paragraph (3), no claim for restitution of an object shall be subject to prescription”.

He observed that a distinction between cultural objects stolen from a private collection and cultural objects stolen from a public collection was not appropriate, as this was irrelevant to the cultural value of the object. He drew attention to the weaker position of a private collector in bringing a claim to court. He therefore argued that the same treatment should be granted to all owners, namely that everyone be able to sue within one or three years from the date on which he or she came to know or should have come to know the necessary details. Accordingly, he suggested that the notion of “public collection” be deleted.

Mr GHOMRASNI (Tunisia) stressed that his delegation was opposed to any proposal to apply limitation periods to cultural objects belonging to States. As regards the definition of a public collection he was not in favour of the requirement of conditions relating to public access and inventories on account of the theft and illegal export of objects originating in illicit excavations. It was evident that it was impossible for such objects to be inventoried or rendered accessible to the public. Even though such objects did not meet those two conditions, they should be protected.

Ms BALKIN (Australia) introduced the proposal set out in CONF. 8/C.1/W.P. 11 submitted by Australia and Canada, in which the following would be added to Article 3 as paragraph (5): “In addition, a claim for restitution of a sacred and secret object belonging to and used by a member or members of an indigenous community in a Contracting State as part of that community’s cultural practice [shall not be subject to prescription] [shall be brought within a time limit of [75] years]”. Alternatively she proposed, as set out in the above-mentioned working paper, that paragraph (4) be amended as follows: “However, a claim for restitution of an object belonging to a public collection of a Contracting State, or a sacred and secret object belonging to and used by a member or members of an

indigenous community in a Contracting State [shall not be subject to prescription] [shall be brought within a time limit of [75] years]”.

She thought this to be appropriate, having regard to the fact that cultural objects belonging to indigenous communities did not form a part of public collections. While supporting the suggestion that a public collection should benefit from an absence of limitation period or, at least, a very long time limit, she proposed that the same benefit be granted to indigenous communities. She emphasised the importance of returning cultural objects to the indigenous community from which they had been stolen. She feared that difficulties would arise if indigenous communities were only accorded a short period within which to bring an action. She also stated that her delegation was in favour of maintaining in Article 3(4)(iii) the words “or local or regional authority” on account of the Australian federal system.

Mr LEANZA (Italy) declared that while he was favourable to the principle of no limitation periods the solution so far proposed ran the risk of being too broad. He considered the condition of public access to be extremely important and proposed that it be retained in the Convention.

Mr FOROUTAN (Islamic Republic of Iran) stated that, in relation to the question of prescription, no general rule existed on this point nor did it have any place in Iranian jurisprudence. Nevertheless, for practical reasons time limits were normally employed. He found it hard to imagine that simply because a certain amount of time had passed, an unlawful possessor should have the right to keep the object. He stated that in respect of crime, illegality or theft, the passage of time did not alter the gravity of the deed.

Ms HUGHES (Canada) supported the statement made by the Australian delegation in relation to CONF. 8/C.1/W.P. 11 concerning indigenous communities. She underlined the fact that the French term “communauté autochtone” might be more appropriate than the term “communauté aborigène” as used in CONF. 8/C.1/W.P. 11. She also supported the suggestion to delete the brackets in Article 3(4)(iii) placed around “or local or regional authority”. She

referred to the fact that public collections also happened to be administered by provincial or local authorities. Concerning the definition of “public collection” in Article 3(4), she noted that regard should be had not so much to the type of institution holding the collection as to the nature of public access to the collection. She therefore suggested the following amendment as set out in CONF. 8/C.1/W.P. 13 by her delegation: “For the purposes of this paragraph, a “public collection” consists of a collection of cultural objects which is established for the benefit of the public and which is accessible to the public on a substantial and regular basis”.

Mr PERL (Argentina) strongly supported CONF. 8/C.1/W.P. 11 concerning the issue of indigenous communities. He drew attention to a possible deficiency in the return mechanism, and considered preparing a paper on this point.

Mr CREWDSON (International Bar Association) referred to the statement made by the Iranian delegation. He underlined that the discussion did not concern the position of an unlawful possessor, but rather that of a good faith purchaser, a person who had not been aware of any illegality. He agreed with the statement by the Israeli representative, who had correctly raised the question of the doubtful advisability of drawing a distinction between a private and a public collector. He pointed out that in general a work of art in the possession of a public collector was better known and of a higher value. He recognised nevertheless that Article 7 of EEC Council Directive 93/7 of 15 March 1993 distinguished between a public and a private collector as regards the limitation period. He requested delegations to consider the difficulties of a good faith purchaser, confronted with a claim seventy-five years after the purchase of an object, to prove that due diligence had been exercised at the time of purchase. He also advocated that objects of religious significance, which were often combined with an element of mystery, should be covered by special provisions. He understood the point made by the Japanese delegation concerning the so called “list” to be designated by each Contracting State. However, he drew attention to the impracticability of this suggestion having regard to the thousands of items sold annually by auction houses worldwide.

Ms WECHSLER (United States of America) recalled that the majority of museums in her country were not publicly, but privately governed. Those privately owned museums, as non-profit making bodies, were considered public institutions and should therefore benefit from the same protection.

Mr GRIFNEE (Belgium) stated that although Belgium was not a State with a federal structure, its degree of decentralisation was such that he was of the opinion expressed in the proposal of the Australian and Canadian delegations relating to the removal of the square brackets around the phrase “local or regional authority”.

Mr BEKSTA (Lithuania) introduced his delegation’s proposal in CONF. 8/C.1/W.P. 10 to delete the requirement of accessibility to the public, as religious institutions were, for instance, rarely open to the public. He suggested that Article 3(4)(iii) should read as follows: “a non profit institution which is recognised as such according to the legislation of the Contracting State” as this might be more in line with the expectations of Contracting States.

Mr FRAOUA (Switzerland) recalled the existence of a divergence, or even a contradiction, between the interests pursued by certain States, which aimed at establishing greater protection of cultural heritage by means of the future Convention, and those pursued by other States, favouring greater legal certainty for transactions. In line with the views expressed by the UNESCO representative, he stressed that the goal of the draft Convention was not directly to punish the thief of cultural objects but rather to achieve an appropriate arrangement for the restitution of the objects by a good faith possessor. Considering it impossible for the future Convention to arrive at an “autonomous” definition of public collections, he suggested that this idea be dismissed and in stating his opposition to any lack of limitation periods he emphasised the difficulties that such an absence would cause to States for which the legal certainty of transactions was a constitutional principle.

Mr SANSON (France) insisted that his delegation was in favour of a régime with no limitation periods. In the first place, it was certainly not the purpose of the draft Unidroit Convention to establish rules of public

international law concerning the protection of the cultural heritage of States. However, this did not mean that there should be no rules on restitution or return when these encouraged a policy of protection. One of those rules was the absence of limitation periods for the recovery of goods belonging to public collections, objects to which a State accorded considerable importance and which might have been acquired through the use of public funds, that is to say the money of the citizens of that State. Second, the definition of a public collection, in that it required regular access, was of difficult application to archival *fonds* and to collections conserved in libraries. If the requirement of accessibility were to be retained, the definition of a public collection should be completed by a reference to collections of objects which fell within the categories of cultural objects defined in Article 2 of the draft Convention.

Mr PANES (Spain) agreed with the importance of public access but warned against the condition being set up as an absolute requirement. He explained that there were numerous situations where cultural objects were not accessible to the public for simple reasons of organisation such as the availability of premises. It was clear that such reasons did not affect the need to ensure the protection of those objects. Equally, on account of Spain’s administrative decentralisation process, he supported the proposal frequently advanced by other delegations to remove the square brackets in the draft Convention around the words “local or regional authority”. Furthermore, he drew attention to the Spanish delegation’s proposal in CONF. 8/C.1/W.P. 9 to amend the definition of a public collection.

The CHAIRMAN suggested the possibility of inserting in the preamble to the future Convention the requirement that cultural objects should in principle always be accessible to the public.

Mr VRELLIS (Greece) considered in respect of paragraph (4) that the absence of a limitation period was not of itself excessive. Referring to the preparatory work he recalled that in order to allow a consensus to be reached more easily the level of protection in time concerning certain objects had already been reduced. Although Greece had not felt it necessary to take the floor in relation to paragraph (3), as a fairly long limi

tation period was in itself satisfactory, paragraph (4) called for comment as an unconditional absence of limitation periods was a primary requirement for Greece, at least for certain categories of cultural objects.

Mr IDIL (Turkey) stressed that the Turkish delegation was in complete agreement with the declaration made by the Greek delegation.

Ms MARIANI (International Council on Archives) reminded delegations that archives were not only important as testimony to the wealth of scientific information but also for their value as a source of official records. Consequently it was imperative to establish a régime with no limitation periods concerning archives. Furthermore she specified that the term “archival *fonds*” could be used as a basis for such linguistic improvements as might be necessary. In connection with the requirement of accessibility to the public, she shared the view that this was a well founded condition although she had to recall that certain archives were not necessarily open to the public.

Ms PROT (UNESCO) drew attention to the UNESCO comments on the draft Unidroit Convention (CONF. 8/6). She stated that UNESCO could not support an article which gave preferential treatment to some collections and not to others. UNESCO’s view on this point was that the same treatment should be given to all categories of objects. She feared that otherwise the Convention would be discriminatory and it was therefore important that account be taken of indigenous communities. She also wondered whether the establishment in the prospective Convention of a general rule of no limitation period for objects belonging to public collections might not effectively jeopardise its chances of success, as many States would be obliged to allow a stricter régime for foreign collections than that existing in their own domestic law.

Mr CAHN (International Association of Dealers in Ancient Art) underlined that his Association refrained in all ways from dealing in stolen art. To achieve this aim, he suggested that items should always be documented both photographically and graphically, so that even for public collections inaccessible to the public due information on the object to be protected would be available.

Ms GAFFNEY (Ireland) stated that her delegation had difficulties with the definition of a public collection as it included only inventoried objects. She stressed that this solution was hardly acceptable, as often very valuable objects were not, at least for some time, inventoried and examples of this situation could be found in her country. She agreed with the remark of the Israeli delegation on the inappropriate distinction between public and private collectors. As to the time limitation, she supported a long period and, with regard to the issue of indigenous communities, she strongly emphasised that importance should be given to this issue. She referred to the I.L.O. Convention of 1989 on Tribal and Indigenous Peoples, and suggested that the same definition of indigenous community be applied in the future Convention. She further believed that the Convention should seek to strike a balance between flexibility and legal certainty.

Mr MARQUES DOS SANTOS (Portugal) stated his complete agreement with the intervention of the Greek delegation, the idea of a régime with no limitation periods being appropriate if a precise definition of public collection were to be established. Taking up the question raised by the representative of UNESCO of whether the establishment in the future Convention of a régime of no limitation period might impose a stricter system on States than that already existing in domestic law and consequently render the chances of ratification more difficult, he replied by emphasising that the establishment of an *ad hoc* rule of no limitation periods was precisely the kind of important innovation which might encourage an evolution in the domestic law of some States, and not only those sensitive to the aim of unlimited temporal protection.

The CHAIRMAN proposed that a procedure be devised to encourage the terms of the debate to move on. Firstly, the different proposals of delegations should be studied in detail and then a working group set up to reach a compromise position. In order that such a group work effectively, he invited delegations to give directions through an indicative vote on certain principal questions.

Mr WICHENCHAROEN (Thailand) asked whether archives were to be included in the definition of a public collection.

Ms MARIANI (International Council on Archives) insisted that archives had specific characteristics and, frequently, an *ad hoc* set of rules. As a question of terminology the idea of public collections could be sufficiently wide, but it would in principle be preferable to respect the French term archive fund ("*fonds d'archive*"), as this term was also employed in English.

Mr MAROEVIC (Croatia) stated that he was in favour of a régime with no limitation period for public collections. He considered that archives could be included in the definition of public collection and moreover proposed that a wide general definition be reached that could encompass archives, museums and public collections.

Mr ZIMBA CHABALA (Zambia) stated that he was in favour of a régime with no limitation periods for objects belonging to public collections, whether or not those objects had been previously inventoried. Furthermore he believed that it would be appropriate to include sacred and secret objects as proposed by the Australian and Canadian delegations in CONF. 8/C.1/W.P. 11.

Ms HUEBER (Netherlands) insisted that the absence of a limitation period was unacceptable to her delegation. She argued that a limitation period of seventy-five years came close to the lack of a limitation period, and was therefore in her opinion far too long. She also believed that the definition of a public collection was much too broad, especially in view of the need for legal certainty.

Mr BOMBOGO (Cameroon) was opposed to a general régime with no limitation periods as long as a sufficiently precise definition had not been reached. He was equally against the protection of objects being dependent on their having been previously inventoried.

Mr GRIFNEE (Belgium) thought it necessary to consider further the temporal scope of application of the future Convention and more specifically whether it would apply to thefts that had occurred prior to its entry into force.

Mr LEANZA (Italy) considered, in relation to the parallelism referred to by certain delegations between EEC Council Directive 93/7 of 15 March 1993 and the

draft Unidroit Convention, that the two texts were not entirely comparable since the Directive referred to objects that had been illegally removed from the territory of a Member State whereas Articles 3 and 4 (Chapter II) of the Unidroit draft contemplated only the restitution of stolen cultural objects.

*The meeting was adjourned at 4.55 p.m.  
and resumed at 5.55 p.m.*

Mr MOLYVANN (Cambodia) stressed that the régime relating to limitation periods, which specifically concerned the temporal scope of protection of cultural heritage, was in principle an area in which national parliaments were competent. He declared that he was totally in favour of the régime laid down by the EEC Directive of 15 March 1993, and moreover suggested the possibility of leaving the limitation period flexible, for example by fixing a minimum limit of seventy-five years but that States be left the discretion to set longer, even unlimited, periods.

The CHAIRMAN put the three following questions to an indicative vote:

a) Should a specific provision on public collections be included in the future Convention ?

- for : thirty-eight
- against : four
- abstentions : five

b) Should the definition of public collection be as in paragraph (4) or should it be a general definition?

- for a definition as in paragraph (4) : nineteen
- for a general definition : twenty
- abstentions : five

c) Should a régime with no limitation period be established ?

- for : twenty-seven
- against : eight
- abstentions : ten

Mr BURMAN (United States of America) requested clarification as to the extent to which the working group should take account of the outcome of the voting, especially in the absence of a strong majority on some points.

Mr EVANS (Secretary-General of the Conference) suggested that the working group might, where appropriate, submit alternative proposals.

The CHAIRMAN pointed out that reasons of efficiency dictated that the composition of the working group be limited, and he accordingly proposed that it be composed of the delegations of Canada, France, Greece, the Islamic Republic of Iran, Japan, the Netherlands and Switzerland.

Mr BOMBOGO (Cameroon) requested that his delegation be admitted to the working group.

Ms KIM (Republic of Korea) also requested that her delegation be admitted to the working group.

The CHAIRMAN welcomed the interest of those delegations in joining the working group and, without precluding the addition of other delegations, recalled the necessity of maintaining a limited membership.

*The meeting rose at 6.50 p.m.*

CONF. 8/C.1/S.R. 4  
14 June 1995

#### FOURTH MEETING

Friday, 9 June 1995, 9.10 a.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4 and 6)

#### *Article 4*

The CHAIRMAN called the attention of delegations to the relevant section in the Explanatory Report prepared by the Unidroit Secretariat (CONF. 8/3), in particular to paragraphs 57 *et seq.* and to the detailed UNESCO comments on the draft Convention (CONF. 8/6). Both texts were very clear in their explanation of the system adopted by Article 4. He observed that as from the second session of the committee of govern

mental experts, the principle had been established of entitlement to compensation of the *bona fide* possessor of a cultural object who was required to return it. It seemed to him impossible to reopen that principle at such an advanced stage of the elaboration of the future Convention, and any further discussion should concern only matters of detail.

Mr WICHENCHAROEN (Thailand) stated that he supported Article 4 wholeheartedly. However, with respect to the first line of paragraph (3), he noted that although the French text posed no problem, the word "it" in the English text usually applied to an entity other than a physical person whereas the "possessor" which was the subject of the sentence could be a physical person or not. He therefore suggested that the words "from whom it acquired the object" be replaced by the words "from whom the object was acquired".

Mr BURMAN (United States of America) drew attention to paragraph 60 of the Unidroit Secretariat's Explanatory Report (CONF. 8/3) which gave an interpretation of the meaning of "fair and reasonable" compensation within the context of Article 4. Although he found the Report to be very useful, he cautioned against the elaboration of a detailed commentary on issues which had not been widely discussed or on which a substantial consensus had not been reached. This was particularly true where, as here, the commentary concerned a matter that had not been defined with precision and which was open to different interpretations.

Ms BALKIN (Australia) agreed that compensation under paragraph (1) should be awarded to a possessor who was a *bona fide* purchaser. However, she opposed the payment of compensation to a possessor which was a borrowing institution with no independent right to keep the object. Supporting a more flexible wording of the paragraph so that only persons truly entitled to do so could claim compensation, she observed that the term "fair and reasonable" was a normal facet of the compensation phase in contract and tort cases and was thus well-known to the Australian courts.

The CHAIRMAN suggested that the Australian representative submit her proposed change to the language of paragraph (1) to the Drafting Committee.

Mr VRELLIS (Greece) considered that the principle laid down in Article 4 of the draft Convention, and the rule whereby the *bona fide* possessor of a stolen cultural object was entitled to compensation in case of restitution, should not be questioned. This being said, he believed that the present solution whereby the claimant was required to pay compensation was not satisfactory. The claimant could, in many cases, be a State with limited financial resources which could create a practical problem as such a State might find potentially high compensation difficult to pay, in addition to legal costs. States without substantial financial resources would not be able to benefit from the mechanism of restitution of cultural objects. To resolve this difficulty he therefore suggested introducing the idea of subsidiarity in the article which would signify that the claimant would not necessarily be the person required to pay compensation to the *bona fide* possessor. In this manner, the claimant would be obliged to compensate the *bona fide* possessor only if compensation could not be obtained from another source. The possessor could address its claim for compensation, for example, to the person who had sold it the stolen cultural object.

The CHAIRMAN noted that some delegations shared this concern regarding the payment of compensation by the claimant. In his view many technical solutions could be foreseen, such as the deletion of the words “by the claimant” in Article 4(1) or the creation, after the adoption of the Convention, of a body comparable to the legal aid system already in existence under different national laws. It would be better, in his view, not to burden the text of the draft Convention further with the addition of too many technical conditions.

Mr NOMURA (Japan) subscribed to the comments of the United States delegation. He observed that under paragraph (1) compensation should be accorded only to a *bona fide* possessor who exercised due diligence. However, under paragraph 60 of the Unidroit Secretariat's Explanatory Report (CONF. 8/3), the interpretation of “fair and reasonable” compensation was left to the discretion of the judge. He insisted that compensation should be awarded to the possessor for amounts spent on repair or restoration, irrespective of whether the possessor knew or ought to have known that the object was stolen. He therefore proposed the addition

of new paragraphs to Article 4, as set out by the Japanese delegation in CONF. 8/C.1/W.P. 6.

The CHAIRMAN drew attention to the relevant comments of UNESCO (CONF. 8/6), which suggested that few cases would arise in which compensation would be necessary.

Mr FRIETSCH (Germany) observed that the draft went further than German national law but that national legislation could be adapted to conform to the draft text. He suggested however that the term “fair and reasonable” was an imprecise standard and that the standard should instead be simply “fair” so that national courts would be in a position to determine the appropriate compensation in accordance with the circumstances of the individual case. He shared the view expressed by other delegations that the capacity of the requesting State to pay compensation was not an appropriate criterion.

Mr MARQUES DOS SANTOS (Portugal) observed with regard to the term “fair and reasonable compensation” that it would be left to the judge to determine, case by case, the amount of compensation to be awarded. He considered that this would be an application of equity, in which case either the judge or the competent authority would take into consideration the circumstances of each case. The principle of equity was a feature of all legal systems and should not therefore be difficult to apply. Secondly, he noted that Article 4 was imprecise with regard to the problem of the burden of proof regarding the exercise of due diligence by the possessor.

Ms HUEBER (Netherlands) stated that the word “return” should be replaced by the word “restitute”. She considered that imposing the burden of proof on the *bona fide* possessor was too harsh, especially when compared to the standard used in Chapter III. She proposed the deletion of the words “and can prove that it exercised due diligence when acquiring the object” in paragraph (1) and its replacement by a less strict standard such as that used in Article 9 of the EEC Council Directive (“it is satisfied”). She noted that owners also should have obligations under the Convention and for this purpose the Netherlands had proposed in CONF. 8/C.1/W.P. 2 the addition of an article 3A as follows: “Any claim made under Article 3

shall contain or be accompanied by information that within a period of [three] [six] months from the time of the theft of the cultural object: (a) a report of the theft has been made to the police, and (b) a uniform description and a picture of the cultural object have been recorded in any reasonably accessible register”.

The purpose of this new provision was to clarify the limitation period within which the owner must act in order to preserve his or her claim. In addition, the existence of a register would mean that a possessor could not plead ignorance of the fact that an object had been stolen. She also advocated the addition of an article calling on States to co-operate in the establishment of a worldwide register with uniform descriptions of stolen or illegally exported cultural objects which could be easily consulted at low cost. Finally, she called for the establishment of clear criteria which would indicate elements to be taken into account in assessing whether compensation was “fair and reasonable”.

Mr SRBA (Czech Republic) underlined the necessity of introducing a special article containing definitions of basic terms such as “owner” and “holder”. As stated in the written proposals of the Czech Republic (CONF. 8/C.1/W.P. 4), an owner should be defined as “the original proprietor from whom the object of cultural value was stolen or illegally exported, regardless of whether this is a legal entity or physical person” and the holder as “the one who is illegally in possession of the object of cultural value”. As proposed in the same document, he argued that the following text should replace Article 4 of the draft Convention: “The holder of a stolen object who is requested to return the object has the right to demand compensation for damage caused in connection with the return of this object from the person from whom he bought or acquired this object, in accordance with the legislation of the Contracting State of the holder”.

Mr IZADI (Islamic Republic of Iran) proposed the deletion from Article 4(1) of the requirement that the claimant compensate the possessor because it imposed a double damage on the claimant.

Mr STURLESE (France) recalled that this point had already been discussed at length and expressed the view that the present text of Article 4 was acceptable to

everyone, reflecting as it did the consensus reached during those discussions. It would be very dangerous to question either the principle or the conditions of its application. He shared the concern expressed by the United States and German delegations regarding the unusual clarification of this article in paragraph 60 of the Explanatory Report on the draft Convention (CONF. 8/3). He hoped that the report would be revised in such a way as to reassure States wishing to ratify the future Convention and in particular with respect of the observations concerning nationalisations and the principle of fair and reasonable compensation. He expressed his delegation's support for the idea of a realistic and not symbolic compensation of the *bona fide* possessor of a stolen cultural object and stressed that the claimant's capacity to pay compensation should not be dealt with by the Convention.

Mr FRAOUA (Switzerland) shared the concern expressed by the French and German delegations. He saw the principle of fair and reasonable compensation as constituting a satisfactory compromise and a notion to be applied with regard to the circumstances of each individual case (for example, taking into account the price paid by the possessor, the value of the stolen cultural object on the art market, and the financial situation of the claimant). He emphasised the fact that restitution of stolen cultural objects acquired in good faith by their possessor was problematic when considered under Swiss law because of constitutional reasons and the protection of private property. However, if the principle of fair and reasonable compensation of the *bona fide* possessor were to be adopted, the Swiss delegation was prepared to move towards this compromise. He added that under Swiss law the *bona fide* possessor was the legitimate owner of the object. Secondly, with regard to the introduction of the idea of subsidiarity in Article 4, he stated that this was an unacceptable proposal as it would destroy the balance of the provision and, given that the limitation periods contemplated by Article 3 were very long with regard to claims for restitution of stolen cultural objects, would create considerable difficulties. To retain the balance in the article, the notion of subsidiarity would also have to be introduced with regard to the restitution of cultural objects and provide that the possessor could return the stolen object but

without being obliged to do so. Lastly, he observed that a self-contained definition of the idea of “possessor” in the Convention should be abandoned, recalling that one of the fundamental ideas in the elaboration of the Convention had always been to minimise as far as possible self-contained definitions on account of the diversity of the legal systems of the States participating in the Conference.

Mr FRIETSCH (Germany) stated that his country could accept Article 4 but subscribed to the proposals of the Netherlands delegation concerning a new Article 3A and the creation of a worldwide register for cultural objects.

Mr ZIMBA CHABALA (Zambia) considered that Article 4(1) represented a proper balance among a number of principles. First, it recognised that of compensation which was not easy to accept but which had to be agreed in the framework of other principles, including restitution upon proof of due diligence. Deviation from the present text and accommodation of the many amendments proposed would run the risk of the Conference closing on 24 June without the Convention being adopted. He also considered that the concept of “fair and reasonable” was properly explained in the Explanatory Report. While believing the establishment of a world register for cultural objects to be an attractive idea, he doubted whether some States would be able to bear the financial burden that such a project would entail.

*The meeting rose at 10 a.m.*

CONF. 8/C.1/S.R. 5  
17 June 1995

#### **FIFTH MEETING**

Friday, 9 June 1995, 3.30 p.m.

*Chairman* : Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 4, 6, 7, 18, 21 and 22)

#### *Article 4 (continued)*

##### *Paragraphs (1) (continued) and (2)*

Mr BURMAN (United States of America) called for confirmation that the UNESCO observations on the draft Convention (CONF. 8/6) did not reflect the opinions of the delegations to the Conference and were thus not to be considered as the official report on the draft Convention. He went on to express his doubts as to whether it was wise to shift the burden of proof in Article 4(1), explaining that such interference with the internal rules of procedure of potential Contracting States would go far beyond the intended and necessary scope of the future Convention. He therefore proposed replacing the word “prove” in Article 4(1) by the words “present evidence as to”. This phrase would interfere far less with national rules of procedure and would therefore facilitate the aim of achieving a large number of ratifications of the future Convention. Turning to the suggestions made by the Netherlands and German delegations to set up an international register for stolen cultural objects, he indicated that he would very much favour such a register. However, he expressed doubt as to whether it would be possible to come up with a broadly acceptable solution within the narrow time frame of the Conference. He therefore proposed that the Conference invite Unidroit to examine the possibility of setting up such a register as well as all the questions which might arise in connection therewith, such as costs, etc. He added that while making this proposal he was well aware of the fact that Unidroit was currently working on a similar topic in the field of commercial law and that it might thus be possible to include this item in the Institute’s Work Programme.

The CHAIRMAN agreed with the proposal of the United States delegation with respect to the international register, adding that it seemed to him that such an initiative might be attractive to many delegations.

Ms KIM (Republic of Korea) drew attention to the words “fair and reasonable compensation” which she felt to be acceptable as far as the underlying principle was concerned. She considered, however, that the compensation to be paid should also take into account the question of whether the possessor was actually in

good faith or not. She also suggested that in determining the amount of compensation to be paid regard should be had to possible changes in the value of the object on account of speculation. She therefore proposed amending the text of Article 4(1) in such a way as to make it clear that the compensation to be paid was either the value of the object or the price paid, whichever was the lower.

Mr CREWDSON (International Bar Association) stated that it would from his point of view be highly dangerous to take into consideration the price actually paid and that the question of good faith had no connection whatsoever with the point under discussion. As far as the proposal concerning the price actually paid was concerned, he added that in his experience it was very common that art dealers would buy objects from other dealers at a price far below the actual market value of the object, taking advantage of the fact that the other dealer was not aware of the object's real value. Such deals were absolutely legitimate and it would therefore be unfair to deprive the purchasing dealer of the advantage he had gained by any such cheap acquisition. Thus the words "the price paid" should be deleted from Article 4(2).

Ms MEKHEMAR (Egypt) declared that her Government considered the principle of fair and reasonable compensation laid down in Article 4 to be satisfactory and that it would by all means necessary attempt to bring about its application. She considered subsidiarity to represent a compromise between the position of the good faith possessor and that of the original owner of a cultural object, and consequently hoped that the proposal of the Greek delegation would be examined by the working group whose constitution had been suggested by the Chairman.

Mr WICHENCHAROEN (Thailand) explained that under Thai law the innocent purchaser was entitled to recover the full price paid if he bought the object in a shop dealing in similar objects or at an auction. The burden of proof under Thai law fell on the claimant. Thus Article 4 of the draft Convention departed from the Thai system of law, but in his opinion there was no point in fighting the illicit trade in cultural objects if one was not prepared to make at least those accommodations. With regard to the term "fair and reasonable

compensation", he observed that it went without saying that the price actually paid was the maximum compensation and that the more flexible text in Article 4(1) would not make any much higher compensation necessary. Giving some discretion to the courts would in any case be appropriate. He added that including the price actually paid in Article 4(2) would do no harm and that it would rather provide a good indication as to whether or not the possessor had exercised due diligence.

Mr GHOMRASNI (Tunisia) considered that Article 4(1) raised serious difficulties in relation to determining the person on whom the burden should fall of paying the fair and reasonable compensation to which the good faith possessor was entitled. In fact, as drafted, paragraph (1) obliged the dispossessed owner to indemnify the acquirer (the good faith possessor), which would be contrary to Tunisian legislation, according to which it was the seller, and not the unduly dispossessed owner, who was the guarantor of the acquirer's good title to the object sold.

The CHAIRMAN asked the Tunisian delegation to specify why it would be for the dispossessed owner to guarantee title to the person who had acquired the object.

Mr GHOMRASNI (Tunisia) explained that the term "claimant" as employed in Article 4(1) designated the unduly dispossessed owner. Therefore, according to the draft, it was the dispossessed owner who was to pay the fair and reasonable compensation, which was contrary to the law of some countries which required the seller to guarantee the acquirer's title. He stated that Tunisia supported the proposal put forward by the Greek delegation to consider the matter of subsidiarity which constituted a fair solution compatible with the legislation of certain countries while at the same time ensuring fair and reasonable compensation to the *bona fide* possessor. He added that his delegation had proposed an amendment to paragraph (1) to remedy its lack of clarity in that, as it stood, the paragraph did not expressly state that the burden of proof of good faith lay with the possessor.

Mr SAVOLAINEN (Finland) strongly supported the view taken by the French delegation that the current text of Article 4 was the best compromise

possible and that in consequence the text of the provision should remain unchanged. This being said, he suggested that one minor amendment should be made which was purely a matter of drafting technique and which would change nothing as far as the substance was concerned. In his view the provision should not identify the person who would pay the compensation. This was unnecessary since under Article 10 the States parties to the future Convention would be free to adopt a system that did not provide for any compensation. The same problem surfaced again in Article 8.

Ms GAISER (International Association of Dealers in Ancient Art) approved the proposals made by the delegations of Japan, the Netherlands, Switzerland, and Germany. She argued in favour of compensation of the full current market value of the object. Any other solution would be unfair since the dealer already had to bear the burden of proof concerning the exercise of due diligence and the risk accompanying the long limitation periods.

Mr GHOFrani (Islamic Republic of Iran) stated that Article 4(1) was very hard to accept since as long as compensation had to be paid, the dispossessed claimant would frequently not be able to recover an object of which it had been deprived. This was particularly so for many third world countries. Already now they would often refrain from making a claim simply because the anticipated costs of legal proceedings were so high that they could not afford to bring the claim. The situation would become even worse once the proposed system of compensation was introduced. He therefore argued that all these elements could even further the illegal trade in cultural objects despite the goal of the draft Convention to reduce it. He emphasised that the aim of his Government was to reduce the illegal trade in cultural objects and he would favour a régime under which only costs for restoration, preservation and maintenance would be refundable. Moreover, "fair and reasonable compensation" caused very severe problems since it was far too difficult to find a criterion for fairness. Consequently he introduced the proposal contained in CONF. 8/C.1/W.P. 22 drawn up by his delegation.

Mr SHIMIZU (Japan) supported the view taken by the United States delegation with respect to the word

"prove" in Article 4(1). In the light of the discussion on Article 4 so far he expressed his inclination to agree that the additional paragraphs that had been proposed in CONF. 8/C.1/W.P. 6 should not be taken up into the text of the provision. He went on to state that the question of the relation between Article 4 and a possible right of retention under the applicable law remained unsolved. Under Japanese law the possessor of an object belonging to another person was – if he had to return it – entitled to compensation for the amount of the costs of maintenance and conservation of the object, irrespective of whether or not he knew or ought to have known that the object was stolen, and was entitled to retain the object until such payment had been effected. He argued that this right of retention as provided for by national laws should not be affected by the future Convention.

The CHAIRMAN pointed out that the Drafting Committee would certainly consider this question. As far as the United States proposal to replace the word "prove" in Article 4(1) by the words "present evidence as to" was concerned, he remarked that the word "evidence" had no equivalent in the French language and therefore the proposed amendment could cause some difficulties.

Mr ALAN (Turkey) stated that the question of compensation posed some very difficult problems to his country which, as other like-minded countries, would be able to accept the principle only if several changes were made to it. The first necessary amendment would be that payment should not be made by the claimant, at least in the first instance. On this point the Turkish delegation agreed with the proposal of the Greek delegation as well as that made in CONF. 8/C.1/W.P. 4 under item number 4 according to which the claimant should have a right to request compensation for any damage to the object. Next, he suggested improving the standards for due diligence since otherwise there would be too many cases in which compensation would have to be paid. Finally, the provisions should contain specific factors that should be considered in determining if and when compensation was to be paid, who ought to pay the compensation and what was meant by "fair and reasonable". Moreover, he strongly opposed the proposal by the I.A.D.A.A. to raise the level of compensation to the actual market

value. In view of the large number of problems raised by this provision he suggested the possibility of setting up a special working group to resolve these issues.

Ms PROT (UNESCO) warned that the future Convention should not be used as a means to develop the national law in a way to make it less favourable to the return of cultural objects. The concern that every Contracting State be in a position to retain national laws more favourable to restitution was the reason for the inclusion of Article 10 in the draft Convention. As to the proposal made by the Netherlands delegation to report any stolen object with the police, she noted that this would automatically exclude any object that had been unlawfully excavated. In respect of the comments made by the delegations of the Netherlands and of the United States of America concerning a worldwide register of cultural objects, she noted that UNESCO was currently studying the possibility of linking up existing registers of stolen cultural objects and that a consultant was currently working on a report concerning the technical questions related thereto.

She announced that UNESCO was also working on a joint programme with the Council of Europe, the Getty Art History Program, and other institutions concerning core data standards for the registration of cultural property which would be a necessary prerequisite for a rapid exchange of information between databases. From her point of view the use of the words "due diligence" in the English version of the draft Convention was rather unfortunate since that term was already well defined in some legal systems. She therefore suggested replacing them by the words "required diligence" or "diligence required under this Convention". This terminology would emphasise the fact that under the Convention its own standards were applicable rather than those of the national law of any Contracting State. With regard to the Japanese proposal, she suggested that it might not always be wise to compensate the possessor for restoration he had carried out since this would mean that even costs for restoration work that had actually destroyed the cultural significance of the object would have to be reimbursed.

The CHAIRMAN thanked the UNESCO representative for her comments on the term "due diligence", which seemed all the more relevant given that questions of terminology were a recurrent issue. However,

States had to accept that it was impossible to find terminology that was perfectly in line with their domestic law. He insisted that it was for the Drafting Committee alone to work towards a compromise solution.

Mr MARQUES DOS SANTOS (Portugal) felt that the UNESCO observations to which reference had been made had only been cited by the Chairman among others for their explanatory nature, in order to clarify the sense of the future Convention. He stated his agreement with the United States delegation on the creation of a practical mechanism in order to follow up the application of the future Convention as from its ratification and also supported the position of the French and Finnish delegations as regards the burden of proof. He noted that the text was the result of a compromise, and the fact that Article 4 was one of the few provisions of the draft Convention not to include words in square brackets showed that there had been widespread consensus in the committee of governmental experts. Consequently he proposed that its terms should not be reviewed. He insisted on the illegal origin of objects covered by Article 4; it was for the person acquiring an object to be particularly vigilant and thereby avoid the acquisition of a stolen object, with the consequence that the provision should only be very rarely applied. Furthermore, the compensation awarded should not reflect the market value of the object as the acquirer's good faith would never remedy the illegal origin of a stolen object. He disagreed with the Greek and Turkish delegations that it was unjust to require that the claimant pay compensation, and considered that the provision had to designate the person on whom the burden of payment should fall, failing which there would be a serious risk of the future Convention not being ratified by a number of States. He further suggested that the article might contemplate a mechanism under which the claimant should make payment, given that the latter could subsequently bring an action against the person who had created the situation, and who was therefore ultimately liable. As now drafted then, Article 4 represented the best solution.

The CHAIRMAN specified that he had only cited the UNESCO observations for their explanatory and educational importance, in order to benefit from their historical value in terms of the preparation of the draft

Convention and to avoid misunderstandings as to any contradictions between the future Unidroit Convention and that of UNESCO, which were apparent rather than real.

Mr HUBBARD (Mexico) expressed the view that it would not be a catastrophe if Article 4(1) were to provide for the award of compensation to the good faith possessor. He agreed, however, with the opinion that it was not necessary for the future Convention itself to determine who ought to pay such compensation. He also insisted on the need to bear in mind the fact that the good faith purchaser would usually have a claim for compensation against the seller of the object.

Mr WEIBULL (Sweden) agreed with the views expressed by the delegations of France, Finland, and Portugal that the present wording of Article 4 constituted a satisfactory compromise and that its substance at least should be kept. He explained that under Swedish law a person who bought a cultural object in good faith became the owner of the object and that the dispossessed owner had no more than three months to buy the object back at the market price. With regard to the term “fair and reasonable”, he considered that its interpretation should be left to the applicable national law.

Mr GIACALONE (Italy) stated that it was common sense, at least among the continental legal systems, that effective liability lie with the person in bad faith. The return of cultural objects would in his view be facilitated by higher compensation being paid to the good faith possessor. As to the Netherlands proposal to set up an international system of registration, he believed that such registration could indeed be the starting point for the period of limitation, but only for the absolute limitation period and not for the relative limitation period. The proposal was an important one although it did not solve the problem of illegally excavated objects. He added that registration should only be one of the circumstances considered by the judge in determining questions such as good faith or due diligence and expressed some doubts as to whether the Conference had authority to deal with the matter of an international registry for stolen objects.

#### *Paragraph (3)*

Mr MOJZER (Hungary) stated that it was important to bear in mind the fact that the possessor referred to in the draft Convention was always a secondary possessor who had acquired the object from a seller and who had also acquired all the evidentiary documents from that seller. The liability of the seller should therefore be greater than it was at present. The respective liability of both possessor and seller should always be taken into account.

The CHAIRMAN stated that this question would certainly be considered by the Drafting Committee.

Mr WICHENCHAROEN (Thailand) asked whether he was correct in his understanding that Article 4(3) dealt with acquisition by inheritance or otherwise gratuitously rather than with the purchase of the object.

The CHAIRMAN confirmed this to be the case.

*The meeting was adjourned at 4.50 p.m.  
and resumed at 6.00 p.m.*

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

The CHAIRMAN proposed that the Committee proceed to consideration of Chapter III, concerning the effects of foreign public law, which was very different from Chapter II which had dealt with private law. He further insisted, as some delegations had already done in writing, on the singular character of the draft Convention in treating these two fields at the same time. This was even more noteworthy as all private international law experts must be aware of the way in which public international law was understood and applied by most States. Chapter III was then of the utmost importance and its highly innovative character had been introduced for the sole purpose of protecting cultural objects.

#### *Article 5*

##### *Paragraph (1)*

Mr NOMURA (Japan) suggested deleting Article 5(1)(c) since the provision would interfere with national laws on export restrictions.

Mr FRIETSCH (Germany) stated that it was the opinion of his delegation that the draft Convention did not set any minimum standards concerning export regulations. Each Contracting State was therefore free to restrict the export of cultural objects in such way as it thought appropriate and in consequence indirectly to influence the scope of the future Convention. He proposed that a claim for return should only be allowed if the laws of a State governing export restrictions had been infringed and that an infringement of, for instance, customs regulations should not be sufficient. He further suggested that Article 5(2) should be given as narrow a wording as possible. In addition he proposed that Article 5(1)(c) be deleted. He added that the mere infringement of laws concerning excavations could not possibly suffice to justify a claim for return and that this was not even necessary as each State could prohibit the export of excavated objects and thus provide for them to fall within the scope of Article 5(1) of the future Convention.

The CHAIRMAN remarked that the square brackets which were to be found in the draft Convention as it now stood indicated that even the committee of governmental experts had entertained some doubts as to whether or not Article 5(1)(c) should be included in the draft Convention.

Mr HUBBARD (Mexico) agreed that Article 5(1)(c) should be deleted. He argued that if an unlawfully excavated object were deemed to be stolen under Article 3(2) it could not at the same time be illegally exported.

The CHAIRMAN remarked that the deletion would change nothing in the substance of the draft Convention.

Ms HUEBER (Netherlands) drew attention to the proposals made in CONF. 8/C.1/W.P. 2. Accordingly she suggested defining the term “or other competent authority”. She further suggested deleting Article 5(1)(c) since if a Contracting State wished the protection of illegally excavated cultural objects to fall within the scope of Chapter III, then such a State should make the necessary arrangements in its national legislation.

Mr BURMAN (United States of America) drew the opposite conclusion from the argument given by the

Mexican delegation since he thought the probability of a large number of ratifications would be considerably higher if illegally excavated objects were excluded from the realm of Article 3(2). He further argued that if a State ratified the future Convention and thereby showed its willingness to enforce – to a limited extent – foreign regulations it should not be too problematic for that State also to enforce foreign regulations concerning excavations.

The CHAIRMAN observed that views on the provision differed widely and that this would be a question the Drafting Committee would have to look at closely. He also stated his conviction that the problem was not one of principle but of drafting.

Mr MARQUES DOS SANTOS (Portugal) observed that the presence of square brackets in the text showed an inconclusive vote by the committee of governmental experts. Agreeing with the delegations of Japan, Germany, the Netherlands and Mexico, he considered that the question of illegal excavations should be mentioned in Article 3, which moreover had no square brackets, rather than Article 5, and consequently called for the deletion of Article 5(1)(c).

The CHAIRMAN recalled that, at the fourth meeting of the committee of governmental experts, the vote on this sub-paragraph had been particularly close as there had been eight votes in favour of its retention, eight votes against and thirteen abstentions.

Mr WICHENCHAROEN (Thailand) expressed the view that if Article 3(2) were to be retained he would agree with the deletion of Article 5(1)(c). He added that the retention of the idea contained in Article 3(2) in its current place would from his point of view be advantageous. If, however, Article 3(2) were to be deleted then Article 5(1)(c) should be retained with the following wording: “been unlawfully excavated or lawfully excavated but unlawfully retained”.

The CHAIRMAN remarked that to the extent that Article 5 did not deal with questions of excavations this proposal might be difficult to understand if the applicable national law did not prohibit the export of objects that were illegally excavated.

Mr RENOLD (Switzerland) recalled that, according to his delegation, the question of unlawful excavations

was already resolved by Chapters II and III and that it was consequently unnecessary to maintain Article 5(1)(c). He stated that as far as Switzerland was concerned, the problem should either be mentioned in the preamble, or not at all.

The CHAIRMAN noted that there was in substance agreement, and that the question of unlawful excavations was purely one of drafting technique. He invited the Swiss delegation to clarify whether it was in agreement with this analysis.

Mr RENOLD (Switzerland) confirmed that this was indeed the Swiss position.

Mr CUETO CARRION (Peru) stated that his country encountered many problems relating to unlawful excavations and the illegal export of archaeological objects, one notable example being the case of the “Señor de Sipan” from northern Peru, and that it was in his opinion important to retain Article 5(1)(c) in the future Convention.

The CHAIRMAN noted that there was unanimity as to the importance of unlawful excavations, and as the Peruvian delegation had stressed the importance of keeping the idea in the future Convention he asked whether it could be understood that provided that the idea did remain in the future Convention, it need not necessarily be retained in Article 5(1)(c).

Mr CUETO CARRION (Peru) replied that his delegation would prefer to see Article 5(1)(c) retained, as it better reflected its position.

Mr CREWDSON (International Bar Association) drew attention to CONF. 8/C.1/W.P. 21 which had been submitted by the Lithuanian delegation. He strongly supported the proposal since from his point of view Article 5(1)(b) was completely out of place. He felt that this provision gave the impression that in a case where an object had been exported under a contract with the exporting State the situation might arise that if the contract was breached by the person who brought the object into the other State, the courts of that State would have discretion in deciding whether or not the object would have to be returned. This would certainly not be advisable. He added that it was his sentiment that ultimately Article 5(1) could be reduced to the content of Article 5(1)(a).

Mr SANSON (France) joined the Mexican delegation in questioning the consistency between Article 5(1)(c) and Article 3(2). He recalled the difficulties raised by Article 3(2) and particularly the assimilation of unlawfully excavated objects to stolen objects because, as drafted, that paragraph would permit a person who could have been responsible for the unlawful excavation of the object and its sale or export to benefit from a claim for restitution. This eventuality would of course be more likely if this person were the owner of the land from which the object had been excavated. If the paragraph were to be retained, it should be completed, as the Austrian delegation had pointed out, so as to take account of the aforementioned situations. He further suggested that dealing with unlawfully excavated objects was less troublesome in Article 5(1)(c) than in Article 3(2).

The CHAIRMAN thanked the French delegation for underlining the crucial issue of the text’s consistency, which did not however affect the general recognition of the importance of its substance, and stated that it would be for the Drafting Committee to review the question of the relationship between the two provisions and to propose a more satisfactory solution. He noted that the Committee of the Whole was faced with the typical problem of a provision on which there was no disagreement as to substance or goal, but which posed serious difficulties as to how and where it should be mentioned.

Mr KAKOURIS (Greece) expressed his preference for deletion of the reference to excavations in Article 5 if Article 3(2) were to be retained.

Mr MAROTTA RANGEL (Brazil) stated that his delegation, like that of Peru, would prefer to see Article 5(1)(c) maintained.

The CHAIRMAN asked the Brazilian representative if he would choose Article 5(1)(c) over Article 3(2).

Mr MAROTTA RANGEL (Brazil) replied that he could accept that solution on condition that the spirit of Article 3(2) be reflected elsewhere in the future Convention.

Ms PROTT (UNESCO) stated that she would prefer the question of illegal excavations to be dealt

with in both Chapter II and Chapter III. This seemed to all be the more important since the standards of proof under Chapter II were different from those under Chapter III. Whereas under Chapter II ownership had to be proved it would suffice under Chapter III to prove that the object had been exported without the necessary permission. She added that it had always been felt that the question of excavations was covered by Chapter III as well as by Chapter II of the draft Convention. This had been so even before either of the provisions currently under discussion had been taken up in the draft as was made clear by the language of Article 5(2)(a), (b) and (c).

Mr EPOTE (Cameroon) stated that his delegation hoped that emphasis would be placed on the importance of the referral of a claim to the court as from the time at which ownership of an object was established, both for reasons of property law, and on account of the use of the expression “because of their cultural significance” in Article 5(1)(a). These words in fact introduced a link between the right of ownership and the need to prove a specific cultural dimension of the aforementioned ownership. The delegation of Cameroon consequently hoped that this expression would be deleted and that greater discretion would be left to domestic legislation in so far as regulations concerning cultural objects were concerned. His delegation would therefore support the retention of Article 5(1)(b).

The CHAIRMAN stated, in order that all misunderstanding concerning the right of ownership be avoided, that neither the committee of governmental experts nor the study group had wished to deal with questions of ownership, but only that of illegal export. He further stated that the phrase “because of their cultural significance”, which the Chinese and other delegations had proposed be deleted, had been maintained by a large majority. Effectively, the goal of the future Convention was to protect cultural objects and not to facilitate the application of export regulations based on fiscal, administrative or customs considerations, which by extension had no connection with cultural objects.

Mr FOROUTAN (Islamic Republic of Iran) argued for the inclusion of clandestine excavations in both Chapters II and III.

Mr ALAN (Turkey) suggested with reference to Article 5(1) that the words “or other competent authority” should be clarified in the future Convention and that an independent tribunal could be set up. He further proposed replacing the words “because of their cultural significance” in Article 5(1)(a) of the draft Convention by the words “because of their nature as cultural objects”. In conclusion he stated that his delegation would prefer Article 5(1)(c) to be retained although the deletion of that provision would also be acceptable on condition that Article 3(2) were retained.

The CHAIRMAN, referring to the first suggestion made by the Turkish delegation, observed that the creation of an independent tribunal might result in legal proceedings even where a faster and more convenient administrative procedure might otherwise have been available.

Mr HUBBARD (Mexico) stated that while he accepted the retention of any provision in the draft Convention that could help to prevent the unlawful export of cultural objects, the reference to unlawful excavations in Article 5(1)(c) was puzzling. If excavations were protected under national law then it would be possible to render the export of unlawfully excavated objects itself unlawful and the case would be dealt with under Article 5(1)(a).

The CHAIRMAN admitted that as far as the words “applicable to the excavation” were concerned Article 5(1) was badly drafted since Chapter III of the draft Convention did not deal with excavations.

Mr WICHENCHAROEN (Thailand) agreed with the last remarks of the Turkish delegation. He stated that he would prefer to see both Article 3(2) and Article 5(1)(c) retained but that at the very least Article 5(1)(c) must be kept if Article 3(2) were to be deleted. Retaining both provisions would however facilitate the fight against the illicit trade in cultural objects.

Ms BALKIN (Australia) considered it necessary to retain the words “or other competent authority” in Article 5(1) since many countries had adopted the UNESCO scheme which was of an administrative nature rather than being court-based. She added that other countries had a mixture of judicial and administrative procedures which they might wish to retain

even after they had ratified the future Unidroit Convention.

Mr HE (China) suggested including the words “and regulations” after the words “contrary to its law” in Article 5(1)(a) of the draft Convention. He further proposed removing the square brackets around Article 5(1)(c). Finally, he stated that since Article 5(1)(c) covered a situation supplementary to Article 5(1)(a) the order of Articles 5(1)(b) and 5(1)(c) should be reversed.

Mr SAVOLAINEN (Finland) fully supported the view taken by the Australian delegation and emphasised the importance of retaining the words “or other competent authority” in Article 5(1).

Mr BURMAN (United States of America) drew attention to CONF. 8/C.1/W.P. 21 and agreed with the view of the representative of the International Bar Association that there was a problem with Article 5(1)(b) of the draft Convention. He also agreed with earlier interventions that the reference to any “other competent authority” should not be deleted. As far as the identification of such an authority was concerned, he suggested including an additional provision in the final clauses according to which each State would notify the Depository of any such “competent authorities” upon ratification of the future Convention.

The CHAIRMAN agreed and remarked that the representative of Turkey had not insisted on the deletion of those words but had asked rather for a clarification to be included in the future Convention.

Mr AL NOURI (Kuwait), referring to the first sentence of Article 5(1) according to which “A Contracting State may request the court or other competent authority of another Contracting State (...)”, agreed that the future Convention regulated private law relations. Nevertheless, he considered that account had to be taken of public international law, diplomatic practice and the rules governing State immunity under which one State could not bring an action against another State. Moreover some States could refuse to recognise the jurisdiction of foreign courts. He stated that his delegation would like to see Article 5(1) amended in order to strike a balance between rules of public and of private international law, and he

suggested to this end that the paragraph begin with the words: “Taking into account the rules of public international law”.

The CHAIRMAN stated that public international law had been taken into consideration throughout the preparatory work, and that it would be unusual to make a reference or reservation in relation to it in Article 5 given that an international convention was by definition an instrument of public international law. He would have been tempted, had time permitted, to ask the Secretary-General of the Hague Conference on Private International Law to cite the many examples of conventions which, once signed, had been considered to be part of public international law.

Mr BEKSTA (Lithuania) recalled the proposal made in CONF. 8/C.1/W.P. 21 that it should be made clear that under the circumstances in which this provision applied the return had to be ordered without any additional conditions. Thus the provision should be drafted in such a way that left no doubt that the obligation to order the return of the object was mandatory.

Ms BLANPAIN (Belgium) wondered why Article 5(1)(c) had only provided for objects which had been removed from a State contrary to its law applicable to excavations, thereby excluding objects removed without violation of the requesting State’s law, as this meant that in such circumstances it was impossible to bring a claim. This had effectively been the case for private collections constituted at a time when there was little regulation of excavations, but when Belgium had not expressly permitted their export.

The CHAIRMAN stated that, as the Mexican delegation had pointed out, Article 5(1)(c) was imperfectly drafted as it did not concern illegal export but rather problems raised in another branch of law, namely that of excavation. He noted that the remark made by the Belgian delegation confirmed the need to improve this small oversight in the drafting.

Mr ZIMBA CHABALA (Zambia) agreed with the Chairman that Article 5(1)(c) required several refinements. He added that these had to be included in the draft before any decision could be taken as to whether Article 5(1)(c) or Article 3(2) should be deleted.

Finally, he observed that there seemed to be unanimous agreement as far as all the other parts of Article 5(1) of the draft Convention were concerned.

Mr FRAOUA (Switzerland) stated that he had understood that some delegations wished to assimilate objects which had been unlawfully excavated to stolen objects and to illegally exported objects. However, on the basis of the domestic legislation of States that were victims of the illegal traffic in cultural objects, the question of determining whether clandestine excavations or objects illegally removed from excavations should be dealt with under Article 3 or Article 5 could be resolved quickly. Since the conditions of application of Chapter II were more easily triggered than those of Chapter III, States would, most probably, systematically rely on Chapter II. Consequently, including the same provision in both chapters was pointless, especially from the viewpoint of legislative technique, as it would be peculiar for one factual situation to constitute two distinct offences. He declared that the Swiss delegation considered the present drafting of Article 5(1)(c) unacceptable as it led or could lead to the return of an object to a requesting State that did not itself have legislation restricting exports.

Mr SHIMIZU (Japan) agreed with the proposal made in CONF. 8/C.1/W.P. 21.

*Paragraph (2)*

Mr WICHENCHAROEN (Thailand) agreed with the spirit of the proposed new wording for Article 5(2) as suggested in CONF. 8/C.1/W.P. 7 and therefore confined his amendments to the strict minimum. The first part of Article 5(2) should thus be reformulated as follows: "For the court or other competent authority of the State addressed to order the return of the object, the requesting State shall establish that the removal of the object from its territory significantly impairs one or more of the following interests". He stressed that the phrase "the court shall order" caused him very serious difficulties since under Thai law only the Constitution could require the courts to make a particular decision. The word "shall" should therefore be deleted. He finally suggested adding the word "for" at the very beginning of the provision.

Mr BOMBOGO (Cameroon) explained that Article 5(2) effectively reduced the rights of the dispossessed States to the object. In fact, tying the justification of return to criteria such as those laid down by Article 5(2)(a), (b), (c) and (d) was prejudicial to that State's interests. He stated that Cameroon called purely and simply for the deletion of Article 5(2).

The CHAIRMAN recalled that this question had been discussed at length throughout the preliminary work and that there had been quasi-unanimity on the fact that there was in international law no precedent for compelling States to accede to the claims of foreign States. This was true in all fields, as for example in the enforcement of judicial decisions, because States always retained some element of discretion and control. It would be illusory to imagine that on the grounds of an allegation of the infringement of export restrictions, a State would agree to make unconditional undertakings to a foreign State.

Mr MAROEVIC (Croatia) suggested adding the words "or collection" to Article 5(2)(b) since in his view a collection was a complex object and that illegally exported objects that were part of a collection were not so far covered by the provision.

The CHAIRMAN asked the Croatian delegation to submit a written proposal.

Ms BALKIN (Australia) stated that she supported the principle laid down in Article 5(2)(d) but that the current text should nevertheless be revised since once an object had been taken away from a living culture it could no longer be used by that culture.

Mr FRIETSCH (Germany), while supporting the idea behind Article 5(2), observed that with the current wording the scope of application of the provision was far too wide. Germany had on several prior occasions taken the view that the future Convention should be limited to objects of outstanding cultural importance in which connection he recalled the German proposal in CONF. 8/C.1/W.P. 18. Since however he knew that this proposal would not be acceptable to all States he would be prepared to accept a compromise. At the very least, however, the last part of the provision would have to start with the words "and establishes that the object".

Mr NOMURA (Japan) agreed with the view taken by the Thai delegation. He explained that the same problem would exist under Japanese law and that it should, therefore, be made clear that the future Convention was not intended to interfere with the independence of the courts.

Mr CAHN (International Association of Dealers in Ancient Art) stated that his association considered the expression “cultural significance” in Article 5(1)(a) to be imprecise as it could refer to any object, be it the most humble or modest. For reasons of clarity and in order to avoid any misunderstanding, he suggested in his capacity as an art historian and on behalf of the I.A.D.A.A. that the words “cultural significance” be clarified.

Ms PROTTE (UNESCO) explained how Article 5(2) had come to be included in the draft Convention. She stated that there had been unanimous agreement that theft was a criminal offence in all jurisdictions and that it had to be made sure that stolen objects would be returned. However when it came to the question of illicit export this agreement had no longer existed. It had become apparent that many States had no legislation restricting the import of cultural objects from other States, although the former had indicated a certain willingness to find a definition of those cases in which they thought they could accept an obligation to return cultural objects. What was now to be found in Article 5(2)(a) to (d) of the draft Convention was the result of a compromise. The provision described those cases which affected cultural heritage so seriously that most States were prepared to accept that they had to be covered by such a provision. She explained that “physical preservation of the object or of its context” was something that concerned the cultural heritage of all humanity. The same applied to “the integrity of a complex object”. This provision addressed in particular the serious threats to vast monumental complexes. The “preservation of information of, for example, a scientific or historical character” specifically addressed the question of illegal excavations where the site of the excavation might not even be known to the State concerned. Finally, the “use of the object by a living culture” was concerned with questions of ethnographic interest and of a ritual and sacred nature. The final clause was meant to cover those very rare cases in

which a State thought the object to be of such outstanding importance that it would have to be returned even though it did not fall under any of the above specified groups of objects.

In the light of these explanations she observed that the views taken by the delegations of Cameroon and of Germany represented the two ends of the spectrum and that the wording of Article 5(2) represented a compromise between those different views. As regards the word “shall” in the first line of Article 5(2), she added that it was intended to clarify that the courts should indeed be under an obligation to order the return of the object.

*The meeting rose at 7.30 p.m.*

CONF. 8/C.1/S.R. 6  
19 June 1995

## SIXTH MEETING

Monday, 12 June 1995, 9.45 a.m.

*Chairman* : Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS (CONF. 8/3; CONF. 8/C.1/W.P. 2, 7, 18, 21 and 48)**

*Article 5 (continued)*

*Paragraph (2) (continued)*

The CHAIRMAN recalled that the items for discussion at this meeting would cover not only Article 5(2) but also the underlying philosophy of Chapter III. In this regard, he underlined certain points that would, on the one hand, prolong this introductory statement but which would, on the other, accelerate the discussion as they had already been the main concern of many years of preparatory work. He pointed out the need to stress, at least in general terms, a distinction which would already be obvious to the initiated, but not so for non-jurists. The legal concerns of Chapters II and III were not the same. Chapter II was aimed at the case of stolen cultural objects, universally condemned both on a moral and legal level whereas Chapter III was concerned with the delicate question of export

restrictions, which by their very nature were viewed, both as to their formulation and to the need for them, differently in different countries.

He recalled with regard to Chapter III that, in the current state of international law, the international community of sovereign States shared the absence of any principle obliging national courts to take into account the public law of a foreign State, such as its export legislation. Indeed the designation of the foreign law, under the conflict of law rules of the forum State as established by private international law, applied only to foreign provisions of private law. At the same time, there had been an evolution on a scientific level. The Institute of International Law, the highest scientific academy of international law, both private and public, had already adopted a Resolution in Wiesbaden some twenty years ago which had, for the first time, condemned this traditional principle of the inapplicability of foreign public law. In effect this remarkable step had been based on the need to ensure a certain degree of international solidarity. The draft *Unidroit Convention* had therefore to be considered as an expression of this evolution as it established that States addressed would be called upon to make an exception to the principle of the inapplicability of foreign public law when the claim for the return of a cultural object was based on a violation of the public law of the State of origin. In this way the draft *Unidroit Convention* aimed also at establishing a number of conditions that enjoyed a certain consensus, thus enabling the principle of the inapplicability of foreign law to be waived. This would be justified precisely by the particularity of cultural objects and by the primordial need to ensure their protection. Taking into account this extraordinary “revolution”, at least at a scientific level, and with regard to the object of the draft *Convention*, he reassured delegations that the delicate questions posed by Chapter III, and in particular by Article 5, had been thoroughly discussed and studied and consequently it was not necessary to question the remarkable compromise achieved. He therefore invited delegations to exercise self-discipline during the debates and to focus only on the questions still open.

Ms HUEBER (Netherlands) thanked the Chairman for his excellent introduction regarding the precise aim of the future *Convention*, the results so far reached and

the important task ahead. She also supported the proposal made by the German delegation concerning Article 5(2) and drew attention to the proposal put forward by her own delegation in CONF. 8/C.1/W.P. 2 to replace the word “or” by “and”.

Mr WICHENCHAROEN (Thailand) suggested an amendment to Article 5(2) of the draft *Convention*. He drew attention to the fact that the present text was formulated in a far too peremptory a manner in relation to the judiciary. He accepted the content of the provisional text of the paragraph, but would have preferred a different wording. He wished to see subparagraphs (a), (b), (c) and (d) of Article 5(2) retained, including the last part of paragraph (2) which read: “or establishes that the object is of outstanding cultural importance for the requesting State”. He underlined the importance of and need for this sentence. He emphasised how objects of cultural importance should be treated differently from any other object of commercial or personal use. More generally, he also stressed that cultural objects belonged to a nation, while cultural objects of outstanding importance belonged to mankind and should therefore be treated differently.

The CHAIRMAN fully agreed with the representative of Thailand. He stressed that the main problem was to distinguish cultural objects from all other objects so as to establish a special régime for the former. This point actually raised the real problem from the legal and technical point of view. He added that there was obviously no intention whatsoever to cause offence to the judiciary or to any administrative organ and was confident that the Drafting Committee would find an acceptable solution.

Mr YIFHAR (Israel) agreed with the suggestion of the Japanese delegation in CONF. 8/C.1/W.P. 7 concerning Article 5(2). He also supported the proposal by the Chinese delegation to delete the words “significantly” and “of outstanding importance”.

Mr NOMURA (Japan) noted that the purpose of Article 5(2) was to create a new legal system in order to prevent the illegal trade in cultural objects. Article 5 was an important provision in relation to the final goal of the draft *Convention*. However, he felt that the effect of the article was unclear. He questioned how a

request or order by a court or other competent authority of the State would affect the ownership or the possession of a cultural object. If the legal consequence of the request or order would be to deprive the possessor, who according to the applicable law also had the ownership of the cultural object, then the circumstances under which he purchased the object should be taken into account in conjunction with Article 8 concerning compensation. If, on the other hand, the legal consequence of the request or order to return the cultural object was to be limited to the physical return of an illegally exported cultural object to the territory of the requesting State without affecting the question of ownership, then there should be a clear provision to that effect. According to his delegation, the effect of a request for return under the draft Convention should not go beyond the physical return of a cultural object to the territory of the requesting State. This should be clearly stated in the future Convention. He recalled that the proposal by his delegation was set out in CONF. 8/C.1/W.P. 7.

Mr MARQUES DOS SANTOS (Portugal) confirmed the existence of the principle of the inapplicability of foreign public law by national courts, unless certain previously established conditions were established and the forum State's own interests were not at issue. With regard to Article 5(2) he wished to delete the phrase "significantly impairs" whilst retaining "one or more of the following interests" because the replacement of "or" by "and" would impose a cumulative series of interests covered by sub-paragraphs (a) to (d), in addition to the condition defined as "outstanding cultural importance". The question of whether this last phrase in the French version corresponded to the English "outstanding cultural importance" remained open.

Mr IZADI (Islamic Republic of Iran) pointed out in relation to Article 5(1) that a situation could arise whereby a cultural object, whilst having been illegally exported, might have passed between different Contracting States to a final possessor who was defendant in a claim for return. This being the case, it would not be clear which one of the Contracting States could be defined as the defendant Contracting State. To clarify the matter, he proposed modifying the content and purpose of Article 5(1) to read as follows: "A

Contracting State may request the court or other competent authority of another State acting under Article 9 on whose territory a cultural object is lawfully situated but which has been removed unlawfully to order the return of a cultural object which has ... " (CONF. 8/C.1/W.P. 48).

Ms PROT (UNESCO), in answer to the question raised by the Japanese delegation, declared that there had in fact been a conscious decision by the study group not to mention the word "ownership" anywhere in Article 5. The reason had been to enable the State making the claim to deal with the object in accordance with its own domestic law. She recalled that sometimes the owner would in fact be the illegal exporter. In that case, a State would not wish to return to a delinquent owner an object which it might have taken much effort to have returned. Although, in some ways the Japanese view simply reflected this decision, she wondered whether including a specific article might not be construed as in some way limiting the rights of the State to deal with the object in accordance with its domestic law. She therefore suggested retaining the article as it stood and underlined that the general consensus of the Conference was not to affect rights of ownership, which would still be regulated by the internal law of the State concerned.

Mr SHIMIZU (Japan) noted that the comment of UNESCO on this point did not diverge from the proposal of his delegation. He referred to the proposed amendment of his delegation set out in CONF. 8/C.1/W.P. 7 in which "ownership" was not mentioned: "(5) The effect of a request for the return of an illegally exported cultural object under this Article is limited to physical return to the territory of the requesting State".

Mr FRAOUA (Switzerland) agreed with the Portuguese delegation that there was a contradiction between the French and English versions of Article 5(2). He did not support the Japanese proposal regarding the addition of a fifth paragraph to Article 5 which he considered to be superfluous, as paragraph (2) of the article did not deal with the delicate question of ownership. This was natural as the main concern here was clearly the return of cultural objects and only the State whose legislation governing the export of such objects had been infringed could make a request under Chapter III irrespective of who might be the

owner of an object. He supported the Thai delegation's suggestion regarding the need to improve the wording "shall order" with respect to the competent authority.

The CHAIRMAN expressed satisfaction at those interventions which had called for a clear distinction to be drawn between the notion of ownership and the return of an object. He stressed that the Unidroit draft placed particular emphasis on the role of the requesting State seeking the return of a cultural object.

Mr ADENSAMER (Austria) underlined the revolutionary idea involved in Chapter III of the draft Convention. He therefore appealed for caution and stated that it would be unacceptable to his delegation to delete the word "significantly" in the first sentence of Article 5(2). Furthermore, if the words "significantly impairs one or more of the following interests" were to be maintained, he made it clear that his delegation could accept the last sentence of Article 5(2) as follows: "or establishes that the object is of outstanding cultural importance for the requesting State." If, however, the word "significantly" were to be deleted, he would plead for the sentence to read "and establishes that the object is of outstanding cultural importance for the requesting State".

Mr BURMAN (United States of America) asked the Israeli delegation for clarification of its statement as it was unclear to him to what extent the Israeli delegation was supporting the Chinese and Japanese proposals.

Mr YIFHAR (Israel) found the Chinese proposal to be very clear and a reasonable compromise. As to the Japanese proposal, he referred to paragraph (2) as set out in CONF. 8/C.1/W.P. 7: "The requesting State shall be required to establish that the removal of the object from its territory significantly impairs one or more of the following interests:" and stated that he would support the deletion of the word "significantly".

Mr BURMAN (United States of America) thanked the Israeli representative for his clarification. Regrettably, he could not support the recommendation. He shared the opinions expressed by the Austrian delegation and by the Chairman. While reminding the Conference that the United States of America, unlike other art market States, had provided one of the strong

est rates of return to requesting States, he underlined the importance of attracting into a treaty régime those art market States which had not yet joined the UNESCO Convention or had not yet reached the same kind of return rate under their own domestic law. This was a major issue: the deletion of the words "significant" and "outstanding", as well as failure to substitute the word "and" with the word "or" or other combinations, would make this part, or perhaps even the whole of the future Convention, unattractive to those States not yet a party to any treaty régime. He recalled the importance of bearing in mind the practical realities underlying the negotiations. In the interest of reaching a compromise, he recommended a cautious approach, so as to render the future Convention effective.

The CHAIRMAN noted that the statement of the United States delegation was highly significant, as the United States of America was indeed one of the few States to have agreed to the return of illegally exported cultural objects. He observed with some surprise that the Israeli delegation had proposed deleting the word "significantly". Such deletion might result in the political suicide of the future Convention and insistence on it would simply end up in a pyrrhic victory. Therefore he could only endorse the proposals of the United States and Austrian delegations.

Mr HE (China) suggested that the words "significantly" and "outstanding" in Article 5(2) be deleted. By retaining the two words, too many different requirements had to be fulfilled by the requesting State to sustain a claim for the return of cultural objects. He recalled, above all, that the purpose of the future Convention was precisely to allow and facilitate the return of cultural objects to the State of origin. He also proposed that the word "use" in Article 5(2)(d) be replaced by the word "need", as this would be more appropriate on account of its broader scope. He also expressed his concern as to whether the four interests set out in paragraph (2) covered all possible cases in which a requesting State might ask for the return of a cultural object. He therefore suggested considering other possible interests that might be included in the paragraph.

Ms PROT (UNESCO) reminded delegations that

the reason for introducing the sub-sections together with the word “significantly” has been to achieve greater clarity. The difficulty for the study group had been to agree on a core set of cultural objects to be returned. The four categories (a), (b), (c) and (d) had been set out in the study group preliminary draft and, after four meetings of the committee of governmental experts, no more precise compromise had been found. She strongly urged therefore that the draft be left unchanged.

The CHAIRMAN supported the statement and the request of the representative of UNESCO to leave the wording of the draft unchanged. However, if any criticism was to be made of paragraph (2), it related to the repetitions and overlapping that characterised it. He could not imagine a case in which a requesting State with an interest in recovering an illegally exported cultural object would not be able to bring its claim under one or more of those provisions.

Mr FRIETSCH (Germany) shared the opinions expressed by both the United States and the Austrian delegations and recalled the German proposal set out in CONF. 8/C.1/W.P. 18. Regretfully he had to state that Germany would have great problems with a future Convention which did not limit the scope of application in a practical manner.

Mr IZADI (Islamic Republic of Iran) supported Article 5(1)(a), although he did not consider the expansion of the scope of application to the breach of customs and export regulation as a positive act. He also supported Article 5(1)(b), sharing the general view on this point, namely that promotion and appropriate legal support for exhibitions abroad would be an effective step towards cultural relations among nations. He stressed that if States did not feel confident about the safe return of a cultural object sent to an exhibition, they would simply not participate. He furthermore pointed out that such objects were not stolen or illegally exported and that they needed to be specified in sub-paragraph (b), as otherwise they would not be covered and protected by the future Convention.

Mr PERL (Argentina) raised the question of the practical consequences for the UNESCO Convention when the Unidroit Convention entered into force. He had no doubts as to the probability that the Conference

would establish a future Convention. However, he wished to point out that attention should be paid to the practical effects of such a Convention.

Ms PROT (UNESCO) pointed out that UNESCO had always regarded the future Unidroit Convention, being a Convention dealing with private law aspects of the illicit trade, as a very important complement to the UNESCO Convention, which dealt with the public law aspects. She therefore hoped that the parties to the UNESCO Convention would also become parties to the Unidroit Convention and that States not parties to the UNESCO Convention would first become party to the Unidroit Convention and then to the UNESCO Convention. She made it clear that the two Conventions differed in some aspects. The UNESCO Convention was in some respects broader. Other aspects were narrower, most notably with regard to the return of stolen cultural objects. She requested delegations to take this last point into consideration, reassuring them that the future Convention would not create major problems for those States which had already implemented the UNESCO Convention in their legislation.

The CHAIRMAN stressed that the majority opinion, including his own, considered the 1970 UNESCO Convention to be very weak from an operational point of view. It was therefore up to the future Unidroit Convention to establish an instrument of private law with the strength lacking in a public law instrument. On a more general level, he invited delegations to agree on a truly operational Convention rather than a theoretically perfect one, which would be a dead letter for the international community.

Mr ALAN (Turkey) wished to see the words “or other competent authority” in Article 5(2) clarified in order to facilitate a clear understanding of what sort of body should deal with claims. Although he did not wish to disagree with the proposal made by the United States delegation and understood the importance of maintaining the explicit conditions and requirements in Article 5(2), he felt that in some respects the conditions were too restrictive.

The CHAIRMAN suggested that the Turkish delegation submit its proposal in writing so as to facilitate debate. With regard to determining the competent authority he suggested the use of a simple model which

would enable each State to reach a decision according to its own constitutional, administrative and other needs. He suggested following the practice of Conventions adopted by the Hague Conference on Private International Law.

Mr SAJKO (Croatia) expressed some doubts concerning the words “significantly” and “outstanding” in Article 5(2). He wondered whether they ought not to be qualified under the *lex fori* or the *lex causae*. He was in favour of them being qualified according to the legal system of the requesting State.

The CHAIRMAN considered it sufficient if the requesting State defined the situation as significant. He asked the representative of Croatia to specify whether he meant that the State addressed should have no control over whether the requirements had been fulfilled or not. If his answer was to be affirmative, he felt bound to state that this was an unrealistic point of view. He stressed that no State would be prepared to forego its right to interpret or decide, within the limits of the Convention, whether the request was justified or not.

Mr SAJKO (Croatia) stated that he fully agreed with the comment of the Chairman in the sense that the State addressed should retain its traditional control. He drew attention however to the fact that those notions were very much linked to the requesting State.

The CHAIRMAN added that the State addressed would not have an arbitrary power to decide on this matter as it would in fact always have to respect the scope of application of the future Convention.

Mr HUBBARD (Mexico) remarked that the aim of the Conference was to establish the best possible future Convention. If one of the various interests mentioned were to be taken into consideration, it might be better to set them out as paragraphs (a) or (b) or (c) or (d) as it should be enough for the State addressed to have regard to one of these conditions and not all of them. However he expressed some doubts concerning the word “significantly” as it was still unclear who would interpret the term. He asked, for instance, what the difference was between “impairing the integrity of an object” and “significantly impairing its integrity”. He stressed that a system should be found to avoid uncertainty in order to render the future Convention workable.

The CHAIRMAN considered that this did not constitute a real problem of interpretation. He agreed with the statement that the impairment of the integrity of a complex object would in itself be significant. In case of expert evidence proving its significance, he doubted whether any judge of a State addressed would impose further requirements.

Ms PROT (UNESCO) confirmed that this particular problem had not been raised within the committee of governmental experts. She felt that whenever a requesting State brought a claim, it should not be particularly difficult to show why an object should be returned. Furthermore, she pointed out that sub-paragraph (c) was specifically designed to cover illicit excavations. She found it unlikely that an illicit excavation would not imply a significant impairment of the preservation of information. In her view, the term “significantly” would not give rise to any interpretative problems.

The CHAIRMAN remarked that in most cases two or three of the conditions would simultaneously be met and that the word “or” between the different conditions would most probably reflect reality.

Mr BASSANTE (Ecuador) underlined the importance of the final sentence in Article 5(2). He felt that the real importance of an object was its link with the cultural identity of the country of origin.

Mr ONWUGBUFOR (Nigeria) expressed concern at the use of the words in the first sentence of Article 5(2) “[T]he court or other competent authority...”. He wondered whether “authority” referred to a judicial body or also to a ministry. He suggested that this part of the sentence be replaced by: “The court or a judicial authority” in order to avoid any arbitrary choice by the State addressed. He further stated that the words “significantly” and “outstanding” were unnecessary once one of the conditions mentioned in sub-paragraphs (a) to (d) had been proved.

Mr FRAOUA (Switzerland), as a member of the study group, recalled that the wording “or other competent authority” had originally been drafted to allow States flexibility when deciding on the necessary authorities and remedies, enabling them to choose simpler and less expensive measures than those

normally available under the law. He underlined the agreement reached regarding paragraph (2) overall, as the balanced result of thorough studies and long discussions. That balance would certainly be upset if the wording “outstanding cultural importance” were deleted, to such a point that the Swiss Government might have difficulties in contemplating ratification of the future Convention. He also wished to point out that there was in current private and public international law no text that established any real obligation of return. This only confirmed the importance of Article 5 of the draft Convention, in particular paragraph (2), and the need to avoid any hasty questioning of it. The text, as drafted, should therefore be maintained subject only to certain stylistic improvements, as a pledge to the remarkable step forward, even “revolution”, that it was making regarding the principle of the inapplicability of foreign public law.

Mr BURMAN (United States of America) agreed with the Swiss delegation. He believed that the law applicable should be the law of the forum State, unless otherwise provided by the future Convention. However in reality this would not result in forum States accepting any decision made by a requesting State and a provision should be considered in this sense.

Mr LE BRETON (France) stated that Article 5(2) seemed perfectly balanced to the French delegation and emphasised that it would be very difficult to amend it, given that the text was the result of arduous work.

*The meeting was adjourned at 11.15 a.m.  
and resumed at 12.00 p.m.*

The CHAIRMAN pointed out that the two aspects still to be considered were the issues of the competent authority and of the words “significantly” and “outstanding”. He felt that the experience of the Hague Conference on Private International Law might enable a solution to be found.

Mr DROZ (Hague Conference on Private International Law) sought to dispel any concern with regard to the wording used in the draft Convention to the extent that each State would have the possibility to determine which were the competent authorities, as in the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. Indeed each country

might prefer a specific solution, notably a court made up of one or more judges, or an *ad hoc* commission or even a mixed commission composed of both jurists and cultural experts, according to their own needs and in conformity with certain requirements, especially those of a constitutional nature. He further suggested that it would be useful to envisage a provision establishing the way in which a requesting State, either through diplomatic channels or by direct submission of a claim to a court or competent authority, should submit a request to the State addressed for the return of an object.

Mr MARQUES DOS SANTOS (Portugal) underlined the fact that it was in the interest of all participating States, be they exporters or importers, to retain the text of Article 5(2) as drafted. He shared the view that the text introduced a valuable and revolutionary aspect in the treatment of foreign public law by domestic courts. It was also an innovation necessary to achieve the high degree of protection to which the future Convention aspired. With regard to the words “significantly impairs” the interests of the requesting State, he stressed that this, and any similar formulation, was perfectly acceptable to the Portuguese delegation as Portuguese law had since 1937 already made provision for the return of cultural objects without subjecting such return to any particular conditions. Regarding the conditions, he emphasised that their implementation would depend, in practice, on the interpretation of the judge or the authority of the State addressed which should be carried out in line with the aims of the Convention.

Mr GIACALONE (Italy) did not feel it necessary to list all qualifications in order to establish that the removal of the object from the territory of a State “significantly impairs one or more of the following interests”. It would be sufficient for a requesting State to demonstrate that one of the “interests” existed, in order to enable the State addressed to evaluate that interest. He also suggested deleting the word “significantly” in the first sentence and replacing the word “outstanding” in the last sentence of Article 5(2) by the word “significantly”.

The CHAIRMAN warned that the deletion of the word “significantly” might lead to an arbitrary interpretation by the State addressed.

Mr AL NOURI (Kuwait) drew attention to the fact that Article 5(2) was somewhat deficient given the wide variety of civil and commercial forms of co-operation open to States parties to an international convention.

The CHAIRMAN thanked the Kuwaiti delegation for having underlined how Article 5 remained silent as to the different forms of co-operation and suggested that more detailed clarifications of this matter be given, perhaps in the final provisions as the representative of the Hague Conference on Private International Law had suggested.

Mr KAYE (Turkey) supported the statement of the representative of Mexico. As legal advisor to his delegation he pointed out that the objections against the words “significantly” and “outstanding” should be carefully considered. He felt that those words were too subjective and could therefore lead to more uncertainty. He recalled that they had often been the result of very close indicative votes at the meetings of governmental experts and added that many delegations to the Conference had not been present at those meetings. Therefore, he disagreed with the statement that the opposing views had been clearly rejected. He agreed with the statement by the Italian representative that there was still ample room for an intelligent compromise. He also supported the need to clarify the wording “competent authority”.

The CHAIRMAN stated, in regard to the last point raised by the representative of Turkey, that the Conference would have to choose between two different systems, one allowing total freedom to the State addressed to designate any authority or another whereby the future Convention would impose on States a specific authority.

Mr NOMURA (Japan) felt that the proposal by the delegation of Lithuania, as set out in CONF. 8/C.1/W.P. 21, merited consideration. He further stressed the obligation of a State addressed to return temporarily exported cultural objects to the requesting State without any additional conditions.

Mr VISWANATHAM (India) pointed out that a requesting State should not have to establish that the removal of the object from its territory significantly

impaired one or more of the following interests when the export of the object was already prohibited because of its importance. The State would have to consider which objects would require a licence, which would render the conditions of Article 5(2) unnecessary. Furthermore, the fact that a requesting State would bring suit already proved that an object was of importance.

Mr GIACALONE (Italy) felt that Article 5(2) was the best compromise imaginable. However, he preferred a more precise qualification of the word “significantly” in order to establish a clearer balance between the powers of the requesting State and the State addressed. He observed that the objects mentioned in Article 5(2) must be protected when considering the request. He also noted that the last sentence of the article should be regarded as a general clause and the word “outstanding” should therefore be replaced by the word “significantly”. In his view, this change should be sufficient to harmonise the different methods of evaluating the relevant interests.

The CHAIRMAN distinguished between the points raised concerning drafting style and those regarding the essence of the draft Convention. With regard to the latter, and so as to avoid the misunderstandings that seemed to have emerged during the discussions, he reminded delegations that the starting point was the principle of the inapplicability of foreign public law in international law, which should never be forgotten during the elaboration of a Convention such as that under consideration where the State addressed would in fact be called on to apply those foreign public laws. There should be no confusion between simple stylistic improvements and the basic conditions regarding the delicate balance of interests.

Ms BALKIN (Australia) suggested that Article 5(2) struck the proper balance and accordingly proposed maintaining the words “significantly” and “outstanding”. As Chairperson of the Drafting Committee she insisted that the Committee had no power to decide on substantive matters. As representative of Australia, she was alarmed by the suggestion of the Turkish delegation, seeking a judicial definition of “competent authority”, as such a solution would not be workable for countries with administrative commissions. She

agreed with the Secretary-General of the Hague Conference on Private International Law that the question of the competent authority should be dealt with in the final provisions.

Mr LEMA TRIGO (Bolivia) fully supported the present drafting.

Ms PROTT (UNESCO) referred to the concern of the Indian delegation which had suggested that an object subject to export control automatically enjoyed cultural importance. She underlined that there were a great variety of export control systems. Therefore, the restrictive terminology of significant impairment and the four types of interests set out in sub-paragraphs (a) to (d) were necessary. She recalled that a general consensus had been reached with regard only to the restitution of all stolen cultural objects and not to the return of all illegally exported cultural objects and reaffirmed that the present draft of the four sub-paragraphs represented a remarkable compromise.

*The meeting rose at 12.50 p.m.*

CONF. 8/C.1/S.R. 7  
20 June 1995

## SEVENTH MEETING

Monday, 12 June 1995, 15.10 p.m.

*Chairman* : Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/5; CONF. 8/5 Add. 1 and 4; CONF. 8/6; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 2, 7, 15, 30 Corr., 32, 34-36 and 44)

*Article 5 (continued)*

*Paragraphs (3) and (4)*

Ms BUIXO (Spain) made reference to Chapter III of the draft Convention on behalf of a country with a great artistic and cultural heritage. She wholeheartedly supported the proposal of the Italian delegation, seconded by that of Portugal, concerning Article 5

(CONF. 8/C.1/W.P. 34) and stressed the advantages of that proposal for source States. Furthermore, she referred to the intervention of the UNESCO representative during the fifth meeting of the Committee of the Whole, in which the diverse systems of export control existing in different States had been highlighted. One of the major innovations of the draft Convention was that it permitted the application of one State's public law by another. She cited two examples of where such a mechanism would have led to a more equitable result: firstly the case of the portrait of the Marquesa de Santa Cruz by Goya, unlawfully removed from Spain in 1980 and found at an auction at Christie's. The Spanish Government had been forced to pay the (very high) market price in order to recover the painting. Two years later, a painting by El Greco had been illegally exported from Spain and bought first by a Swiss collector and subsequently by a Japanese citizen, both of whom asked Spain for compensation equivalent to the work's full market value. She pointed out that importing States could one day find themselves in similar positions and thus be concerned by questions of this nature. She concluded that the future Convention would enable a source State to make a claim for the return of an illegally exported object without having to depend on the possessor's goodwill, and that the amount of compensation would not be fixed by an individual but by a court. Consequently, the State's dignity would not be subject to ridicule illegal traffickers in art objects.

Mr ALAN (Turkey) called for the longest possible limitation periods and proposed that the time limits in Articles 5(4) and 3(3) should be consistent. He also proposed the deletion of the words "ought reasonably to have known" from Article 5(4).

The CHAIRMAN agreed that consistency was important. However, he noted that Article 8 also contained the words "ought reasonably to have known". He explained that the draft Convention sought to achieve a balance: in some instances, these words benefited the claimant and in others worked to its disadvantage. The committee of governmental experts had sought to achieve consistency throughout the draft Convention but it was impossible to have complete textual consistency between Chapters II and III because they dealt with different subject matters.

Mr IZADI (Islamic Republic of Iran) advocated the removal of limitation periods in Article 5(4) and elsewhere in the draft Convention.

Ms HUEBER (Netherlands), referring to the proposals submitted by the delegation of the Netherlands (CONF. 8/C.1/W.P. 2), stated that her delegation favoured short limitation periods in Article 5(4). As reflected in the same document, she argued in favour of the inclusion of a new Article 5(3) which would impose additional obligations on the requesting State. She also advocated a new article on a worldwide register.

Mr PERL (Argentina) expressed agreement with the points raised by the delegation of Iran with a view to reaching a consensus by proposing minimum and maximum limitation periods of three and fifty years in Article 5(4).

Mr MARQUES DOS SANTOS (Portugal) observed that the proposal by the Netherlands (CONF. 8/C.1/W.P. 2) was too concrete, that it contained too many specific elements and that it did not have the abstract nature required in the text of a Convention. He preferred the present wording of Article 5(3). As to paragraph (4), he was favourable to limitation periods of one and thirty years respectively. He reiterated comments that had already been made on Article 3: a claim for restitution was subject to two cumulative conditions; locating the cultural object and identifying the possessor. The starting point for the limitation period was in effect postponed by the requirements of those two conditions and, consequently, the length of the limitation period could be shorter. He was in favour of retaining the words “or ought reasonably to have known”.

Mr MAROEVIC (Croatia) opposed the Netherlands proposal that photographs should be taken only of the cultural object whose restitution or return was sought. He noted that the aim of Article 5(2) was to preserve the surroundings of which the cultural object formed a part from the distortion that its illegal removal created. He also stated that his delegation was in favour of the longer time limits of three and fifty years prescribed in Article 5(4) of the draft Convention.

Mr FRIETSCH (Germany) agreed with the

proposals of the Netherlands delegation and in particular with the inclusion of a new provision that would impose additional obligations on the requesting State. He also expressed the view that the time limits for both Articles 5(4) and 3(3) should be one and thirty years. He stated, however, that if the cultural object formed part of a public collection, the limitation period should be the same as that in Article 3(4).

Mr NOMURA (Japan) considered that, in the case of both Article 5(4) and Article 3(3), the minimum and maximum time limits should be three and thirty years respectively.

Mr ADENSAMER (Austria) agreed with the delegation of the Netherlands that the Convention should define more explicitly the duties of the requesting State, while also agreeing with the delegation of Portugal that the proposal of the Netherlands was too concrete and would not work in all circumstances. He suggested that the proposal might be included as an example of the type of actions that the requesting State must take before presenting its claim for return. He observed that the limitation periods in Article 5(4) should be as short as possible and favoured minimum and maximum periods of one and thirty years respectively. In this regard, he noted that longer periods were not justified because the requesting State did not have to collect and present extensive evidence but merely to show that the cultural object had been illegally removed.

The CHAIRMAN pointed to the need to reach a compromise between the proposal of the Netherlands delegation to insert a new provision in the draft Convention and the concern expressed by some delegations that the Netherlands proposal would impose an undue burden on the requesting State.

Mr HE (China) noted that the view of the Chinese delegation concerning Article 5(4) was reflected in CONF. 8/5 Add. 1. He wished, however, to raise two points. First, as stated in that document, the minimum and maximum limitation periods should be three and fifty years respectively. Second, in the view of the Chinese delegation, the term “from the date of the export” in Article 5(4) was too imprecise and should be modified. He noted that the situation in Article 5(1)(b) differed from those in Article 5(1)(a) and (c) and

consequently merited separate treatment. As to Article 5(1)(a) and (c), he recommended that the words “from the date of the export” be replaced by the words “from the date of the removal of the cultural object from the territory of the requesting State”. With respect to Article 5(1)(b), he recommended that the words “from the date of the export” be replaced by the words “from the time of the expiration of the permit under which the cultural object was exported”.

Mr BURMAN (United States of America) proposed that the minimum and maximum limitation periods under Article 5(4) should be three and thirty years respectively. Although the purpose of Article 5(3) was to ensure that sufficient information was available to enable the State addressed to take protective action or initiate proceedings, he sought reassurance that the forum State would remain in a position to request, pursuant to its internal procedural rules, that the requesting State furnish further information or evidence. He suggested that the Drafting Committee should include more precise language to reflect this understanding.

The CHAIRMAN agreed with the interpretation of the United States delegation. He confirmed that the purpose of Article 5 was to facilitate the return of cultural objects rather than to impose conditions on the requesting State that would make return more difficult. He suggested that the Drafting Committee might craft more precise words accurately to reflect that purpose.

Mr HUBBARD (Mexico) raised two objections to the Netherlands proposal. First, he considered it improper to dictate rules to the presiding judge before the procedure for return had begun and suggested that the judge should enjoy greater flexibility to decide the evidence that the requesting State must produce. Second, the proposal improperly shifted the burden of proof to the requesting State by requiring it to prove bad faith on the part of the possessor rather than requiring the possessor to prove good faith. Finally, he questioned whether the use of the word “police” in the Netherlands proposal was an appropriate term with respect to all States.

The CHAIRMAN considered that the Mexican representative had accurately summarised the spirit of Article 5(3) and the possible difficulties that could be encountered were the Netherlands proposal to be

adopted. He considered that the debate had gone far beyond the intention of the Convention’s drafters and that it was for the Drafting Committee to answer the question.

Mr ZIMBA CHABALA (Zambia) supported the present wording of Article 5(3). He disagreed with the Netherlands proposal on the ground that it would detract from the purpose of facilitating the return of illegally exported cultural objects. He stated, however, that he would be willing to accept amendments provided that they had as their purpose the provision of comprehensive information that would enable the court or the competent authority in the State addressed to determine whether the requirements of Article 5(1) and (2) had been satisfied. He expressed a general preference for the longest possible limitation periods and accordingly supported the longer periods prescribed under Article 5(4).

Mr CAHN (International Association of Dealers in Ancient Art) considered the Netherlands proposal to be appropriate. It was a useful practical measure as photography, uniform description and registration would protect a cultural object indefinitely and in the case of legal action assist in the production of evidence. Public access to a register would have a deterrent effect on the illegal export and theft of cultural objects. He added that it would be fitting for UNESCO or any other international agency to set up a fund in order to relieve some of the financial burdens that such an operation would entail.

The CHAIRMAN supported the Austrian statement on the matter and felt that compromise was possible. Account had to be taken of the fact that the formalities proposed by the Netherlands could in some cases make the return of a cultural object easier to achieve but that in others they ran the risk of complicating matters. In order to avoid this, it would be useful to include in the proposal a phrase such as “as far as is possible”.

Mr SAVOLAINEN (Finland) fully subscribed to the opinions of the United States delegation concerning Article 5(3) and (4). Specifically, he would prefer limitation periods of three and thirty years under Article 5(4). He noted that the question raised by the Netherlands delegation was essentially a drafting issue and that such problems always arose at the drafting

stage of international instruments concerning international co-operation and assistance. The matter should therefore be resolved by the Drafting Committee in accordance with widely-accepted formulae.

Mr BURMAN (United States of America) observed that the Drafting Committee in general considered only those issues that delegations had reasonably clarified. He therefore sought to clarify his view that Article 5(3) should not be read so as to impair the capacity of the forum State to request additional information or evidence from a requesting State. He proposed that Article 5(3) be redrafted to state clearly that it did not limit the ability of the forum State to request, according to its internal procedures, that additional information be presented prior to its consideration of the request.

The CHAIRMAN agreed that the Drafting Committee should consider only points that had been reasonably clarified by delegations. He would defer to the Chairperson of the Drafting Committee to decide what had been reasonably clarified. He considered that it was not necessary to dwell further on Article 5(3) because the Drafting Committee would produce a compromise proposal, perhaps along the lines suggested by Austria, between the Netherlands proposal and its opponents. He would also defer to the Chairperson of the Drafting Committee as to the appropriate time for an indicative vote on the issue.

Ms KIM (Republic of Korea) supported the Netherlands proposal to establish a worldwide register. She expressed support for the three and fifty year limitation periods. She proposed, however, that Article 5 should draw a distinction between a possessor in good faith and a possessor in bad faith and should prescribe longer limitation periods in the case of a bad faith possessor.

Mr LE BRETON (France) stated that while his delegation was sympathetic to the Netherlands proposal, it should not be forgotten that the compilation of such a register would require much work. It could certainly be undertaken by an organisation such as UNESCO, but it was a considerable task, as the French experience of compiling a register of stolen objects had shown. It should not therefore be a condition of application of the future Convention. In relation to Article 5(3), he referred to the amendment of Article 2 as

proposed at previous sessions, which would give a precise and restrictive definition of the concept of cultural object by the deletion of the words "such as". Article 5(3) should then be revised in order to take account of the new wording of Article 2. Concerning the limitation periods in Article 5(4) he shared the views of the Finnish delegation and was in favour of "a period of three years 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 years".

Mr ONWUGBUBOR (Nigeria) confined his comments to Article 5(4). He supported limitation periods of three and fifty years. He also proposed the replacing the words "knew or ought reasonably to have known" by the simple word "knew" or "discovered". He considered that the words "or ought reasonably to have known" placed an unreasonable burden upon the requesting State.

The CHAIRMAN noted that the issue raised by the Nigerian delegation had been discussed previously at some length. In his view, whether the formulation was "knew" or "ought reasonably to have known" would make little practical difference because it was ultimately a matter for the court or competent authority to decide whether the criterion was satisfied.

Mr PERL (Argentina) considered three and fifty years to be the appropriate limitation periods because they enhanced the principle of return. He also noted that the fifty year limitation period provided the requesting State with the maximum time in which to discover the date of the export of cultural objects.

The CHAIRMAN pointed out that with respect to the shorter limitation periods the difficulty of discovering the location of the object and the identity of its possessor was of little practical importance because the clock started running from the date on which the claimant knew or ought to have known of those facts.

Ms BUNGO (Albania) supported longer limitation periods of three and fifty years because she considered that bureaucratic procedures were lengthy in many States. She supported the proposal of the Netherlands delegation to insert a new paragraph 5(3) in the text. However, with respect to sub-paragraph (a) of the Netherlands proposal, she questioned the meaning of

the word “police” and whether the term was appropriate in the case of all States. With respect to sub-paragraph (b) of the proposal, she questioned whether the State would be obliged to register illegally exported cultural objects owned by private persons.

Mr VRELLIS (Greece) declared that as far as Article 5(3) of the draft Convention was concerned, it was impossible for him to accept the Netherlands proposal because in the situation of the export of an object by the lawful possessor, which did not necessarily entail illegality in all countries, sub-paragraph (a) could not be applied. He also expressed doubts as to the applicability of sub-paragraph (b) and considered the requirements of photography and registration difficult to fulfil when an object was the private property of an individual. He was consequently in favour of the current wording of Article 5(3), and in connection with paragraph (4) he preferred the longest possible limitation periods.

The CHAIRMAN asked the Netherlands delegation whether it would agree to postponing further consideration of the proposal contained in CONF. 8/C.1/W.P. 2 until the Drafting Committee had presented a new draft.

Ms HUEBER (Netherlands) agreed with the Chairman’s suggestion.

Mr CREWDSON (International Bar Association) requested that the Drafting Committee turn its attention to the third sentence of paragraph 89 of the Unidroit Explanatory Report (CONF. 8/3). He considered that the sentence drew a false distinction between the text of Article 5(3) of the draft Convention and the parallel provisions of Article 5 of EEC Council Directive 93/7 of 15 March 1993.

Mr SAJKO (Croatia) stated that his delegation was in favour of three and fifty year limitation periods under Article 5(4). He considered Article 5(3) to be well-balanced. He cautioned that a more complex wording would cause complications for several reasons. One such reason lay in the different approaches to the application of foreign law. Most Common Law States treated it as a factual question whereas most Civil Law States treated it as a legal one. The present wording would avoid those complications.

Mr SAVOLAINEN (Finland), responding to the concerns voiced by the United States delegation, advocated the adoption after the first sentence of Article 5(3) of a provision that was familiar in international instruments concerning international co-operation and assistance. The provision would provide that if the State addressed considered that the information provided was insufficient, it could request additional information or evidence.

#### *Article 6*

The CHAIRMAN opened discussion on Article 6 and invited delegations which had submitted proposals in writing to take the floor.

Mr WICHENCHAROEN (Thailand) supported the intent of Article 6. He was however concerned by the words “the court or other competent authority of the State addressed *may only refuse* to order the return of a cultural object” appearing in Article 6(1) and suggested that they be replaced by less imposing and intrusive language. He also proposed that Article 6(1)(b) be included in the future Convention by removal of the brackets which currently surrounded it in the draft Convention.

Mr NOMURA (Japan) stated that Article 6(1), like Article 5(2), was unacceptable to his delegation because it created the impression of interference with judicial independence. He also proposed that Articles 6 and 7 be combined in the manner suggested by his delegation in CONF. 8/C.1/W.P. 7.

Mr LE BRETON (France) understood the intention behind the drafting of Article 6(1) to be the limitation of exceptions to the principle of return and the provision of a framework for the possible discretionary refusal by a domestic court to order the return. However, he questioned whether this solution was truly satisfactory, as the court would be called to take into consideration issues which went beyond substantive legal questions. He saw the provision as providing for the interpretation of criteria relating for example to history, and for which the judge was not qualified; domestic courts would consequently make political decisions. He agreed that the Explanatory Report on the draft Convention (CONF. 8/3) gave one interpretation of the provision, but feared that the French

delegation would not be able to accept such wording of Article 6(1).

The CHAIRMAN observed that the French delegation had correctly summarised the intention of the participants in the preliminary work on the draft Convention when they had adopted Article 6(1). As was specified in the Explanatory Report, the provision was intended to limit the use domestic courts could make of public policy exceptions. He pointed out that the exception was a well known mechanism of private international law permitting the applicable law to be ousted, and noted that a State which undertook to apply a convention by its adoption and ratification should be circumspect in its use of the traditional exception of public policy to refuse claims brought under that convention. Such moderation was *a fortiori* applicable in the context of the draft Unidroit Convention in that it specifically called on domestic courts to apply provisions of foreign public law.

Attempting to explain the wording of Article 6(1)(a), he used the example of a claim brought by a State under Chapter III in relation to a cultural object illegally exported from its territory to France. If that object, in the view of the French authorities, belonged to the cultural heritage of France, public policy would surely be used as a motive to oppose its return. He stated that the provision should not be used to give national courts a discretionary power that they would in any case give themselves, but that it should limit such eventualities given that public policy exceptions always had some political background. He called on the representative of the Hague Conference on Private International Law, given the wide experience of that international organisation of similar clauses, to explain how an improved wording could avoid the problems highlighted by the French delegation.

Mr DROZ (Hague Conference on Private International Law) referred to the written comments on the draft Convention submitted by the Hague Conference on Private International Law (CONF. 8/6 Add. 1) and voiced his concern in relation to Article 6(1) as it was worded in the draft Convention. First, he recalled that he had drawn attention to the analogy in the international rules on child abduction and the illegal export of cultural objects ever since the first Geneva Colloquium on Art Law organised in 1985 by the International

Chamber of Commerce. The Hague Conference had in 1980 adopted a Convention on the Civil Aspects of International Child Abduction (to which over forty States were party) in which a mechanism provided for the return of the child to the State from which it had been abducted. During the process leading up to the adoption of the Convention the problem had been raised of whether the return of the child could be refused on the basis of its being a national of the country to which it had been abducted. He felt that the solution which had been adopted (i.e. the avoidance of a provision to that end) had been wise. If the idea of *ordre public* had been extended to family situations (specifically, if the nationality of the child had been a possible ground for refusal of return of the child), the Convention would have lost much of its efficacy.

Secondly, he remarked that in the context of the draft Unidroit Convention, the cultural connection was to the object what nationality was to the child in the 1980 Convention. He felt that taking into consideration the object's cultural connection with the State addressed in order to allow a refusal of return would threaten the efficacy of the future Convention. As some States (for example China in its written comments on the draft Convention (CONF. 8/5 Add. 1)) had pointed out, the idea of cultural connection was ambiguous. He cited the example of the Greek site of Ephesus, which culturally "belonged" equally to Turkey and Greece, or objects found in Sicily which had a connection with both Italian and Greek civilisation. Equally, both Picasso and Van Gogh had worked principally in France, yet Spain and the Netherlands considered them to have a connection with those countries.

As the French delegation had pointed out, appreciating the existence of a cultural connection would put the judge in a very difficult situation. He drew attention to the fact that the heterogeneous character of a State's culture could provide it with the justification that the object was of great importance for its cultural heritage. Nowadays it was accepted that culture should be shared by, and be accessible to, all. Consequently, cultural objects originating in the Far East had long been part of private collections in France and Spain, representing special importance in that they were those countries' only examples of cultural objects from oriental civilisations.

He feared that the adoption of the concept of closer connection with the culture of the State addressed might give rise to the danger of acts aiming to recover objects, despite export restrictions, which had been exported in the past and which still belonged to private collections in the countries to which they had been exported. He was concerned that some people might take the law into their own hands, relying on the closer connection of a cultural object to their own country.

He proposed a solution different from that in the draft Convention, recalling that in the 1980 Hague Convention the concepts of *ordre public* and closer connection to the State addressed had been left aside but that an extremely restrictive limiting article had been included. The refusal to return the child was possible only if there was a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The adoption of a similar clause in the future Convention could provide for the refusal of the return of a cultural object when it provoked an intolerable infringement of the cultural integrity of the State addressed.

The CHAIRMAN thanked the representative of the Hague Conference for the explanations he had made on the subject of the public policy exception. He stressed however that at this stage in the drafting of the future Convention the principle of the adoption of such an exception should not be ruled out. To illustrate the point, he cited a judgment of a New York court in which it had been decided, following a claim by the Italian Government for a Matisse painting, that it was impossible to hold that the object was an important part of the Italian cultural heritage.

He noted that the analogy between the Hague Convention on the Civil Aspects of International Child Abduction and the future Unidroit Convention was highly questionable, as the latter dealt with objects and not persons and that furthermore nationality was not equivalent to a cultural connection. He stated that if there were to be no provision dealing with public policy exceptions in the future Convention, courts would be able to invoke domestic policy considerations to deny the applicability of the Convention. He thanked the representative of the Hague Conference for his

concrete proposal which would be passed on to the Drafting Committee.

Mr JIRASEK (Czech Republic) proposed the deletion of Article 6(1)(a) because its inclusion would increase the crime of illegal export. He further proposed the deletion of Article 6(2).

Mr RENOLD (Switzerland) proposed a new combined formulation of Articles 6 and 7, as contained in CONF. 8/C.1/W.P. 36, which was similar to the Japanese proposal in CONF. 8/C.1/W.P. 7. He considered it essential to define as clearly as possible the exceptions to the application of the prospective Convention and that the grouping of the exceptions provided for by Articles 6 and 7 under one heading was therefore of great interest. He felt it important to clarify four fundamental points for his delegation. Firstly, contrary to the view expressed by some delegations, he was in favour of retaining Article 6(1)(a), specifically because this provision was the result of long negotiations and that it had survived the different phases of development of the draft Convention. Nevertheless he understood delegations, like that of France, which had expressed concern over the provision. Secondly, with a view to simplification, he proposed the deletion of Article 6(1)(b). This provision dealt with the situation of successive illegal export, and he felt that the court or competent authority of a State addressed could not be required to undertake an act which would be unlawful in its own legal system. Thirdly, he went on to mention Article 7(2)(a) under which the provisions of Article 5(1) were inapplicable if the export of a cultural object that took place during the lifetime of its creator or during the five years following that person's death, and suggested that the limitation period be increased to fifty years in line with the rules on copyright embodied in the Bern Convention. Finally, he announced that he was in favour of the deletion of Article 7(2)(b) as he considered it too difficult to determine the date of the creation of a cultural object when the creator was not known.

Mr EPOTE (Cameroon) wished to amend the beginning of Article 6(1) to read as "when *one* of the requirements of Article 5, paragraph 2 has been satisfied". This change would bring it in line with Article 5, enabling a court or competent authority to

refuse the return of an object if the export significantly impaired one *or* other of the interests listed. With a view to achieving a compromise, he expressed the hope that Article 6(1)(a) would be improved and therefore become more realistic, given its present highly subjective and irrational nature.

Mr BOMBOGO (Cameroon) considered that since the provision covered cultural objects that were closely connected with the culture of the State addressed, additional powers should be conferred on the judge to order an expert assessment to determine the origin of the object in question.

Mr HUBBARD (Mexico) proposed the deletion of Article 6 in its entirety. As originally conceived, the article had been designed to restrict reliance on the principle of public policy as a reason for refusing to return cultural objects. However, he considered that the article as drafted did not place any limit on the ability of a judge or competent authority to invoke the public policy exception. He also criticised the drafting of Article 6(2) which included an exception to an exception.

The CHAIRMAN agreed that, even in the absence of Article 6, a judge could invoke the public policy exception, in appropriate circumstances.

Mr HE (China) supported the deletion of Article 6(1)(a). With respect to Article 6(1)(b), he stated that his delegation was in favour of requiring a State addressed to return an illegally exported cultural object except where the object had first been unlawfully removed from the territory of the forum State.

The CHAIRMAN observed that the proponents of retention and of deletion had strong arguments in their favour. He noted, however, that the authors of the text had included Article 6 because they feared that, in its absence, the Convention would be abused by constant reference to public policy. If Article 6 were deleted, the protection afforded by the words “may only refuse” would be lost.

Mr YIFHAR (Israel) stated that Article 6 was important to his delegation. He pointed to the necessity of vesting in a judge the discretion to decide which was the stronger of competing claims made by the requesting and addressed States when each State had a

close connection with the cultural object. He explained that Israel was a nation of immigrants and that many of the immigrants bought cultural objects with them. He gave as a hypothetical example an immigrant from Russia coming to Israel with a Chagall painting and questioned whether the painting properly belonged to Russia, the State in which the painting had been created and its author born, or France, the country where the author resided or Israel to which the object was brought and with which the author had a connection by reason of his religion. He considered that Article 6 provided the proper answer to this problem because the criteria contained in Article 5(2) alone governed the question of which State had a closer connection with the cultural object.

He also advocated the addition of a new paragraph (3) to Article 6, as his delegation had proposed in CONF. 8./C.1/W.P. 30 Corr. Referring to the proposed addition, he noted that as Article 6 now stood it gave the State addressed no right to refuse to return an object that was brought into that State for exhibition or restoration. Yet he foresaw the possibility that a person whose family had once owned the cultural object might seek to sue the exhibiting museum for its recovery while it was on exhibition in the State addressed.

The CHAIRMAN considered that the example put forward by the Israeli delegation underlined the need to avoid anything in the future Convention which would hinder cultural exchanges, especially with regard to international exhibitions. In many cases concerning international exhibitions, an international agreement impeding all legal proceedings, such as those mentioned by the Israeli delegation, would be reached. This type of procedure was already in existence in many countries, especially in France.

Mr PERL (Argentina) proposed the addition in the text of Article 6 of a limitation period of six or twelve months within which the State addressed must respond to a request for the return of a cultural object.

The CHAIRMAN questioned whether the limit suggested by the delegation of Argentina would not be taxing to the internal procedure of some States addressed. He also suggested that the proper place for such a time limit might be in more detailed provisions outside of Article 6.

Mr SAVOLAINEN (Finland) referred to the intervention of the representative of the Hague Conference on Private International Law and the Hague Conference's written comments on the draft Convention (CONF. 8/6 Add. 1). He disagreed with the application to the future Convention of some of the grounds for refusing return to be found in the Hague Convention on the Civil Aspects of International Child Abduction. He also opposed the incorporation in the draft Convention of the definition of public policy found in Article 20 of the Hague Convention on the ground that it was obscure and merely served to illustrate the difficulties inherent in attempting to define the term. He looked forward to proposals on the merger of Articles 6 and 7 of the draft Convention.

Mr BURMAN (United States of America) considered the Hague Convention on the Civil Aspects of International Child Abduction to be irrelevant and suggested that redrafting would not succeed in repairing the defects in Article 6. He therefore proposed that it be deleted in its entirety. He stated that retention of the article would for several reasons make implementation by the United States problematic. First, he had found no support for the argument that a textual attempt to exclude or restrict the application of the public policy doctrine would have the desired effect. The alternative, to state explicitly that States cannot apply *ordre public*, would limit the number of States that would ratify the future Convention. Second, it was unacceptable explicitly to grant to a forum State court or competent authority the political power to decide whether to return or retain the object after the requesting State had established its claim under Article 5. He noted that if Article 6 were to survive in the final text of the Convention, the United States would call for a reservation to exclude its application and would have to devise a mechanism to deal with States which exercised that power in relation to United States claimants.

Mr ALAN (Turkey) stated that Turkey found Article 6 problematic for the reasons stated in CONF. 8/5. In particular, he noted that Article 6(1)(a) did not reflect the intention of the Convention. He was grateful for the suggestions made by the representative of the Hague Conference on Private International Law and agreed that a better solution could be found although

perhaps not in the words that its representative had suggested.

Mr MOZEL (Russian Federation) stated that his delegation had carefully examined the provision with the help of experts in the field and that their conclusions reflected the position of the French delegation. There was a problem with Article 6, regardless of the analysis set out in paragraphs 94 and 95 of the Explanatory Report. He feared that the provision would place the judge in a difficult position and that legal considerations would be sacrificed to those of an economic, historical or even a patriotic character. He concluded that this tendency should be changed and an improved provision achieved, although this would call for hard work.

The CHAIRMAN endorsed the reasoning of the Russian delegation and suggested that there were two ways of proceeding. On the one hand, if the Committee voted for the deletion of Article 6 from the draft Convention, this would mean that there would be no provisions limiting the public policy exception and in practice the authority addressed could refuse, in certain cases, to order the return of the illegally exported object on grounds of legal-policy considerations as the Mexican delegation had clearly explained. On the other hand, the basis for those legal-policy decisions concerning the refusal to return could be limited as much as possible, thus improving Article 6. He concluded by proposing an indicative vote on the issue during the meeting.

*The meeting was adjourned at 5.15 p.m.  
and resumed at 6.00 p.m.*

The CHAIRMAN announced that agreement had been reached with the Chairman of the Drafting Committee against an indicative vote on Article 6 during this meeting, as it seemed more useful to wait for the Drafting Committee's proposals to the Committee of the Whole.

Mr HOSAIN (Pakistan) placed on record the decision of his delegation not to pursue the proposals it had advanced in CONF. 8/5 Add. 4. He observed that the proposals had been linked to the former colonial rule in his State and hoped that the spirit in which they were withdrawn would be reflected in the spirit and

tone of the Conference as a whole. He stated that his delegation would agree to the deletion of Article 6 if its deletion commanded a consensus. He agreed, however, with the observation of UNESCO (CONF. 8/6) that “experts in international law with a strong familiarity with cases where public policy had been invoked, feared that the omission of a limiting article of this kind would leave open many possibilities of evading the essential purpose of the Convention”. He considered that the Committee should take this sentiment into account when deciding upon the fate of Article 6. He supported the suggestion referred to in the Unidroit Explanatory Report (CONF. 8/3) that Article 6(1)(a) should include the word “manifestly” before the words “closer connection”. In his view, this addition would remove the need for judges to engage in the difficult task of assessing the relative weight of the cultural connections involved. He also expressed the view that the addition of Article 6(1)(b), or indeed of any exception other than that contained in Article 6(1)(a), would weaken the effort to limit the refusal to return. Accordingly, he proposed the deletion of Article 6(1)(b).

The CHAIRMAN noted that the word “manifestly” was familiar in private international law conventions dealing with the issue of public policy.

Mr SAJKO (Croatia) stated that many private international law conventions did not contain a definition of “public policy” but simply a formula that the convention would not be applied in circumstances where its application would be “manifestly contrary to the public policy of the State addressed”. He characterised Article 7(1) as an inter-temporal norm which was contrary to the principle *tempus regit actum*. The operation of the principle would do injustice to the owner of the illegally exported object because the object might remain in the hands of a *mala fide* possessor. Consequently, he advocated deletion of Article 7(1).

The CHAIRMAN sought clarification from the representative of UNESCO of the issue of *bona fide* and *mala fide* purchasers that the representative of the Republic of Korea had raised.

Ms PROTT (UNESCO) stated that the issue of *bona fides* and *mala fides* was raised in Chapter II of

the draft Convention in relation to the diligence of the purchaser but not in Chapter III. She explained that in most States the possessor of a cultural object was assumed to be in good faith even if the object had been illegally exported. Moreover, if a court in a country which protected the title of a *bona fide* possessor decided not to return the cultural object, then the possessor’s title would be protected.

Mr MAROEVIC (Croatia) stressed his concern that Article 6(1)(a) directly contradicted Article 5(2)(a)-(d). It was his understanding that the aim of Chapter III was to protect cultural heritage rather than the interests of the owner or possessor. He stated that, for the most part, Article 5(2) was directed to immovable cultural heritage and to pieces taken from immovable cultural heritage and rendered moveable.

The CHAIRMAN suggested that there was no possibility of the application of Article 6(1)(a) to such a situation.

Mr MAROEVIC (Croatia) expressed the fear that the application of Article 6 would lead to political rather than legal solutions with respect to cultural objects previously located in the territory of the requesting State and then located in the territory of the State addressed.

Mr ZIMBA CHABALA (Zambia) considered that the criteria listed in Article 5(2)(a)-(d) were more culturally significant in helping the competent authorities to determine if the conditions for return had been fulfilled. With respect to Article 6(1)(a), he noted that because of Zambia’s colonial past, there was a very close connection between States in the region and in fact Zambia shared a border with eight different States. In these circumstances, it was extremely difficult for Zambia to distinguish its cultural objects from those of its neighbours. In his view, Article 6(1)(a) would place a judge or competent authority in his region in the difficult position of deciding whether to return a cultural object based on the criterion that the object was “closer” to the State addressed. If Article 6(1)(a) were to be retained, it should be modified so as to facilitate return of illegally exported cultural objects. He also agreed with the possibility of merging the acceptable parts of Articles 6 and 7.

### *Article 7*

The CHAIRMAN remarked that the Swiss delegation had in its CONF. 8/C.1/W.P. 36 proposed the merger of Articles 6 and 7 and he opened the floor for comments on the Swiss proposal and on Article 7. He wished to make a number of brief comments. First, he explained that the issue of public policy was applied only exceptionally in private international law. Second, in the case law of most States, an exception was restrictively construed and this restrictive interpretation reduced the danger of too broad an application of the public policy exception. Third, he stressed the danger of deleting Article 6, already commented upon by several delegations. He agreed however with the delegation of Croatia that the concrete situations in which Article 6(1)(a) could be applied would be few in number.

Ms HUGHES (Canada) stated that CONF. 8/C.1/W.P. 36 did not address the concerns of indigenous communities and referred to the proposals of the Canadian delegation in CONF. 8/C.1/W.P. 35 amending Article 7(2). She explained that Canada had tabled the amendments to protect the cultural objects of indigenous communities. She noted that the last part of Article 7 was an exception to an exception and suggested that the Drafting Committee use clearer wording to seek to facilitate interpretation of the provision which permitted a claim for return of a cultural object even in the lifetime of the creator or, where the creator was unknown, even if the object was less than twenty years old. She proposed that the last part of Article 7 appearing in square brackets be made a part of the draft Convention and amended in accordance with the Canadian proposal. Finally, she noted that the exception proposed was very narrow and provided for the return of objects to indigenous communities only and not to a museum or other persons.

Mr BEKSTA (Lithuania) considered that Article 6 achieved a result opposite to that which its drafters had intended. In his experience, all of Lithuania's negotiations to secure the return of cultural objects had floundered on the very principle of "closer connection" to the State addressed that the article enshrined. He considered that the criteria in Article 5(2) were sufficient to determine whether a cultural object should be returned.

The CHAIRMAN wondered whether the Committee should be guided by past examples or future possibilities in perhaps more normal times.

Mr MARQUES DOS SANTOS (Portugal) stated that if Article 6 were deleted there would be no limits on the power of national courts to apply the public policy exception so as to refuse the return of a cultural object illegally exported from the requesting State. A provision was needed to limit the application of that exception as much as possible; however, Article 6 did not reflect this and he questioned whether the notion of closer connection with the culture of the State addressed really corresponded to a public policy exception. He declared that the delegation of Portugal associated itself with the proposal of the delegations of France and Angola (CONF. 8/C.1/W.P. 44) for clarification of the notion. Finally, he stated that his delegation did not support merging Articles 6 and 7 and confusing the different problems they addressed. He did not consider this sound policy and observed that the drafting of the exceptions to the application of Article 5(1) and (2) in two separate articles had become almost a tradition in the preparation of the future Convention.

The CHAIRMAN agreed with the statement of the delegation of Portugal which, in his view, explained clearly the cultural public policy aspect and the importance of limiting it by improving the draft provision set out in Article 6. He considered the possibility of proceeding to an indicative vote, following the proposal of the Drafting Committee which would take into account the proposal of the Pakistani delegation to add the word "manifestly" to the draft text.

Mr FRAOUA (Switzerland) recalled that his delegation had submitted a written proposal combining Articles 6 and 7. Unlike the Portuguese delegation, he believed that the two articles dealt with the same issue, namely the exception to the principle of the return of an illegally exported cultural object in Article 5. With regard to Article 6(1)(a) as proposed by his delegation, a close cultural connection or manifestly closer connection with the culture of the State addressed was simply a cultural connection with the society of the State addressed. He found the proposal of the Israeli

delegation to be unacceptable because it was not enough for a country to be a destination for immigrants, consequently importing many objects, for those objects then to be construed as having a close cultural connection with that State.

The CHAIRMAN suggested that the Swiss delegation was therefore in agreement with the proposal of the Pakistani delegation. He asked the Portuguese delegation whether it would not be possible to merge Articles 6 and 7, on a drafting level, in order to avoid introducing into the future Convention an exception to an exception, as the Canadian representative had pointed out.

Mr MARQUES DOS SANTOS (Portugal) replied that he truly believed that the two articles in question did not deal with the same issue but if the Committee wished to merge them he would not oppose such a solution.

Ms BUIXO (Spain) proposed the deletion of Article 6(1)(a) as the provision undermined the desired automatic return of an illegally exported object by giving the State addressed the quality of judge or arbiter.

Mr GRINE (Algeria) supported the proposal of the Spanish delegation. Article 6(1)(a) was at the very least questionable as it allowed the court or authority of the State addressed to refuse to order the return of an object where a closer connection to that State was established, and it was for this same court or authority to determine whether that closer connection existed. He therefore proposed that the article simply be deleted.

The CHAIRMAN stated that the draft Convention should not interfere with the internal rules of procedure of the State addressed.

Mr IZADI (Islamic Republic of Iran) stated that Article 6 was contrary to the spirit of the Convention because it entrusted to a judge or competent authority the extraordinary discretion of deciding whether to return or retain a cultural object under the vague and ambiguous "closer connection" standard. Consequently, he proposed the deletion of the article.

The CHAIRMAN stressed that although Article 6 might seem to be in contrast with the spirit of the Convention, this had not been the intention of its

drafters. He observed that even if the Convention contained no article on public policy, Iran might still refuse on public policy grounds to return a cultural object that was Iranian in origin and of great cultural significance to the Iranian people.

Mr BOMBOGO (Cameroon), while opposed to the deletion of Article 6, considered however that the notion of the closest connection with the culture of the State addressed had to be more precise. He reiterated his previous proposal whereby the judge would have the possibility of calling for expert opinion to determine which State had the closer cultural connection. With regard to the working paper submitted by the Swiss delegation and in particular sub-paragraph (c) under which the future Convention would be brought into line with the Bern Convention, thereby extending the period to fifty years following the death of the creator, during which time Article 5(1) would not apply, he recalled that the Bern Convention established that after fifty years an object became part of the public domain and was thereafter subject to State control.

Mr PRUSZYNSKI (Poland) advocated the changes to Article 6(1)(a) that his delegation had proposed in CONF. 8/C.1/W.P. 15.

Mr LE BRETON (France) supported the proposal of the Portuguese delegation.

Mr WICHENCHAROEN (Thailand) reiterated his support for the retention of Article 6. To allay the fear expressed by some delegations that judges entrusted with the task of interpreting Article 6 would deliver arbitrary decisions, he observed that it was normal procedure for the judge in such circumstances to call upon experts in the relevant State agencies to give testimony. He also enquired whether an indicative vote on the matter would give delegations only the choice of either retaining or deleting Article 6, or whether the Swiss proposal of combining Articles 6 and 7 would also be put to a vote.

The CHAIRMAN replied that no indicative vote would be taken until such time as the revised text of the Drafting Committee was available. He suggested that the statement of the Thai delegation concerning expert witnesses answered in large part the question raised by the delegation of Cameroon.

Ms BALKIN (Australia) fully supported the amendments to Article 7 proposed by the Canadian delegation in CONF. 8/C.1/W.P. 35. She objected to the suggestion by the Netherlands in CONF. 8/C.1/W.P. 2 that if Article 7(2) were retained, then the provision should define clearly what was meant by “cultural objects of indigenous communities”. She considered that such a definition would be elusive and would unnecessarily complicate the draft Convention. She also noted that experience had demonstrated that such objects were easy to identify in practice.

Mr LEMA TRIGO (Bolivia) supported the Canadian proposal to add the words “and the object will be returned to that community” in Article 7(2).

Ms JOHNSTON (United States of America) stated that the United States delegation supported the Canadian suggestions concerning indigenous communities. However, she considered that the term “for use by that community” was too vague. She sought clarification from the Canadian delegation as to whether the term meant use for the traditional, cultural or religious practices of indigenous communities.

Mr ONWUGBUBFOR (Nigeria) proposed the deletion of Article 6 because it imported unwarranted policy issues into what was essentially a legal decision. He considered that a requesting State was entitled to the return of a cultural object if it satisfied the legal requirements of Article 5(2)(a)-(d). He also advocated the deletion of Article 7(1). In the view of his delegation any restriction on the application of Article 5(2) would work to the detriment of the requesting State and detract from the justice of the case.

The CHAIRMAN was puzzled by the suggestion of the Nigerian representative that public policy had no place in legal argument. He stated that suggestions for the revision of Articles 6 and 7 would be submitted to the Drafting Committee and that an indicative vote would be deferred until the Committee had produced a revised draft of the articles.

Mr ALAN (Turkey) stated that the addition of the word “manifestly” before “closer connection” in the text of Article 6 did not meet his concerns. If the article were to be retained, it should specify a completely different ground of rejection.

Ms HUEBER (Netherlands) stated that the merging of Articles 6 and 7 seemed to her to be very attractive, especially since Article 6 was difficult to read. That task could be left to the Drafting Committee. She proposed the deletion of Article 6(1)(b) but favoured retaining Article 6(1)(a) with the addition of the word “manifestly” before the words “closer connection”. She also proposed the retention of Article 7(1) and the deletion of Article 7(2) for the reasons stated in CONF. 8/C.1/W.P. 2 submitted by her delegation. If it were retained, it should be amended in the manner specified in that document. Furthermore, she reiterated her view that a definition of cultural objects of an indigenous community was necessary.

Ms KIM (Republic of Korea) supported the present text of Articles 6 and 7. She stated, however, that the exceptions enumerated in those articles should be allowed only where the prior removal had been effected in good faith.

Mr BEKSTA (Lithuania) proposed that if Article 7(2) were retained, it should be amended in accordance with his delegation’s submissions (CONF. 8/C.1/W.P. 32).

Mr FRAOUA (Switzerland) emphasised two points: first, with regard to the closer or the manifestly closer connection with the culture of the State addressed, he pointed out that certain civilisations were spread over territories which did not correspond to the boundaries of a single State. If two different States considered that the same cultural object had a closer connection with their own culture, they would each make a claim for return and it would be up to the judge, with the assistance of experts, to decide whether there was a closer connection with State A or with State B. Such a case could arise even though it would be rare. Secondly, with regard to indigenous communities, he sympathised with the Canadian proposal (CONF. 8/C.1/W.P. 35) as supported by the Australian delegation but found it unacceptable because of the unclear definition of the word “indigenous”.

*The meeting rose at 7.30 p.m.*

CONF. 8/C.1/S.R. 8  
20 June 1995

## EIGHTH MEETING

Tuesday, 13 June 1995, 9.40 a.m.

*Chairman* : Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 1, 2 and 3; CONF. 8/C.1/W.P. 4, 7, 8, 23, 31, 37, 42, 43, 46 and 47)

The CHAIRMAN, in accordance with Rule 51 of the Rules of Procedure, invited nominations for the two offices of Vice-Chairperson of the Committee of the Whole.

Ms HUEBER (Netherlands) nominated Ms Hughes (Canada) as First Vice-Chairperson of the Committee of the Whole and Mr Beksta (Lithuania) as Second Vice-Chairperson of the Committee of the Whole.

Mr FRAOUA (Switzerland) seconded those nominations.

*Ms Hughes (Canada) and Mr Beksta (Lithuania) were elected unanimously.*

### *Article 8*

#### *Paragraph (1)*

Mr NOMURA (Japan) considered it necessary that there be a proper system of compensation for the possessor of a cultural object who had to return it pursuant to an order made under Article 5 of the future Convention. As far as the “fair and reasonable compensation” was concerned, he stated that the possessor of an object that had been illegally exported should be entitled to compensation equivalent to the purchase price. He argued that this had to be the case because by having to return the object he or she was deprived of the ownership acquired from the legal owner in an otherwise lawful transaction. The possessor of an illegally exported object therefore deserved to be put in a better position than a person who had acquired a

stolen object. On this reasoning, he took the view that the possessor of an unlawfully exported object should also be entitled to reimbursement of any amount spent on the preservation or repair of the object. Finally, the possessor of an unlawfully exported object should be entitled to refuse to return the object until the compensation had been received together with the reimbursement of the other amounts.

The CHAIRMAN called on delegations to be careful not to confuse the two completely different cases of stolen objects on the one hand and illegally exported objects on the other. It should further be borne in mind that there might be cases in which it was the purchaser himself who was at the origin of the illegal export.

Mr FRIETSCH (Germany) first observed that Article 8(1) of the draft Convention only seemed to require what he termed “simple negligence”. He was afraid that an unduly high level of diligence could cause prospective customers to refrain from the purchase of a cultural object. In the interest of a liberal art market he therefore suggested that Article 8(1) only apply in cases of intention or gross negligence. He further stated that there could be no doubt that the burden of proof had to lie on the requesting State and that Article 8(1) should clearly reflect this. Finally, he considered that the level of compensation should only be qualified by the word “fair” and that the financial situation of the requesting State should not be taken into consideration when assessing the amount of compensation to be paid.

Mr BEKSTA (Lithuania) drew attention to the use of the word “possessor” throughout Article 8 of the draft Convention. He argued that a possessor who did not own the object could not transfer ownership to the requesting State.

Ms BALKIN (Australia) agreed with the view taken by the Lithuanian delegation. She also thought that the use of the word “possessor” might lead to some difficulties, especially in cases where the possessor was, for example, a museum that had only borrowed the object. In such a case it might not necessarily be appropriate to provide for compensation to be paid to that museum. Compensation might in such cases have to be paid to some other person.

Ms JOHNSTON (United States of America) observed that under the Constitution of the United States of America a person who was deprived of his or her property pursuant to the law had a right to compensation. She accordingly argued that there would be a problem if the future Convention did not provide for compensation, since in many cases falling within the scope of Article 8(1) the possessor would be considered the owner of the object.

The CHAIRMAN agreed and added that the situation would most probably be the same in most States. He further observed that he was under the impression that in spite of the aforementioned problem there seemed to be general agreement with the principle underlying Article 8(1).

Ms HUEBER (Netherlands) supported the point raised by the Australian delegation. She suggested that a special provision should be included in the future Convention dealing with such cases.

The CHAIRMAN remarked that this was a purely drafting question that should be dealt with by the Drafting Committee.

Mr ALAN (Turkey) suggested that when there was a question of compensation the burden of proof should be on the possessor. There should also be a duty of diligence as in Article 4 of the draft Convention. Furthermore, he favoured the additional obligations placed on the possessor under Article 5(2) being included in Article 8(1) also. Finally, he expressed the view that it should be made clear that any compensation should in the first instance come from the person who had transferred the object to the current possessor.

Mr MARQUES DOS SANTOS (Portugal) stated that the question of the burden of proof raised by the delegations of Germany and Turkey was, according to paragraph 108 of the Explanatory Report (CONF. 8/3), left to the national law of the Contracting States, a solution which the Portuguese delegation supported.

The CHAIRMAN thanked the Portuguese delegation for its reference to the Explanatory Report and recalled that it would be impossible to maintain a strict parallel between Chapters II and III which dealt with totally different situations.

Mr WICHIENTHAROEN (Thailand) stated that as far as the burden of proof was concerned the Thai legal system was contrary to the solution currently provided for in Articles 4(1) and 8(1). He admitted however that, for the sake of protecting cultural heritage, it was necessary to make an exception. He therefore supported the language and intent of Article 8(1) and the compensation scheme in that provision as it was not always possible to compensate the possessor with the full market value of the object.

Ms GAISER (International Association of Dealers in Ancient Art) took the view that the "fair and reasonable compensation" provided for in Article 4(1) and Article 8(1) of the draft Convention might give rise to problems with regard to the constitutionally guaranteed protection of property. Such a protection existed in many States and in those States which recognised the notion of *bona fide* possession the problem would be particularly severe. She therefore suggested that compensation be equivalent to the market value of the object and that when and how compensation should be paid would also need to be clarified. To ensure that the payment really would be made, she proposed that the amount due be deposited prior to the return of the object. Finally, she suggested that, as a precaution against vexatious law suits, the amount in dispute be deposited prior to the institution of the proceedings.

Mr ZIMBA CHABALA (Zambia) supported the principle that fair and reasonable compensation should be paid. He suggested that the same level of diligence should apply in Article 8(1) as in Article 4 of the draft Convention. As far as the burden of proof was concerned, he agreed that it should be the possessor who had to prove the relevant facts.

Mr SAJKO (Croatia) stated that the only person who should be entitled to fair and reasonable compensation should be the owner and not the mere possessor. Although he admitted that this would, as a consequence, raise the question as to how and according to which national law ownership was to be determined, he considered this to be the only possibility.

The CHAIRMAN observed that Article 8(1) had nothing to do with the question of ownership. He suggested that such questions should be left to the relevant internal law.

Mr ONWUGBUFOR (Nigeria) asked for a clear statement to be included in the future Convention as to the purpose for which compensation had to be paid. The future Convention should clearly reflect the notion that compensation should not be paid for unlawful export of an object but only for its maintenance and preservation.

The CHAIRMAN stressed that compensation had nothing to do with the illegal acquisition of the object. The purpose of the future Convention and the award of compensation were to protect the cultural heritage. He added that the present text struck a perfectly acceptable balance between all the relevant interests.

Mr MARQUES DOS SANTOS (Portugal) declared his opposition to the proposal to fix the level of compensation at market value. He was in favour of an equitable compensation, a flexible concept that should be left to the discretion of the judge in the light of the circumstances of each case.

The CHAIRMAN considered that equity was part of justice in a given case and stated that he could not fully understand the difference between the terms “fair” and “reasonable” which were moreover translated by the single word “équitable” in the French version.

*Paragraph (2)*

Mr FRAOUA (Switzerland) stated that his delegation was firmly opposed to the retention of Article 8(2) as drafted, and he further noted that it had been included in square brackets even in the draft Convention. The paragraph had also been the source of many discussions during the last sessions of the committee of governmental experts. However he was aware that an export certificate could be useful, and the Swiss delegation had therefore, in a spirit of compromise, submitted a redraft of paragraph (2) (CONF. 8/C.1/W.P. 47) with the aim of integrating the criterion of an export certificate into a comprehensive list of criteria so as to enable the judge to determine whether the possessor had exercised due diligence and so as to ensure parallelism with Article 4.

Mr YIFHAR (Israel) stated with reference to the comments made by the representative of the Inter

national Association of Dealers in Ancient Art, that market value was not an appropriate criterion for determining the level of compensation. Since Article 8(1) was closely linked to Article 5(1) both should be drafted in the same way as far as the level of compensation was concerned.

Mr ADENSAMER (Austria) stated that his delegation was firmly opposed to Article 8(2) as the purchaser could not possibly be aware of all the export regulations throughout the world and it therefore favoured the deletion of the provision. He saw the Swiss proposal as set out in CONF. 8/C.1/W.P. 47 as being the only way of preserving the principle underlying Article 8(2) in the future Convention.

Ms BUIXO (Spain) observed that the Spanish system of export certificates offered the purchaser the possibility of combating the presumption that the export was illegal when not accompanied by a certificate. This was why the Spanish delegation proposed two new alternative versions of Article 8(2) (CONF. 8/C.1/W.P. 37) and proposed the deletion of that paragraph if neither of those proposals were accepted.

The CHAIRMAN thanked the Spanish delegation for the proposed alternatives but pointed out that, as the Austrian delegation had already underlined, it was impossible to presume that everybody knew the legislation of all the States of the world and any subsequent changes thereto, especially with regard to geographically distant States.

Mr NOMURA (Japan) shared the concerns expressed by the Austrian delegation and suggested leaving the decision to the judge’s discretion. He also supported the proposal to delete Article 8(2).

Mr FOROUTAN (Islamic Republic of Iran) stated that in his view Article 8(2) provided a logical order in the international trade of cultural objects. He explained that the legal system of his country provided for mechanisms to reduce the number of claims and counter-claims. He further voiced his expectation that the provision might, in the end, lead to worldwide co-operation in the fight against the unlawful export of cultural objects. He therefore proposed that Article 8(2) of the draft Convention be retained.

Mr LE BRETON (France) recalled that his delegation had initially favoured the deletion of Article 8(2) as drafted, given the provisions set out in paragraph (1); it was however now willing to support the text put forward by the Swiss delegation as its drafting was acceptable and in conformity with the spirit of the future Convention.

Mr CREWDSON (International Bar Association) stated that from his point of view there was a high degree of likelihood that a rule such as that contained in Article 8(2) would lead dishonest dealers to forge export licenses rather than prevent them from selling illegally exported objects. With reference to the point that it was hardly possible for anybody to have detailed knowledge of export regulations throughout the world, he explained that there were several widespread, specialised journals concerning the art market and that the relevant information could be published there.

Ms HUEBER (Netherlands) supported the view taken by the Swiss delegation in CONF. 8/C.1/W.P. 47, adding that Article 8(2) as it currently stood was not acceptable even though the general principle was to be supported.

Ms KIM (Republic of Korea) supported the text of Article 8(2) adding that, in the light of the international registration system that had already been discussed, a uniform procedure for the certification of the export of cultural objects could be considered.

Mr WICHENCHAROEN (Thailand) stated that the effects of the absence of an export certificate should be dealt with in the future Convention. As to the fear that the purchaser would be required to know all relevant export regulations and the obvious unfairness of this, he stated that UNESCO would certainly publish those regulations once the future Convention had come into force. He then noted that the purchaser referred to in Article 8(2) was not necessarily the same person as the possessor referred to in Article 8(1). He went on to explain that the question of an export certificate was also of importance in determining whether due diligence had been exercised. He finally stated that, as a compromise, he would be prepared to agree in principle with the Swiss proposal in CONF. 8/C.1/W.P. 47.

Mr MARQUES DOS SANTOS (Portugal) stated that his country had a system of export certificates and consequently was not opposed to retaining Article 8(2) as it stood. He nevertheless supported the Swiss proposal which constituted one step towards a compromise and took into account the understandable difficulties of States which were not able to accept those certificates, in particular for the aforementioned reasons regarding the impossibility of knowing the legislation of all countries.

He went on to underline his opposition to the view expressed by the representative of the International Bar Association to the effect that the provision could encourage the falsification of certificates, as this could occur with or without the provision. He stated therefore that he could not see any direct link between such an occurrence and the presence of a provision as put forward by the Swiss delegation.

The CHAIRMAN observed that in the light of the last comments the situation was very clear: the existence or absence of an export certificate was a factor to be taken into account by all States and, pending further comments, everybody seemed to agree on this point. On the other hand, there was still disagreement concerning the idea that the absence of an export certificate would lead to a presumption in law. The situation was totally different from that of Chapter II. In fact, apart from the problem of forged certificates, the idea had been launched at one of the sessions of the committee of governmental experts that the establishment of the presumption could lead to the additional problem of dishonest customs officers selling authentic certificates, thereby creating a serious situation.

Mr AREND (Germany) called for the deletion of Article 8(2) since the provision would cause grave difficulties to all persons dealing in art. He expressed his concern that, after the future Convention had entered into force, the problem would arise of whether the object had been exported before or after such entry into force and furthermore it would be very difficult to determine whether an export certificate had, at the relevant time, been required.

Mr WEIBULL (Sweden) supported the views expressed by the delegations of Switzerland and Austria. He explained that although Sweden had a

system of export licences, he nevertheless thought that the absence of export certificates should only be one of several factors to be taken into consideration when determining whether compensation had to be awarded.

Mr VRELLIS (Greece) stated that his delegation supported the text of Article 8(2) as it stood between brackets, as giving limited effect to an export certificate was already a compromise solution. Firstly, the certificate was optional and no State was obliged to introduce such a system. Many States had introduced such a regime as also had EEC Regulation No. 3911/92 of the Council of the European Communities of 9 December 1992 on the Export of Cultural Goods. A procedure for the application of provisions regarding certificates of origin had also been established.

Secondly, as any document was potentially subject to forgery, that argument did not seem convincing. The same applied to money and yet no-one dreamt of abolishing the monetary system. Thirdly, the assumed difficulty of a vendor faced with having to know the legislation of the State of origin was minimal. In fact, an honest merchant should carry out some research to verify whether the object he was selling was original or not. That research would permit him to discover the country of origin of the cultural object by a simple telephone call, either to the diplomatic mission of the State of origin or to the International Confederation of Art Dealers, which was under an obligation to inform its members of the legislation of different countries.

Furthermore, the question was not one of an irrebuttable presumption but a simple one. In other words, customs officers of exporting countries would not be obliged to control certificates when they were controlled by a judge. The burden was therefore on the purchaser to ask the vendor for an export certificate and, if the latter refused, the purchaser was free to decide on running the risk of acquiring the object without a certificate. The judge therefore, in conformity with the procedures of his country and with the aid of all the means of proof established by this legal system, would have to decide whether the purchaser was in good or bad faith, given that the presumption arising from the absence of a certificate was a simple one. The purchaser must be aware of the risks associated with the acquisition of an object without a certificate.

For these reasons the Greek delegation supported the retention of Article 8(2) as it stood, whilst awaiting the written proposal from the Swiss delegation.

The CHAIRMAN did not agree with the suggestion that the provision constituted a harmless compromise and that it was of an optional character. It was certain that it would only apply when a Contracting State had introduced a system of export certificates. The important aspect of the provision was its effect which was mandatory. As to the presumption, the text as it stood was ambiguous and tended toward establishing an irrebuttable presumption which the majority of delegations had already considered unacceptable, in particular those of importing States.

Mr VRELLIS (Greece) recalled that the first proposal submitted to the committee of governmental experts had conferred on the certificate the status of an irrebuttable presumption. A preference for a simple presumption had been expressed after the ensuing discussions. If the text was ambiguous on this point, the nature of a simple presumption had to be clarified further. It was obvious that the provision was optional and the Contracting States had the choice of introducing a régime of export certificates into their legal systems.

The CHAIRMAN noted that while each State was free to introduce such a system, the provision would be of mandatory application for the State addressed.

Mr BURMAN (United States of America) first stated that his remarks were not meant to prejudice any possible future developments concerning the system of export certificates as foreseen by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. His comments were based on the current situation in which the system had not achieved widespread implementation. This being said, he stated that it was not acceptable that a presumption be based on the existence or absence of an export certificate. With regard to the comments made by the Greek delegation, he added that the question of export certificates should only be considered in the context of existing international bodies that focused in particular on customs procedures and customs documents.

Finally, he agreed with the view taken by the German delegation that it would be a burden and could freeze the international trade in cultural objects if the reference to export certificates were to be maintained in the future Convention, since it would be virtually impossible to determine, with the necessary degree of certainty, in every single case when an object had first been exported and thus if there should have been an export certificate for that particular object. He therefore concluded that, if the presumption were retained in the future Convention, the importance of the existence or absence of an export certificate would have to be weighed against other possible factors in each case.

Mr EPOTE (Cameroon) stated that his delegation supported the general idea underlying Article 8(1), but specified the need for further clarity regarding the emphasis on the possessor and the different elements of the paragraph. Furthermore, he declared his support for the Greek proposal regarding paragraph (2). In fact, a cultural object was a sensitive object and no-one could be unaware of the major importance which States attached to their cultural heritage. Paragraph (2) therefore established a minimum level of control, all the more so as the authenticity of a certificate could be controlled by existing means. His delegation therefore supported the retention of the two paragraphs, subject to redrafting.

Mr ZIMBA CHABALA (Zambia) explained that Article 8(2) was meant to assist the market and that it provided a valuable indicator as to whether an object had been exported lawfully. It would require the purchaser to think seriously before buying an object but it would also offer clear guidance as to which conditions had to be fulfilled to ensure against any future claims for return. He did not therefore really understand the concerns expressed by other delegations. He also thought that, as a compromise, the Swiss proposal in CONF. 8/C.1/W.P. 47 merited close consideration. He believed that the existence of an export certificate should at least be one of the elements considered in determining whether compensation should be paid.

Mr CHATTI (Tunisia) stated that his delegation supported the retention of paragraph (2) as drafted,

believing as it did that export certificates should be compulsory since their absence or deletion would risk favouring illegal commerce in cultural objects. Furthermore, it should be one of the criteria enabling the good faith of the purchaser to be determined. The risk of forgery was no reason for deleting this system, as such reasoning could just as well apply to the passport system, which however was still maintained.

The CHAIRMAN recalled that it was not a question of introducing an exception to the obligation of returning an illegally exported object, the issue being that of compensation. Many delegations had already affirmed that their States would consider it impossible to order the return of a cultural object simply on the basis of an illegal export, without any compensation being awarded, and this for example for constitutional reasons. He recalled, in reply to the Zambian delegation, that there seemed to be unanimity that the existence or absence of an export certificate was one of the relevant factors to be taken into consideration. However a serious obstacle was encountered when certain delegations opposed the award of any compensation when a State was called upon to return an object on the basis of provisions of foreign public law, which would constitute a revolution in their legal systems. The Drafting Committee should seek to find a consensus on that point.

Mr ALAN (Turkey) expressed the view that the burden on the purchaser would not be so heavy if the future Convention required knowledge of the relevant export regulations, as these were published by UNESCO. He added that there was also a published collection of all those regulations.

Ms PROTT (UNESCO) stated that UNESCO had published a summary of the export legislation of over 140 States and that a study entitled "Export Certificates for the Control of Movement of Cultural Objects" had been prepared in 1994 at the request of the Eighth Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. To keep that kind of information permanently updated, she suggested that it could be integrated in an international data base. Finally, she observed that there seemed to be a general consensus

that the absence of a required export certificate should be one criterion to be taken into consideration with regard to the question of due diligence.

Ms SCHNEIDER (Executive Secretary of the Conference) stated that both the English and French versions of the UNESCO documents regarding the use of export certificates for the regulation of cultural objects were available to delegations.

Ms HUGHES (Canada) agreed with the proposal put forward by the Swiss delegation in CONF. 8/C.1/W.P. 47. She added that the Canadian delegation had proposed adding a due diligence requirement in the provision at earlier meetings and considered that the Swiss proposal would go a long way to meeting Canada's concerns.

*The meeting was adjourned at 11.00 a.m.  
and resumed at 11.45 a.m.*

Mr HE (China) favoured the current wording of Article 8(2) since it reflected the actual practice of many countries, for example China. Article 8(2) should therefore be retained as it stood.

#### *Paragraph (3)*

The CHAIRMAN invited the delegations of Germany and Japan to introduce their proposals which had already been circulated prior to the Conference (CONF. 8/5 Add. 1; CONF. 8/5 Add. 2).

Mr SHIMIZU (Japan) referred to the proposal made in paragraph 22 of CONF. 8/5 Add. 1. Accordingly he pleaded in favour of the deletion of Article 8(3). The provision was unnecessary since the possessor and the requesting State would always be free to agree upon whatever they might feel appropriate, even without the provision. Moreover the reference to "ownership" in the provision was likely to cause confusion as to what was the precise obligation under the future Convention, once a request for return had been made. The use of the word "ownership" might be taken as an indication that the obligation went beyond the mere physical return of the object. As was stated clearly in paragraph 110 of the Explanatory Report (CONF. 8/3) this was however quite the opposite of the intention of the provision. Nevertheless, if the provision were to be retained, it should at least be

made clear that the request to return the object was limited to its physical return. In this connection he referred once again to the suggestion that had been made in paragraph 13 of the Japanese comments in CONF. 8/5 Add. 1.

The CHAIRMAN admitted that the provision might indeed give rise to some misunderstanding. He repeated that it was clear from paragraph 110 of the Explanatory Report (CONF. 8/3) that the provision was not intended to allow any claim to go beyond the physical return of the object, its sole aim being to facilitate the return of the object. The provision had been discussed extensively at the meetings of the committee of governmental experts but their intention had not been expressed as clearly as it should have been.

Mr MARQUES DOS SANTOS (Portugal) stressed that Article 8(3) was only applicable with the agreement of the requesting State, as was made apparent by an amendment tabled by the Brazilian delegation and supported by Portugal. The provision aimed at facilitating the return of an object, it being understood that the possessor had the possibility of becoming an owner solely with the agreement of the requesting State. He considered that if the case was one of an object belonging to the public domain of the requesting State, the latter would never authorise the possessor to retain ownership of such an object.

The CHAIRMAN agreed with that interpretation and further suggested that the provision would probably be rarely used and could consequently turn out to be superfluous. It was however for the requesting States to decide whether the provision, which did not raise substantive difficulties, should be retained or not.

Mr WICHENCHAROEN (Thailand) expressed the view that notwithstanding the explanations in paragraphs 110 and 111 of the Explanatory Report (CONF. 8/3), Article 8(3) would overburden the future Convention with superfluous details. He thought that the provision would even complicate the return of cultural objects. Referring to Article 8(3)(a), he observed that the provision seemed to imply that the requesting State would recognise possession as being identical to ownership. He also envisaged problems with the law relating to inheritance once the possessor

or the owner had passed away after an agreement had been made pursuant to Article 8(3). Finally, he added that the deletion of Article 8(3) would not deprive the parties of the possibility of agreeing on the fate of the object as it always remained possible for them to deal with the object in a way that was not expressly provided for in the future Convention.

The CHAIRMAN supported the position of the Thai delegation and proposed an indicative vote.

Mr HUBBARD (Mexico) agreed with suggestion of the Chairman.

Mr FRAOUA (Switzerland) stated that he was not opposed to an indicative vote, but asked each delegation to consider the matter carefully before voting as the provision addressed the concern of States wishing to recover cultural objects in the hands of a good faith purchaser but lacking the necessary financial resources to pursue their claim and therefore having to abandon it. The importance of the provision lay in the fact that it facilitated the return of cultural objects to their territory, while the issue of ownership could be settled between the requesting State and the good faith possessor with no need for any outside intervention.

The CHAIRMAN suggested that all the arguments had been put forward and the intention of those responsible for the draft Convention fully explained by the Swiss delegation, whilst the Thai delegation had considered the paragraph to be superfluous and that the same result could be obtained through direct negotiation. He proceeded to an indicative vote regarding the inclusion of paragraph (3).

*The paragraph was retained by twenty-nine votes to fifteen, with eleven abstentions.*

The CHAIRMAN proposed that the paragraph be submitted to the Drafting Committee.

*It was so decided.*

*Paragraph (4)*

The CHAIRMAN recalled that this paragraph had been considered on many occasions by the committee of governmental experts. He noted that no written

amendments had been tabled and that no delegation had called for the floor. He therefore proposed that the Committee pass on to paragraph (5), stressing that the discussion would not address the problem of succession raised by the provision.

*Paragraph (5)*

Mr WICHENCHAROEN (Thailand) stated that the problems with Article 8(5) were identical to those which had already been discussed with reference to Article 4(3) of the draft Convention. He proposed that the words “from whom it acquired” should be replaced by the words “from whom the object is acquired”.

Ms KIM (Republic of Korea) expressed the view that the text should be drafted to deny compensation to the possessor in bad faith. She drew attention to the proposal made in CONF. 8/C.1/W.P. 8 and accordingly suggested that the cost of returning the object should be borne by a possessor who had acquired the object in bad faith or at least negligently.

The CHAIRMAN recalled that the matter had already been discussed at length and further suggested that the question of good and bad faith was not relevant in the context of Chapter III.

Ms KIM (Republic of Korea) enquired why there was no reference to the costs of the restitution of the stolen object.

The CHAIRMAN explained that this question had already been dealt with in Chapter II. He stated that at the third meeting of the committee of governmental experts a vote had been taken on the question and that twenty-four delegations had been in favour of maintaining the provision and none against with fourteen abstentions.

Ms KIM (Republic of Korea) asked whether this meant that there was no intention of addressing the question of costs for the return of the object in the future Convention.

The CHAIRMAN replied that the question of costs associated with the restitution of an object was dealt with in Chapter II and was not relevant to Chapter III of the draft Convention.

## CHAPTER IV – CLAIMS AND ACTIONS

### Article 9

#### Paragraph (1)

The CHAIRMAN invited the representative of the Hague Conference on Private International Law to illustrate some of the options before the diplomatic Conference.

Mr DROZ (Hague Conference on Private International Law) noted that Article 9 departed from the question of cultural objects in order to address the very technical question of conflicts of jurisdiction. Article 9 was a provision covering both claims for restitution of stolen objects and requests for the return of objects following their illegal export. Paragraph (1), the most important provision, simply laid down a uniform rule of jurisdiction, supplementary to the rules governing jurisdiction in the Contracting States. In fact, the jurisdiction of the court where movable property was located was unknown in comparative law, preference being given to the jurisdiction of the defendant's domicile or, in Common Law jurisdictions, to that of the court that issued the writ for a claim *in personam*.

The creation of an *ad hoc* ground of jurisdiction for cultural objects was welcome as what was important was the recovery of the object itself and not its value. The claim for restitution or the request for return would often be much more effective if presented before the court of the Contracting State where the object was located, thus enabling the judge to order its immediate restitution or return. When the location of the object was unknown and the claim was therefore referred to the court of the domicile of the defendant while the object was possibly located in another State, the proceedings would of necessity be more protracted and a decision enforcing a foreign judgment would need to be ordered which would further slow down the proceedings.

The rule as drafted had the advantage of encouraging claimants to bring a claim where the object was located and before a court which was obviously the most appropriate to take such a decision. The aim of Article 9 was to create uniform grounds of jurisdiction that all States had to accept, on the understanding however that they were free to maintain their traditional grounds of jurisdiction or grounds based on interna-

tional treaties when applicable, such as those set out by the Brussels or Lugano Conventions or the inter-American Conventions.

Germany and the United States of America had submitted written proposals regarding this system that merited a response (CONF. 8/5 Add. 2 and CONF. 8/5 Add. 3 respectively). The German Government had proposed that either the court of the location of the object or the domicile of the defendant have jurisdiction, excluding all other possible grounds. Such a solution could be contemplated although he wondered whether it was worth depriving Contracting States of the possibility under domestic law of deciding how best to address the needs of the future Convention.

For example, if an object had been stolen in a Contracting State whilst the thief or receiver was domiciled in a State that was not a Contracting State, the proposal of the German delegation would make it impossible to initiate proceedings before the courts of the former. It would however have been preferable to institute proceedings at the place where the crime was committed, in the *forum delicti commissi*, a forum widely recognised by other international conventions, then to proceed to the enforcement of the decision on the basis, perhaps, of another treaty such as the Brussels Convention. He did not consider the German delegation's proposal of only two grounds of jurisdiction to be practical; it would be preferable to establish one ground of jurisdiction and to leave the free play of the usual rules based on international treaties or the ordinary law of States.

The United States delegation had agreed to the creation of the ground of jurisdiction according to the location of the object, but only if the judge accepted this jurisdiction. This was the application of the well-known theory of *forum conveniens*. In the case however of the restitution or return of cultural objects, the application of this theory and, therefore, the possibility for a judge to decline to exercise this ground of jurisdiction or deliberately to refuse to judge a case seemed intolerable or unthinkable. Intolerable, because in the case of a claim for the restitution of a stolen object located for example in a Contracting State, the court of the State addressed could in fact decide to refuse to judge the case and the claimant could do no more than return to that court with a decision which would only be enforced if domestic law so permitted.

The Convention would then be rendered inoperative as the claimant would be obliged to bring a series of claims which would in fact be superfluous and moreover costly. It would be much simpler for the court of the location of the object to determine the issue with the object before it.

The doctrine of *forum conveniens* was moreover inconceivable in the context of the return of illegally exported cultural objects, as the claimant was a Contracting State, a partner, and it would consequently be difficult to decline jurisdiction. Furthermore, he declared that he did not believe that the United States delegation intended to apply the doctrine of *forum conveniens* to a requesting State in matters of return of cultural objects. The United States of America was undeniably generous with regard to the return of cultural objects and would no doubt not wish to tarnish its image by blocking the application of the future Convention by means of the doctrine of *forum conveniens*.

With regard to the proposal of the Islamic Republic of Iran to add a provision to Article 9 making the law of the State of origin or that of the requesting State applicable, he explained that the judge would have to apply the rules of the future Convention and base any decision on those rules.

He pointed out that while the draft contained no provisions regarding the enforcement of judgments certain proposals which had been made in the committee of governmental experts on this matter had been deemed superfluous. He nevertheless stated that he was ready to express his opinion on questions relating to the enforcement of decisions if they were raised.

Mr FRIETSCH (Germany) did not share the opinion of the representative of the Hague Conference on Private International Law. For the reasons given in the written comments submitted by Germany in CONF. 8/5 Add. 2, he suggested either deleting the provision or amending it in a way that provided for an exclusive jurisdiction. He considered this to be indispensable to avoid conflicting judgments and problems concerning the recognition of such judgments in other countries. Admitting that the German proposal to rephrase Article 9(1) was not necessarily drafted in the best possible way, he stated that at least the principle behind this

suggestion should be taken up in the future Convention.

Mr BURMAN (United States of America) restricted his comments to a reply to the explanations of the representative of the Hague Conference on Private International Law. He stated that the written observations by the United States of America in CONF. 8/5 Add. 3 had been intended only to clarify that a choice of forum by the parties was necessarily subject to the acceptance of such choice by the chosen court. The choice in other words would not have a binding effect on the *forum prorogatum* since there was no convention on international jurisdiction of universal application. A different view was taken only as far as cases of international arbitration were concerned.

The CHAIRMAN asked the delegation of the United States of America to comment on the remarks made by the representative of the Hague Conference on Private International Law according to which the doctrine of *forum conveniens* might be applicable with respect to Chapter II but not with respect to Chapter III of the future Convention.

Mr BURMAN (United States of America) explained, with regard to Article 9(1), that the doctrine would presumably be construed in such a way that it would only be applicable as far as the determination of the competent local court within the United States of America was concerned, but that it would not apply with respect to the question of international jurisdiction. He believed that it was likely that Article 9(1) of the future Convention would be construed as an affirmative grant of jurisdictional authority. He stressed, however, that this remark was strictly limited to Article 9(1) and that he had not so far commented on Article 9(3).

Mr FOROUTAN (Islamic Republic of Iran) approved the content of Article 9(1) since the provision properly respected the fact that procedural law was considered public law and therefore only the *lex fori* could be applied. He also agreed with the principle in Article 9(2) to allow the choice of forum or to submit the dispute to arbitration. He thought, however, that there was a certain ambiguity in the provision as far as the determination of the parties to the dispute was

concerned, since not only Contracting States but also various institutions might wish to bring proceedings in another Contracting State. Therefore the provision should state clearly who the parties were to be.

Turning to the question of the applicable law, he considered it a great achievement that the future Convention provided for the application of foreign public law but nevertheless believed that there should also be a clear rule determining the national law applicable with regard to questions of substantive law. He added that the law of the requesting State should govern the question of theft and also determine whether an export licence was necessary. He thought that these questions were not addressed by the draft Convention with the necessary clarity. He stated that there was a lawsuit currently pending before the competent courts in Belgium which had been instituted by the Islamic Republic of Iran. In this case the claimant had not yet succeeded since the Belgian courts were not able to apply the public law of the requesting State. For this reason he proposed amending Article 9(1) as set out in CONF. 8/C.1/W.P. 46.

The CHAIRMAN stated that the case described by the delegation of the Islamic Republic of Iran would not cause any difficulties under the future Convention since after its entry into force the relevant rules of public law of the requesting State could easily be applied by the courts. He went on to state that since there was a clear distinction to be made in all legal systems between questions of jurisdiction and of choice of law, Article 9 would be the wrong place to deal with questions of choice of law which for technical reasons should not be addressed before questions concerning jurisdiction.

Mr FRAOUA (Switzerland) declared that the Swiss delegation was opposed to the Iranian proposal because the very aim of the future Convention was to render a minimum set of uniform rules applicable which would specifically avoid the problems underlined by the Iranian delegation and currently experienced in Belgium.

He enquired of the representative of the Hague Conference on Private International Law the meaning of the phrases “[w]ithout prejudice” and “in all cases” in Article 9(1), as he believed that they led to confusion and he was unclear as to whether they

addressed questions of form or substance. He also wondered whether the expression “in all cases” was directed towards the grounds of jurisdiction of the Contracting States whose courts would also be competent in all cases, or if it left the door open to different possibilities based on the internal laws of each Contracting State. He declared that the confusion arising from this expression led the Swiss delegation to ask, with the guidance of the representative of the Hague Conference on Private International Law, for the deletion of the words “in all cases”.

The CHAIRMAN stated that he did not understand this expression and asked the representative of the Hague Conference for clarification.

Mr DROZ (Hague Conference on Private International Law) stated that he also found the phrase “in all cases” unsatisfactory. He explained that the underlying idea was to give the requesting State the right to bring a claim before the court of the location of the cultural object, if that was within a Contracting State. The problem was therefore one of drafting and the text could be improved by such language as “the claimant may always bring a claim or request” with particular emphasis on the word “always”.

Mr SAJKO (Croatia) expressed the view that Article 9(1) dealt with alternative international jurisdictions allowing the claimant to choose the courts before which it intended to bring its action. He further stated that Article 9(1) was not in conformity with Articles 5 and 6 of the draft Convention, since they always referred to the courts or other competent authorities of the State addressed. From this he drew the conclusion that those provisions were meant to submit exclusive jurisdiction to the courts of the State addressed.

The CHAIRMAN thanked the Croatian delegation for raising this issue. He considered that Article 9 was, or should be, in line with all the preceding provisions as it established a general provision regarding conflicts of jurisdiction and only concerned the competent court. He invited the representative of the Hague Conference on Private International Law to reply to the question posed by the Croatian delegation.

Mr DROZ (Hague Conference on Private International Law) stated that the court with jurisdiction over the return of the illegally exported objects, therefore with jurisdiction in respect of a State claim, must in practice be the court of the place where the object was located; this was the most realistic solution as the requesting State would claim its cultural object specifically because it knew of its whereabouts. He declared that this was why it was unlikely that a State would pursue a claim before a court other than that where the object was located. He underlined that there was no practical legal experience with regard to a claim or request from a State on the basis of its public law, as most of the current multilateral conventions specifically did not cover the public law field.

He further emphasised that it was possible for a requesting State, which did not know the exact location of the object but knew that the object was in the possession of a person whose domicile was situated in another Contracting State, to seize the court of the latter country with a view to the court's ordering the seizure of the object and issuing an execution order against the assets of the possessor.

The CHAIRMAN stressed that the future Convention not only specified courts but also "other competent authorities" such as administrative authorities which could be seized, possibly not in the framework of claims under Chapter II, but pursuant to Chapter III.

Mr VRELLIS (Greece) stated that the Greek delegation could not support the position of the German delegation with regard to Article 9(1) but wholeheartedly agreed with the observations of the representative of the Hague Conference on Private International Law. At this advanced stage of the proceedings it would be unwise to discuss these difficult questions regarding conflicts of law in relation to cultural objects.

The CHAIRMAN agreed with the Greek delegation that since the national judge would be obliged to apply the Convention, there was little reason or relevance in debating questions of conflicts of law in Article 9.

Ms BALKIN (Australia) agreed with the principle enunciated in Article 9(1) and (2) although she considered that the phrase "without prejudice to" required further clarification as it seemed to suggest

some hierarchy of rules concerning jurisdiction in force in the Contracting State, compared to the jurisdiction derived from Article 9(1). Since she agreed with the representative of the Hague Conference on Private International Law that priority was intended to be given to Article 9(1), she thought there should be some clarification.

The CHAIRMAN requested that the general aim of the future Convention be preserved and that the current system established in Europe, for example by the Brussels, Lugano and San Sebastian Conventions amongst others be maintained. He called on the representative of the Hague Conference for further clarification.

Mr DROZ (Hague Conference on Private International Law) stated that this was a question for the Drafting Committee. The article clearly aimed at adding a uniform ground of jurisdiction and to offer this option to any claimant, together with the freedom to take up the option or to rely on internal law or international law. He agreed that the expression "without prejudice" was an unsatisfactory choice of wording and called upon the Drafting Committee to improve it.

Mr SHIMIZU (Japan) sympathised with the suggestion made by the delegation of the Islamic Republic of Iran.

The CHAIRMAN suggested that the question of conflict of laws should be addressed, if at all, during the next meeting of the Committee.

Mr MARQUES DOS SANTOS (Portugal) declared his agreement with the Chairman, the representative of the Hague Conference on Private International Law and the Greek delegation in preferring not to address questions of conflict of laws as the judge would be required to apply the future Convention and its minimum uniform rules. At the same time, the Convention would give effect to foreign public laws which would settle the difficulties raised by the Japanese and Iranian delegations.

He agreed that, in the light of the comments made by the representative of the Hague Conference on Private International Law, it was essential to retain Article 9 of the draft Convention, and in any event the

ground of jurisdiction of the location of the object, which established an imperative set of grounds of jurisdiction offering the claimant a choice. The words “in all cases” should be retained as it was not conceivable that this ground of jurisdiction be excluded.

With regard to Article 9(2), he proposed that the question of the choice of forum be subordinated to acceptance by the court designated.

*The meeting rose at 1.00 p.m.*

CONF. 8/C.1/S.R. 9  
21 June 1995

### NINTH MEETING

Tuesday, 13 June 1995, 3.20 p.m.

*Chairman* : Mr Lalive (Switzerland)

### **AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS (CONF. 8/3; CONF. 8/C.1/W.P. 40 and 55)**

*Articles 6 and 7 (continued)*

Returning briefly to Articles 6 and 7 of the draft Convention, the CHAIRMAN suggested that the Drafting Committee should only draw up a limited number of alternative proposals. One would depart from the original draft and delete Article 6, while the second possibility would be a new text drawn up with reference to the indicative results of the debates. Once these different proposals had been drawn up, they would be put to the vote.

Ms BALKIN (Australia), as Chairperson of the Drafting Committee, agreed entirely with the Chairman’s proposal, and underlined that a further option had been considered by the Committee, namely the amalgamation in a single article of the present Articles 6 and 7 of the draft Convention.

*Article 9 (continued)*

*Paragraphs (1) (continued) and (2)*

Mr WICHENCHAROEN (Thailand), stressing the fact that he had not been involved in the preparatory work on the draft Convention, suggested the redrafting

of Article 9(1). He felt that this article did not clearly give priority to the jurisdiction either of the court designated under the domestic law of a Contracting State, or to that where the cultural object was located. He therefore suggested that Article 9(1) be clarified in accordance with the intent of the drafters of the future Convention.

Mr SAVOLAINEN (Finland), agreeing on the importance of the issue raised by the delegation of Thailand, confirmed that Article 9(1) should be interpreted so as to give the claimant an additional ground of jurisdiction to those already granted by the law of the Contracting State where the cultural object was located. He suggested inserting clarification to the effect that Article 9(1) would expressly apply both to claims for restitution and to requests for return. He considered this distinction justifiable as claims for restitution of cultural objects might lead to decisions recognised and enforceable under the Brussels and Lugano Conventions, whereas this would never be the case for return orders. He also considered, in relation to claims for restitution, that the physical presence of the cultural object in a Contracting State in accordance with paragraph (1) should establish sufficient grounds of jurisdiction for the courts of that State, even if the object was subsequently removed to a foreign country.

On the other hand, this would not necessarily be so under Chapter III relating to return orders, i.e. in a case where the illegally exported object was no longer in the territory of the State addressed.

In such a case the judge might have the power either to dismiss or to stay the proceedings for the return until such time as the cultural object was found. In this connection he suggested that the mechanism set out in Article 12(3) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction might be an appropriate model.

The CHAIRMAN, after summarising the previous discussions, considered that the Drafting Committee ought not to encounter major difficulties in adapting the wording of Article 9 to reflect its discussions. As to the substantive points, he favoured maintaining the jurisdiction of the court of the location of the object, in accordance with Article 9(1), including situations where the object was subsequently removed to another State.

Mr WICHENCHAROEN (Thailand) emphasised that in his view this interpretation of paragraph (1) should apply to claims based on both Chapters II and III, and he wished to see an express provision to that effect. Although additional wording would be very useful as far as the modalities of recognition and enforcement of judgments were concerned, he stressed that this idea would take the draft too far from its original goal. Consequently, he suggested simply including a reference to the law of the State concerned. As to paragraph (2), he wondered whether the provision was really necessary as it concerned a matter for the parties involved.

The CHAIRMAN reminded delegations that this point had already been the subject of lengthy discussions. Although he was sympathetic to the proposal of the Iranian delegation to introduce a conflicts of law rule on the applicable law, he emphasised that this solution could not be taken up in a Convention on substantive law. Article 9 should *a fortiori* exclude a provision on the applicable law, as it concerned what were, in private international law, termed conflicts of jurisdiction and here more specifically recognition and enforcement of judgments.

Mr DROZ (Hague Conference on Private International Law), commenting on the Thai delegation's intervention, confirmed that Article 9(1) should be interpreted as adding an international ground of jurisdiction, in the sense that its origin lay in the Convention itself, of the court or competent authorities of the State where the object was located. This choice of forum for the claimant would simply be added to the usual rules governing jurisdiction, i.e. those of domestic law and those resulting from the application of a convention applicable in that State. Maintaining the jurisdiction of the forum in cases where the cultural object had been removed from the territory of the State concerned subsequent to the introduction of proceedings was important, since the court seized could continue with the proceedings and give judgment against the defendant, whose bad faith was demonstrated by the object's disappearance, applying financial sanctions against that person which could encourage the restitution of the object.

He was opposed to the proposal to insert a provision on the applicable law, given the substantive nature

of the draft Unidroit Convention. Moreover, the inclusion of a conflicts rule designating the applicable law would be even less advisable in connection with Article 9 which was concerned with conflicts of jurisdiction. Returning to the Thai proposal, he shared the view that the draft Convention was in some respects deficient, particularly as a decision handed down in the country of the defendant's domicile would still be subject to proceedings for recognition in the country where the object was located. However, he considered that this deficiency had been exaggerated, as its removal would imply agreement on many very delicate issues, particularly the international plea of *lis alibi pendens*, the respect of the rights of the defendant, etc. Needless to say, dealing with all those issues would have slowed down progress on the draft Convention. He therefore agreed that such thorny questions should not be discussed.

Finally, regarding the recognition of administrative decisions, he emphasised that in principle these were excluded from all conventions on the recognition and enforcement of judgments, and he considered a more ambitious approach in the draft to be a dangerous one. It was preferable for the claimant simply to plead his or her case in the country where the object was located, thereby avoiding the need for the recognition of a judgment in a foreign country, and the provisional and protective measures available under Article 9(3) should enable the object to remain in that country during the proceedings.

The CHAIRMAN agreed that the delicate question of the recognition of judgments should not be touched on at this stage.

Mr LAZAROU (Cyprus) agreed with the Australian delegation's reservation concerning the wording in paragraph (1), as the present version did not accurately reflect the intention of enabling the claimant to bring a claim in the Contracting State where the cultural object was located. He therefore suggested replacing the words "without prejudice" by the word "notwithstanding".

Mr ALAN (Turkey), sharing the concern of several delegations that a real risk existed of various and different interpretations being given to the same terms in the draft Convention, felt that consideration should be given to the possibility of inserting in Article 9 a

reference to an international tribunal or advisory body which would play some role or have jurisdiction in relation to the application of the future Convention.

The CHAIRMAN, while hoping that Article 9 could be improved wherever possible, did not believe that the future Convention would give rise to any more difficulties than those already encountered in relation to other international conventions such as the Brussels and Lugano Conventions. Establishing an international tribunal in order to solve jurisdictional problems did not seem justifiable. He called on the representative of the Hague Conference to give his opinion on the matter.

Mr DROZ (Hague Conference on Private International Law) felt the current wording of Article 9(1) to be satisfactory, and considered that establishing an international tribunal to oversee the application of the future Convention was somewhat exaggerated, especially in the light of possible difficulties and the resources available. Concerning the proposal of the United States delegation to set up a *forum non conveniens* mechanism, he welcomed the fact that it concerned only paragraph (2), i.e. voluntary extension of jurisdiction through jurisdiction clauses, and not paragraph (1), which was the principal ground of jurisdiction under the future Convention.

Mr ALAN (Turkey) wished to make it clear that his suggestion in favour of an international tribunal or advisory body was not limited to Article 9 but was actually aimed at providing uniform application of the future Convention as a whole.

Mr HUBBARD (Mexico) supported the idea put forward by the Turkish delegation and wished to see the matter debated in further detail.

The CHAIRMAN suggested that the Committee return to the question at a later stage.

Mr AL NOURI (Kuwait), confirming the view his delegation had already expressed in relation to Article 5, emphasised that Article 9(1) risked raising practical problems concerning State immunity. He requested that the concepts used in paragraph (2) be clarified, in particular the word “parties”, which could relate both to States and to individuals. He also hoped that the term “arbitration” would be explained, as it could in

principle be either international or domestic. In this connection he reminded delegations that if the parties were States, they could opt for arbitration solely in public international law, i.e. *ad hoc* arbitration, or institutional arbitration in the context of the International Court of Justice.

The CHAIRMAN stated that from his point of view the question of State immunity was not raised by Article 9(1) or (2), and even less so by paragraph (3) in which States were referred to only as claimants. He recalled the well established practice in public international law whereby a State bringing a claim before the courts of another State would lose its right to invoke its own immunity from jurisdiction. Although this was a clear reality in international law, for reasons of clarity in the application of the future Convention he suggested that it be mentioned in the Explanatory Report. As to the risk of uncertainty that some had highlighted in the definition of “parties” under Article 9(2), he did not consider that this risk could arise in relation to an action based on Article 9(1).

More generally, two situations should be distinguished in regard to the term “jurisdiction” in paragraph (2): under Chapter II, the claimant would as a rule be a private person and consequently any public international law jurisdiction, and in particular that of the International Court of Justice, would be excluded. Recourse to such a jurisdiction was however possible under Chapter III, as only States would be involved, and if they so wished they could agree to go to international arbitration.

Mr BURMAN (United States of America) agreed in relation to paragraph (2) that there could be an issue of State immunity in the future Convention, although he doubted whether this could be resolved by the Committee. Contracting States would probably deal with the matter individually. He agreed with the need for paragraph (2), considering that recourse to arbitration might facilitate resolution of the problem, and should therefore be supported. In this perspective, for States not party to the two major Conventions on Recognition and Enforcement of Foreign Arbitral Awards, the New York and Panama Conventions, a statement in the future *Unidroit* Convention allowing parties to enter into arbitration could be a sufficient basis for the enforcement and recognition of their arbitration agreement.

The CHAIRMAN returned to the question of State immunity from jurisdiction, reaffirming that in the absence of proof to the contrary, practice on this issue was highly uniform in that a State bringing a claim before the domestic courts of another State lost, by virtue of that action, its right to invoke its own immunity from jurisdiction.

Mr SAJKO (Croatia) stated that in his view Article 9(1) and (2) provided alternative international grounds of jurisdiction, whereas Articles 5 and 6 seemed only to be applicable in cases where the court with jurisdiction was that of the location of the cultural object, and not in other cases such as claims brought before the forum of the defendant or the *forum commissi delicti*. These fora would therefore not be in a position directly to apply Articles 5 and 6. He proposed that those cases be considered in further detail.

The CHAIRMAN suggested that the last intervention could be understood as being in favour of including a *forum rei sitae*.

Mr SAJKO (Croatia) stressed that if the claimant wished to have an alternative forum, difficulties could arise concerning the application of Articles 5 and 6.

Mr FRIETSCH (Germany) considered that while it was true that paragraph (2) allowed jurisdiction on a voluntary basis, the present draft laid down no limitation on choice of forum clauses, and he therefore questioned the need for the paragraph.

Mr MARQUES DOS SANTOS (Portugal) agreed with the observations made by the representative of the Hague Conference on Private International Law and by the delegation of the United States concerning Article 9(2), and underlined that the effectiveness of jurisdiction clauses was linked to the acceptance by the court concerned of that choice of jurisdiction. As to State immunity, he was of the view that it did not pose a significant problem, given that the State was in the position of claimant. He emphasised that “arbitration” should be understood essentially as private law arbitration.

The CHAIRMAN noted that, in the situation envisaged by Article 9(2), the parties could, if they so agreed, bring their claims before public international law jurisdictions.

Mr YIFHAR (Israel) called for greater clarification of the word “parties” in Article 9(2), as the present wording could concern States as well as individuals party to the dispute. In the latter case, he could not imagine a simple agreement between two individuals obliging a foreign court to accept jurisdiction over their dispute. He felt that the inclusion of jurisdiction clauses in favour of a foreign court was similar to allowing arbitration. He therefore proposed deleting any reference to such clauses in paragraph (2) and simply maintaining the possibility of submitting the dispute to arbitration.

The CHAIRMAN suggested that a distinction be drawn between courts chosen by the parties that were situated in a Contracting State and those situated in non-Contracting States.

Mr ADENSAMER (Austria) considered that a more general remark should be formulated at this stage of the debate. In his opinion, the draft Convention did not provide an express solution for cases where both claims for restitution based on Chapter II and requests for return based on Chapter III were possible concerning a cultural object which had been both stolen and illegally exported. Consequently, he wondered whether this silence in the draft should be interpreted as a tacit reference to domestic law.

The CHAIRMAN reminded delegations that the general opinion during the preparatory work had been that States should be given the freedom to decide on which ground those claims should be based.

Ms PROTT (UNESCO) recalled that this issue had been discussed during the preliminary work, although not at great length. Because of the different levels of proof applied in Chapter II and Chapter III, the general opinion in both the study group and the committee of governmental experts had been that each State should decide on which basis the claim should be brought. The question of litigation costs concerning claims by private owners had also been raised. UNESCO knew of rare cases where such claims had been brought by a State in its own name, as the State regarded the issue to be important and shared an interest in the recovery of the object.

The CHAIRMAN considered that his sentiment that this was more a theoretical than a practical question had been confirmed, but nonetheless it merited mention in the Explanatory Report.

Mr BURMAN (United States of America) felt that the following basic issues should be considered in more detail: “who”, “against whom” and “where” a claim should be brought concerning a cultural object. He therefore introduced his delegation’s proposals in CONF. 8/C.1/W.P. 55, seeking primarily to define the concept of the claim’s “international character”. Secondly, it provided some parameters limiting both *ratione personae* and *ratione loci* the scope of Article 9. As this proposal had not yet been distributed, the substance of the proposal could not be carefully followed and analysed by delegations.

The CHAIRMAN recalled that hitherto the draft Convention had limited itself to creating an international ground of jurisdiction in favour of the court of the location of the object. The United States proposal departed from this track and went much further as it posed substantive rules, specifically on the question of *locus standi*.

Mr DROZ (Hague Conference on Private International Law) pointed out that to a large extent the proposal repeated previous proposals of the United States which had not been adopted during the preparatory work. The main question here was that of the scope of application of the future Convention. Until now, this scope had been governed by Article 1, with Article 9 simply designating the court with jurisdiction outside the ordinary domestic law of the Contracting States to ensure the protection of cultural objects as laid down by the prospective Convention. The United States proposals were much wider ranging, providing substantive rules on the person with *locus standi*. In this respect, the draft Convention also gave clear answers; under Chapter II it was the dispossessed owner, and under Chapter III the State which had seen its export regulations flouted. The proposal of the United States delegation would fundamentally alter the draft Convention as initially conceived. The intention had been to ensure general protection, whereas the proposal at issue would only protect certain categories of owners, namely those resident in Contracting States. Such discrimination did not reflect the spirit of the

preliminary work undertaken by Unidroit. Furthermore, if one were to venture into such sectarianism, nationals and not only the residents of Contracting States should benefit. In comparative law nationality, like residence, was taken into account as a criterion for protection. In order to avoid such interminable arguments, he suggested that the draft Convention be maintained as it stood. Moreover, he recalled that in all the Conventions drawn up at the Hague, the question of *locus standi* had never been dealt with by fixed criteria as only the merits of each case, the basis of an action, were relevant.

The CHAIRMAN suggested that consideration of the United States proposal be resumed once a written proposal was available.

#### *Paragraph (3)*

The CHAIRMAN opened the discussion on paragraph (3), which was particularly important for keeping a cultural object in the territory of the forum State during proceedings.

Mr WICHENCHAROEN (Thailand) stated that while Article 9(2) could be deleted, he supported its maintenance. He further emphasised that paragraph (3), since it was linked with paragraph (1), must be regarded as indispensable.

Ms PROTT (UNESCO) stressed the importance of paragraph (3). Although most legal systems reflected this solution, it was essential expressly to prevent the disappearance, destruction or inappropriate handling of a cultural object while litigation was pending and before a judgment on the merits could be handed down. It was unnecessary to recall that the high commercial value of cultural objects obviously increased the risk of their disappearance.

Mr GHOMRASNI (Tunisia) suggested that the phrase “Resort may be had” be replaced by “Resort must be had”, as he considered the current wording to be too flexible.

## CHAPTER V – FINAL PROVISIONS

### *Article 10*

Ms PROTT (UNESCO) recalled that in various legal systems, stolen cultural objects would be returned

without payment of any compensation, regardless of whether a good faith possessor had acquired title.

As the purchaser in those systems would never be considered to be the owner, no payment of compensation would be awarded. In relation to the draft Convention, the intention of the study group and of UNESCO had never been to suggest a change in national systems which already provided for the return of stolen cultural objects without payment of compensation to the possessor. Concerning this specific issue therefore, she once again urged those States to refrain from altering their domestic rules.

Ms SREMIC (Croatia) drew attention to the proposal submitted by the delegations of Croatia and Kuwait, as set out in CONF. 8/C.1/W.P. 40. This amendment was meant to clarify Article 10 and to avoid any possible misinterpretation of the article.

Mr SANSON (France) stated his concern that the effect of Article 10, especially in French law, could be to deprive the good faith possessor of all compensation when the object was returned. He called for this question to be subject to closer examination, also because of the risk of forum shopping, as the claimant would bring his action wherever the law of the forum State was more favourable.

The CHAIRMAN emphasised that legal technique in private international law was not, in general, favourable to stylistic formulae such as “the most favourable law”. In fact, mechanisms that were most favourable to the restitution of cultural objects were often less protective of the cultural heritage of the State of origin. The risk of forum shopping could be avoided by the mechanism of non-recognition of such judgments.

Mr CREWDSON (International Bar Association) fully supported the remarks made by the Chairman as he felt that the debates within the committee of governmental experts concerning Article 10 had not been sufficiently extensive. While stressing the great importance of UNESCO’s comments on Article 10 of the draft Unidroit Convention (CONF. 8/6), he expressed his concern regarding the current wording of the article. Having lost the effectiveness it had in the study group text, the article would in its present form most probably not enable courts to interpret the Convention.

Serious consideration and further discussion of Article 10 seemed to be necessary.

Mr FRAOUA (Switzerland), in his capacity as a member of the study group, recalled that Article 10 had been drawn up with a view to the establishment of minimum rules which at the same time would not encroach on the greater protection that might be offered by the ordinary domestic law of certain States. Returning to the example offered by the French delegation of the good faith possessor required to proceed to the restitution of an object without receiving compensation, he pointed out that in any case the same result would be achieved even if there were no Convention, as the solution under the ordinary law would in any event apply.

Mr ALAN (Turkey) expressed concern that Contracting States would not take advantage of the option provided by Article 10 to apply rules more favourable to the parties concerned. He therefore suggested that Article 10 should, at least in some respects, be mandatory.

Mr SAVOLAINEN (Finland) recalled that Article 10 had been thoroughly discussed at the last meeting of the committee of governmental experts when a small *ad hoc* group had produced a text that had obtained unanimous support. As France had been represented on that group, he could not understand its present concern regarding the article. He supported the drafting technique and the applicability of the article and saw no real risk of forum shopping. He reminded delegations that the applicable law would seldom automatically be the *lex fori*, as in most cases the applicable law would be designated by the choice of law rules according to the private international law system of the *lex fori*, the *lex causae* being that of the State of the location of the object at the time of its acquisition. He therefore objected to changes to the article. Concerning the proposal to delete Article 10, he pointed out that, having regard to the system of interpretation appropriate to this type of Convention, most jurisdictions would probably not consider the Convention as preventing them from applying rules more favourable to the restitution or the return of a stolen or illegally exported cultural object. Deleting Article 10 would simply

create unnecessary confusion and he therefore supported its retention.

Mr LE BRETON (France), while reserving the right of his delegation to submit a written proposal, stated that he was opposed to jeopardising the delicate balance struck by the draft Convention on the pretext of improving Article 10.

Mr AL NOURI (Kuwait) recalled the Croatian and Kuwaiti proposals set out in CONF. 8/C.1/W.P. 40.

Mr VRELLIS (Greece), while not opposing the proposal of the Turkish delegation, emphasised that the Greek delegation was in favour of maintaining Article 10 as it stood, and consequently he regretted not being able to agree with the opinion of the French delegation.

Mr BURMAN (United States of America) suggested amending the wording of Article 10 in order to clarify that the Contracting State referred to was in fact the forum State.

Ms PROTT (UNESCO) reminded delegations that the philosophy behind the draft Convention was to make the art market as clear as possible by increasing the diligence required of prospective purchasers. The return of any cultural object to its original owner would maximise this result. The provision of compensation was intended for States with constitutional difficulties concerning such return or restitution. Therefore, the introduction of compensation by States whose own domestic law already protected the original owner would be a great step backwards.

*The meeting rose at 5.25 p.m.*

CONF. 8/C.1/S.R. 10  
21 June 1995

#### **TENTH MEETING**

Thursday, 15 June 1995, 9.45 a.m.

*Chairman* : Mr Lalive (Switzerland)

#### **AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

(CONF. 8/3; CONF. 8/5 Add. 1 and 2; CONF. 8/6; CONF. 8/C.1/W.P. 7, 28, 38, 55 and 56)

The CHAIRMAN announced that the Committee of the Whole should complete the first reading of the draft Convention before the end of the day in order to begin as soon as possible the examination of the texts prepared by the Drafting Committee. He noted that the discussions relating to Articles 9 and 10 were already advanced but the two articles called for further consideration after which the Committee might proceed to more general questions regarding the possible adoption of provisions concerning the retroactive character or not of the Convention and the possibility for some States to adopt the future Convention only in part, for example Chapter II or Chapter III.

#### *Article 10 (continued)*

Ms BAUR (France) reiterated the very strong reservations that the French delegation had already formulated with regard to Article 10 for reasons which she deemed self-evident. She considered that the future Convention aimed at conciliating diametrically opposed interests through solutions that would bring about an equitable compromise between the owner and the good faith possessor. This balance should not be upset. In certain cases, a State or the competent authorities of a State could be led to refuse to enforce decisions delivered on the territory of a foreign State which might be deemed contrary to national *ordre public*.

She stated that the French delegation had agreed to compromise on a number of fundamental principles of French law because the future Convention seemed to offer certain guarantees such as a fixed limitation period and the compensation of a good faith possessor. She recalled that according to French law the good faith possessor became the owner after a certain lapse of time and therefore there would currently be no restitution. She stated that France would find itself in a difficult position and would be obliged to refuse the enforcement on its territory of judgments requiring a good faith possessor to return an object without receiving compensation as the Explanatory Report (CONF. 8/3) seemed to suggest. Furthermore, according to this same interpretation, the good faith possessor could be deprived of the object in circumstances where the

limitation period set by the future Convention would already have lapsed a long time before, on the ground that the legislation of another State was more favourable to the restitution or return of a cultural object than the Convention itself in that the law of the State did not impose any time limits.

She considered that any State would still be able to refuse to enforce such judgments on its own territory and therefore to protect the fundamental principles embodied in its internal law which such judgments would infringe. However it seemed bad policy to adopt a Convention when it was already known in advance that certain judgments made on the basis of the text would never be enforced on French territory.

She furthermore drew attention to the difficulties of implementing Article 10 and concluded that the French delegation was in favour of maintaining the provision subject to a certain number of fundamental rules being in any event retained. The underlying principle of Article 10 could be maintained if the mechanism of just compensation and the limitation periods were also retained.

The CHAIRMAN requested the French delegation to submit its proposal in writing.

Mr MARQUES DOS SANTOS (Portugal) stated that the Portuguese delegation was in favour of maintaining Article 10. He noted that a provision existed under Portuguese law since 1937 providing for the unconditional return of illegally exported cultural objects. It would be contrary to the aim of the Convention if Portugal were to be obliged to introduce legislation that was more restrictive. He recalled that the purpose of the future Convention was to protect legal traffic in cultural objects and to combat illicit traffic. He considered that each State was free either to apply the *ordre public* exception or not to ratify the Convention if the State did not wish to enforce judgments based on more favourable legislation as set out by Article 10. It was however too late to raise fundamental questions regarding the provision. He also suggested that the article would in any event only apply in a few cases because if many countries had more favourable provisions within the framework of their domestic legislation than those provided for by the Convention, it would be less difficult to agree on the minimum rules of the future Convention.

The CHAIRMAN pointed out that even though very different points of view had been expressed a compromise did seem possible. He considered it to be out of the question that States be obliged to adopt a less favourable legislation within their legislative framework. He further suggested that from a technical standpoint, and contrary to the view expressed by the Finnish delegation, it was certain that the application of a more favourable law had produced unsatisfactory results in international private law. The Convention set out a minimum set of uniform rules for States, as one delegation had pointed out, and would not prevent a State, in the absence of Article 10, establishing more favourable rules regarding the restitution or return of stolen or illegally exported cultural objects. He considered that such a provision could give rise to serious technical difficulties, the risk of forum shopping and faulty interpretation. He concluded that the idea of applying the most favourable law seemed to have gathered a unanimous consensus and that this could be included in the preamble or, perhaps, in the Explanatory Report on the future Convention. He reminded delegations that before taking a decision, the Committee should await the written proposal of the French delegation.

Mr SAVOLAINEN (Finland) recalled in connection with the intervention of the French delegation that a special drafting group of the committee of governmental experts in which France had participated had unanimously adopted Article 10. He agreed with the Chairman that the purpose of the draft Convention was to establish uniform, minimum rules. Article 10 clearly reflected that purpose. He considered that the article should be retained in the place that it presently occupied in the draft Convention rather than relocating the principles it contained in the preamble or elsewhere. He joined the Portuguese delegation and the representative of the Hague Conference on Private International Law in their support for the present wording of the article. Finnish law did not contain a compensation provision and Finland would never ratify a Convention if, as France had proposed, it required that compensation be paid in all cases.

Mr FRANCONI (Italy) referred to Article 10 and the concern of the French delegation that the application of national law would undermine the opera

tion of the Convention. He understood the concern to be limited to the issues of compensation and limitation of actions. In the view of his delegation, Article 10 was essential to the structure of the draft Convention and should be retained. To allay the concerns of the French delegation, he suggested that reference be made to the compulsory application of the provisions of the Convention with respect to compensation and limitation of actions by inclusion of a formula beginning “[w]ithout prejudice to”.

Mr FRIETSCH (Germany) considered that Article 10 would raise practical and legal problems as identified by the French delegation. He also agreed with the Chairman’s view that the deletion of Article 10 would not prevent a State from applying more favourable national rules of law. He recalled the German proverb “shorter is better” and stated that while the French proposal was not without its merits, his delegation could agree to the deletion of Article 10.

Mr CREWDSON (International Bar Association) voiced concern that a common law judge reading the existing text of Article 10 might have difficulty understanding the principle underlying the article, which was that compensation should normally not be awarded. He quoted from the UNESCO comments on the draft Convention (CONF. 8/6): “At no stage was it intended to suggest that national systems which already provided for return of stolen cultural objects without compensation to the possessor should change this rule by providing compensation”. He suggested that a return to the original text of Article 10, which was reproduced in the UNESCO comments, would make it clear that Article 10 did not require a national judge to award compensation if such an award was contrary to national law.

Ms BALKIN (Australia) supported the inclusion of Article 10 but suggested that it be redrafted to make its meaning clearer. She stated that Article 10 enabled States to tailor existing laws to conform to the future Convention. She agreed that the UNESCO proposal contained all the necessary elements and declared her opposition to any version of Article 10 that would make prescription and compensation compulsory.

The CHAIRMAN expressed the view that a redrafting of Article 10 could bridge the differences

between delegations and looked forward to the French proposal for a revised text of the article.

Mr SHI (China) supported the retention of Article 10. In the view of his delegation, the application of more favourable national laws would promote the central purpose underlying the Convention which was to facilitate the return of cultural objects.

Mr VRELLIS (Greece) agreed with the statements of the Portuguese and Chinese delegations. He admitted that comparing any two systems in their entirety to decide which was the more favourable was not always easy. There was however a precedent established by the 1973 Hague Convention on the Law Applicable to Maintenance Obligations according to which if maintenance could not be obtained by virtue of one applicable law, another law enabling its award would be applied.

He recalled that the future Convention established minimum rules. The Convention without Article 10 would be difficult to accept as the minimum rules set out were mandatory. He considered that Article 14 of the EEC Directive was an interesting precedent. He stressed that his delegation was willing to support the proposal of the Turkish delegation, which established that the principle of Article 10 was mandatory. He concluded that when discussing this matter, it must not be forgotten that those States which were prepared to return cultural objects did so not as a favour to other States but for the sake of justice.

Ms HUEBER (Netherlands) agreed that national judges would have difficulty interpreting Article 10 and suggested that it be redrafted to lend it greater clarity. In her view, the lack of clarity lay in the use of the words “more favourable treatment”. She supported the version of Article 10 that UNESCO had proposed.

Ms JOHNSTON (United States of America) supported Article 10 as it stood. She emphasised that the draft Convention did not supersede any right or claim that might otherwise exist under the national law of a Contracting State. In response to the argument that the article would lead to a non-uniform application of the future Convention, she pointed out that a claimant was free to pursue local remedies rather than invoking the Convention. She observed that United States law provided substantial rights of recovery of stolen

property and anticipated that recourse to that law, rather than to the provisions of the Convention, would be the norm.

The CHAIRMAN proposed that following the last speakers' comments the discussion regarding Article 10 be brought to an end. He believed that there was no real opposition to the substance of the article and briefly recalled the various positions taken during the debates, referring specifically to the Explanatory Report (CONF. 8/3) and to the written observations submitted by UNESCO (CONF. 8/6).

Mr KAYE (Turkey) expressed support for the Finnish proposal referred to in the UNESCO comments (CONF. 8/6) and also subscribed to by UNESCO, that would make mandatory the rule that a State might apply its national law when this would disallow compensation to the possessor of an illegally exported object. In his view, the spirit of the Convention supported the application by States of more favourable rules, particularly on the crucial issues of compensation and prescription. He observed that in Common Law jurisdictions judges often gave weight to the adoption of a convention. Under the draft Convention as currently worded, lawyers could argue in court that compensation was the prevailing standard. He suggested that a mandatory rule would avoid this possibility and promote the purposes of the future Convention.

The CHAIRMAN noted that there was an emerging consensus among delegations that the wording of Article 10 should be made more precise.

Mr SAVOLAINEN (Finland) suggested that, in considering amendments to Article 10, the Drafting Committee might draw inspiration from Article 14 of the Hague Convention on the Law Applicable to Trusts and on their Recognition which had been signed and/or ratified by a number of States represented at the Conference.

Ms PROTT (UNESCO) noted that Article 10 had been part of the text in one form or another since the draft Convention was conceived and that it was the result of a delicate compromise between competing views. She observed that UNESCO's proposed Article 10 in its comments (CONF. 8/6) was the last version

that had emerged from the work of the study group. She noted, however, that UNESCO would not support that draft to the exclusion of other drafts.

*Article 9 (continued)*

The CHAIRMAN re-opened the discussion on Article 9 and referred to the proposal of the United States delegation (CONF. 8/C.1/W.P. 56).

Ms JOHNSTON (United States of America) stated that paragraph (1)(a) of her delegation's proposal sought to limit claims to Contracting States or to habitual residents of Contracting States. She conceded that such a provision would reduce the worldwide protection of cultural objects but considered that it would increase the number of States ratifying the future Convention because it ensured that non-Contracting States would not enjoy the benefits that it conferred. She pointed out that it was not unusual for international treaties to impose obligations and confer benefits only upon Contracting States.

With respect to the proposed paragraph (2)(b), she remarked that the draft Convention allowed claims to be made in the Contracting State where the cultural object was located and agreed that such a provision was necessary to ensure the proper implementation of the future Convention. She considered however that a *bona fide* possessor should be given notice of a claim and an opportunity to raise defences against it when the object was in the physical possession of a person who did not assert title to the object, such as a shipper, warehouse or museum. Such a notice requirement was a matter of fundamental fairness and due process that was required by the Constitution of the United States and under the law of most States. She further noted that the international exchange of cultural objects would be discouraged if the lender were to be denied the opportunity to defend its title to a cultural object located in another State. She also observed that, under the procedural rules of the United States, an action would be dismissed if it would affect the interest of a party who could not be brought before the jurisdiction of the court. The inclusion of a notice provision would exclude the possibility of such a dismissal.

The CHAIRMAN sought clarification on two technical points. First, he observed that the words "shall

include” in the new text proposed by the United States delegation might be read as not limiting the list of those who could claim and should perhaps read “shall only include”. Second, he stated that the use of the words “good faith” appeared to introduce substantive issues into what was essentially a procedural provision. This in turn raised the question of which law was applicable to such substantive issues.

Ms JOHNSTON (United States of America) noted with respect to the second question that the United States had already submitted a proposal on applicable law (CONF. 8/C.1/W.P. 28) and recalled that it was not unusual for jurisdictional issues to raise substantive questions.

Mr MARQUES DOS SANTOS (Portugal) stated his total opposition to the two proposals of the United States delegation (CONF. 8/C.1/W.P. 55 and 56). With regard to the international nature of the claim for restitution or the request for return of a cultural object, this notion was already defined in Article 1 and the problem should not be raised again at this stage of the proceedings.

As to the new article as set out in CONF. 8/C.1/W.P. 56, it was very different to the present text of Article 9. He recalled that the representative of the Hague Conference on Private International Law had supported the amendment of the United States delegation for Article 9(2) with regard to the choice of jurisdiction, subject to the designated court accepting that selection. However, he considered that the new United States proposal was discriminatory and did not conform to fundamental texts for the protection of human rights as it discriminated in favour of habitual residents of a Contracting State against other persons. He declared that if the intention of the United States delegation was to impede the application of the Convention between citizens of the United States of America, then a reservation clause could be proposed. Lastly, he formulated a fundamental objection to the United States proposal as the spirit underlying it was totally different from that underlying Article 9 of the draft Convention.

The CHAIRMAN referred to a written communication of the representative of the Hague Conference on Private International Law concerning the problems

outlined by the Portuguese delegation. In fact the United States delegation had a specific aim: that the Convention should not apply to litigation between United States citizens. This should not necessarily apply to other States. First the general requirement that the claimant must be a resident of a Contracting State should be eliminated. The proposition must then be accepted that any State could declare its intention not to apply the future Convention to claims for the restitution of stolen objects if the claimant and the defendant resided habitually on its territory. With regard to Chapter III regarding the return of illegally exported cultural objects, it was obvious that the requesting State must be a Contracting State.

Mr BURMAN (United States of America) agreed with the comments of the representative of the Hague Conference on Private International Law with respect to claims under Chapter III. However, he suggested that in redrafting Article 9, the Drafting Committee should distinguish between Chapters II and III since Chapter II, as drafted, did not preclude a request by a non-Contracting State. He disagreed with the introduction by the Portuguese delegation of human rights into a debate on habitual residence. He observed that in its proposed new article the delegation of the United States had sought to introduce clarity, perhaps at the price of limiting the scope of the future Convention, in order to pinpoint with certainty the persons entitled to claim thereunder and the persons against whom they could claim. If the Conference did not clarify this point, he feared that the implementation of the Convention would suffer.

The CHAIRMAN enquired whether the delegation of the United States would agree with the representative of the Hague Conference that under Chapter III the State from which the cultural object had been illegally exported must be a Contracting State and, if so, whether he would be prepared to delete paragraph (1)(b) of the proposed new article.

Mr BURMAN (United States of America) accepted this suggestion.

Mr SAVOLAINEN (Finland), referring to paragraph (1)(a) of the new article proposed by the United States, agreed with the Portuguese delegation that the provision contradicted a basic principle of the

European Convention on Human Rights which protected private property within the jurisdiction of the member States without regard to nationality, race, residence, etc. He agreed with the representative of the Hague Conference that the future Convention should have no application when the possessor and the claimant were habitually resident in the same Contracting State, provided that they were habitually resident in that State at the time of the acquisition of the cultural object.

The CHAIRMAN observed that the representative of the Hague Conference had not proposed explicitly including that limitation on the application of the future Convention in the text.

Mr SHIMIZU (Japan) found it difficult to understand the assertion of the Finnish delegation that paragraph (1)(a) of the new article proposed by the United States delegation violated human rights. In his view, the provision did not preclude the owner seeking redress under local law. He stated that the proposal of the United States concerning applicable law was very important (CONF. 8/C.1/W.P. 28). When the question of applicable law had earlier been raised by the delegation of the Islamic Republic of Iran, other delegations had pointed out that the future Convention would, as a uniform law, become the applicable law once adopted. The text however left unanswered several questions such as the person who could bring a claim and the meaning of such terms as “possessor” and “theft”. As indicated in the written comments made by his delegation (CONF. 8/5 Add. 1), a new provision should be added to state rules of private international law to decide which national law should govern questions that the Convention left unanswered. He therefore supported the proposal of the United States delegation concerning the applicable law (CONF. 8/C.1/W.P. 28). The use of the words “international character” of claims would lead to the non-uniform application of the future Convention. He therefore proposed that the words be deleted from the *chapeau* of Article 1 of the draft Convention and that Article 1(a) should instead provide that the future Convention would only apply to “cultural objects that are located in a Contracting State and were stolen outside the territory of that Contracting State”.

The CHAIRMAN noted that the United States had also proposed a separate article concerning the applicable law. He agreed that the issue of applicable law should be dealt with separately from the issue of jurisdiction that Article 9 addressed. He noted that as a basic principle of private international law, the forum court decided which law to apply in accordance with its own principles of private international law. He considered that the United States proposal simply restated this basic principle in a somewhat complicated manner. In particular, the words “as appropriate” appearing in the proposal were imprecise because they vested a wide discretion in the judge of the forum State.

*The meeting was adjourned at 11.10 a.m.  
and resumed at 11.50 a.m.*

The CHAIRMAN recalled that a certain number of delegations were in favour of maintaining Article 9 as it stood, in all its simplicity. However other articles could be envisaged that might have certain effects on the interpretation of Article 9.

Mr FRANCONI (Italy) stressed the need to avoid the confusion of three separate issues: (a) access to justice for purposes of implementation of the future Convention; (b) jurisdiction; and (c) the applicable law. Article 9 addressed the first subject only and the other issues were properly dealt with elsewhere.

The CHAIRMAN suggested that the clear distinctions drawn by the Italian delegation should help to avoid unnecessary complications and speed up the discussion.

Mr FRAOUA (Switzerland) stated that the Swiss delegation had understood the statement of the United States delegation as introducing a new proposal, different to that set out in CONF. 8/C.1/W.P. 56 which proposed an amendment to Article 9.

He recalled that there had already been difficulties, during the preparatory work and specifically in the meetings of the committee of governmental experts, in agreeing on certain minimum rules of procedure. Consequently it had been decided that Article 9 would only concern jurisdiction, thus leaving aside all questions of procedure. He did not therefore understand

how certain delegations could accuse the Convention, as the Chairman had recalled, of being nebulous and vague with regard to this question, even if he hoped that within a reasonable lapse of time the Contracting States would agree on minimum rules of procedure. Nevertheless such an agreement could not be reached at this stage of the diplomatic Conference. It was neither the time nor the place.

The fundamental question which concerned the United States delegation, apart from the question of who could be a claimant, was the territorial scope of application of the future Convention. The Swiss delegation therefore supported the proposal of the United States with regard to Article 9 which would determine who qualified as a claimant under Chapter II. Furthermore, he drew attention to his delegation's proposal (CONF. 8/C.1/W.P. 38) currently not under discussion (as it proposed modifying Article 1 of the draft Convention) which also established who could bring a claim for restitution. Lastly, he encouraged delegations to give consideration to the United States proposal.

Mr FOROUTAN (Islamic Republic of Iran) pointed out that the purpose behind the future Convention was to halt the illegal trade in cultural objects. This purpose would not be accomplished if the State addressed where the cultural object was located did not take account of the substantive laws of the requesting State. However, he was uncertain whether the Convention as drafted would require the State addressed to consider and apply the relevant substantive laws of the requesting State. He stated that he had no objection to a separate article dealing with the question of the applicable law.

The CHAIRMAN noted that both he and several delegations had expressed the view that problems of applicable law should be distinguished from issues of jurisdiction. He stressed that Article 9 had nothing to do with applicable law.

Ms HUEBER (Netherlands) agreed that the issue of applicable law was distinct from that addressed in Article 9. She supported the comments of Portugal, Finland, the representative of the Hague Conference and other delegations concerning the proposal of the United States for the addition of a new article.

Mr BURMAN (United States of America) considered that the European Convention on Human Rights had nothing to do with the new article that his delegation had proposed. He noted, however, that certain human rights Conventions did impose rights and obligations on habitual residents of States party to those Conventions. He suggested that his delegation's proposal could be improved by including a wider category of claimants to encompass the citizens, domiciled persons, etc. of a Contracting State.

The CHAIRMAN recalled that the Finnish delegation had stated that the European Convention on Human Rights would make it difficult for his delegation to accept the proposal of the United States on account of its reference to habitual residents.

Mr BURMAN (United States of America) reiterated that several human rights Conventions employed the term "habitual resident" to identify those persons to whom the provisions of the Conventions applied. He agreed with the Italian delegation that issues should be dealt with separately in the future Convention if such separate treatment would increase clarity. He referred to the working paper of his delegation (CONF. 8/C.1/W.P. 55) and noted that it offered two alternative formulations of Article 9. With respect to the longer formulation, he recalled from the discussions on Article 1 of the draft Convention that a number of delegations had considered that the definition of "international character" should properly be dealt with in Article 9. He noted that the definition of "international character" in paragraph (1) of the proposed Article 9 described two factors that would trigger the operation of the Convention, the first of which was the theft or removal of an object from a Contracting State. He pointed out that this eventuality was readily ascertainable in many cases and that it was highly beneficial in international treaties to have a clear triggering provision. Second, the proposal in paragraph (1)(b) stated that a claim was of an international character when it was brought by an owner who was a Contracting State or an habitual resident of a Contracting State. He observed that the purpose of the definition was to clarify the situations to which the Convention applied and it sought therefore to promote the harmonised application of the Convention. He noted that paragraph (2) of the proposal excluded

domestic situations. He referred to the Swiss proposal (CONF. 8/C.1/W.P. 38) concerning Article 1 and stated that it too would serve as a useful approach in a drafting context.

Mr SAJKO (Croatia) agreed with the comments of the delegations of Portugal and Italy concerning Article 9(1). He noted that in almost all international conventions the scope of the convention was defined in the opening provisions and suggested that the same approach should be taken in the future Convention. In his view, Article 1 was clear and acceptable because it delimited the substantive and territorial scope of the Convention. He also supported Article 9 as drafted.

Mr LE BRETON (France) declared that the Italian delegation had expressed views fully in accord with those of the French delegation. He therefore supported the retention of Article 9 as it appeared in the draft Convention.

Mr FRIETSCH (Germany) endorsed the arguments of the Portuguese, Dutch and other delegations concerning the proposed new article of the United States. He recalled the written comments of his delegation concerning a proposal for a strict rule on jurisdiction (CONF. 8/5 Add. 2).

Mr VRELLIS (Greece) supported the statement of the delegation of the Islamic Republic of Iran.

Mr YIFHAR (Israel) was not convinced that the term “international character” required definition. He noted, however, that the definition proposed by the delegation of the United States was unacceptable and proposed the following alternative: “Claims of an international character for the purposes of Article 1 are claims where the defendant and the relevant object are located outside the jurisdiction of the Contracting State of the claimant at the time the action is commenced”.

Ms REICHEL (Austria) pointed out that the question of the applicable law was relevant neither to Article 9 nor to any other article of the draft Convention. She explained that from 1984, the start of the work at Unidroit, questions regarding private international law had only been dealt with in an indirect way in the Convention. She therefore did not support the United States proposal as set out in CONF. 8/C.1/W.P. 28 as it had no place in the Convention.

The CHAIRMAN considered that it was premature to proceed to an indicative vote on Article 9. He suggested that proposals for the addition of provisions to Chapter IV should first be considered in order to provide the Committee of the Whole with an overall view of the Chapter. He invited the Chairperson of the Drafting Committee to express her views on the subject.

Ms BALKIN (Australia) sought clarification on the current situation with respect to Article 9. She considered that little support existed for the United States proposal and therefore believed that it was unnecessary for the Drafting Committee to spend time redrafting the article along the lines suggested by the United States delegation.

The CHAIRMAN stated that he had the impression from the discussions that most delegations favoured Article 9 as it stood. He also considered however that some delegations would be more satisfied with Chapter IV as a whole if additional provisions were added. He asked the delegation of the United States if it wished to proceed to an indicative vote on Article 9.

Mr BURMAN (United States of America) clarified that his delegation did not propose a new Article 9 but additional paragraphs to the article by way of clarification. For example, he did not, and nor did other delegations, object to Article 9(1)(a). He stated that it should be ascertained at a future date whether there was a willingness to consider proposals for amendment to the article that could improve its clarity.

The CHAIRMAN suggested that the United States delegation did not object to Article 9(1) or Article 9(3) and could accept Article 9(2), subject to certain drafting improvements. If his understanding was correct, indicative votes would be necessary only on the additions proposed by certain delegations, including that of the United States. He asked the United States delegation whether his understanding of its position was correct.

Mr BURMAN (United States of America) stated that the Chairman’s understanding was correct.

*Article 6 (continued)*

Ms BALKIN (Australia) considered it opportune to

take an indicative vote on the issue of whether Article 6 should be retained or deleted.

The CHAIRMAN agreed that an indicative vote on Article 6 might save the Drafting Committee unnecessary work. He stated that he would call an indicative vote on the matter during the afternoon meeting.

*The meeting rose at 1.00 p.m.*

CONF. 8/C.1/S.R. 11  
23 June 1995

### **ELEVENTH MEETING**

Thursday, 15 June 1995, 3.00 p.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 28, 30, 36, 44, 50, 55 and 56)

*Article 9 (continued)*

The CHAIRMAN indicated that the last meeting had given rise to an agreement, which could almost be qualified as unanimous, on Article 9(1), so the indicative vote which had been requested on the article by the Chairperson of the Drafting Committee was therefore superfluous. He suggested that additions to Article 9 such as the proposal submitted by the United States delegation, or proposals for the amendment to specific articles, be examined. This would enable the Drafting Committee to foresee the order in which they should be placed. He gave the floor to delegations wishing to speak both on Article 9 and on the whole of Chapter IV, which covered all the proposed additions.

Mr WICHENCHAROEN (Thailand) drew attention to the proposal made by the United States delegation (CONF. 8/C.1/W.P. 55) which aimed at including several new paragraphs in Article 9 of the future Convention. He commented that from his point of view the term “international” in Article 1 of the draft Convention needed no further definition. Nevertheless he did not see any harm in including what had

been proposed as paragraph (1)(a) and (b). As far as paragraph (2)(a) and (c) were concerned he felt, however, that including those provisions would not add anything new but risked repetition. With regard to paragraph (2)(b) of the proposal in CONF. 8/C.1/W.P. 55 he suggested that the provision could be integrated in paragraph (1) of the proposal if that latter provision were to be included in the future Convention. The precise wording would in this case have to be decided upon later. He further suggested that it would be better to include the amendments proposed in CONF. 8/C.1/W.P. 55 in Article 1 rather than in Article 9 of the draft Convention since the purpose of the amendments was to clarify what was meant by the word “international” in Article 1.

Mr BURMAN (United States of America) agreed with the final proposal made by the Thai delegation to include the amendments in Article 1 rather than in Article 9, and then drew attention to the alternative proposal contained in CONF. 8/C.1/W.P. 55. He explained that this proposal was shorter and much simpler in form, that it contained fewer elements and might therefore be easier to apply and to adopt in the future Convention. He suggested that this shorter proposal might be considered by the Drafting Committee with a view to possible inclusion in Article 1. In examining the proposal an attempt should be made to find a text that would provide for the necessary clarification, and at the same time avoid the problems that had been highlighted in connection with the longer proposal in CONF. 8/C.1/W.P. 55.

Mr CREWDSON (International Bar Association) was of the view that having regard to the critical remarks that had been made concerning the longer proposal there should be no objections to the shorter proposal (CONF. 8/C.1/W.P. 55). With respect to the further proposal made by the delegation of the United States (CONF. 8/C.1/W.P. 56), he observed that an attempt had been made throughout the draft Convention to avoid the use of phrases such as “good faith purchaser”, “bad faith purchaser”, “good faith possessor” etc. The proposed new article would therefore constitute a step backwards. He further observed that the use of the phrase “habitual resident” in paragraph 1(a) of the proposed new provision was dangerous since it reduced the scope of application of the future

Convention too much. He illustrated his view with reference to cases where the claim for compensation was made by an insurance company that had made a payment in respect of a stolen object. Such an insurance company did not necessarily need to be located in a Contracting State.

Mr KHODAKOV (Russian Federation) stated his opinion that the question was not yet ripe for submission to the Drafting Committee and that the proposal of the United States delegation (CONF. 8/C.1/W.P. 56) merited detailed examination on the basis of an analysis of concrete situations. Studies of specific cases should be made, determining in each given situation whether the future Convention would in fact be applicable. Firstly, the prospective Convention would most definitely apply to the case of a person resident in a Contracting State whose cultural object was stolen and removed to the territory of another Contracting State. Secondly, the future Convention would also be applicable to the case of the theft and removal to the territory of another Contracting State of a cultural object belonging to an entity (which could not have a "habitual residence" unless it was registered or incorporated) situated on the territory of a Contracting State. These were not of course the only situations imaginable.

The stolen object might not only belong to a legal or natural person, but rather to a State which would also have the right to bring a claim for the object under the provisions of Chapter II. Another situation could be that of a non-resident of a Contracting State who possessed a collection of cultural objects located on the territory of a Contracting State which was stolen and removed to the territory of another Contracting State. He wondered whether this situation was covered by the future Convention. If delegations wished this result, the proposal of the United States delegation would be unacceptable as it led to its exclusion. The same was true of the situation in which a person who was not resident in a Contracting State took, for a limited period of time, his collection of works of art to the territory of another Contracting State where it was stolen. In such a case there would be no habitual residence in a Contracting State, but the object had been stolen on the territory of a Contracting State.

He explained that Article 1(a), which concerned the restitution of stolen cultural objects that had been exported from the territory of a Contracting State, was wide-ranging, in that it did not indicate to whom the object should belong. This was of course logical if the aim of the future Convention was to protect the rights of ownership of *objets d'art*. If this were the goal of the prospective Convention, then it would be desirable that it be applicable in the two aforementioned cases. However, this would not be the case under the proposal of the delegation of the United States. He therefore enquired whether this result was indeed intended, and if so what were the reasons behind it. Delegations should first decide on their expectations of the future Convention before passing the question over to the Drafting Committee. The delegation of the Russian Federation was for its part hesitant to accept such a proposal.

In conclusion, he stated that he had similar reservations concerning the United States proposal in CONF. 8/C.1/W.P. 28 to make the law applicable to the interpretation and application of the provisions of the future Convention that of the forum State. The application of an international convention called for recourse to international law and to the general principles of law, not to national law.

The CHAIRMAN thanked the delegation of the Russian Federation for the points raised, and agreed that the proposals were not yet ready for submission to the Drafting Committee, unless it were to be considered that there were two texts, the first being Article 9 as it stood (which had been the subject of widespread approval), and the other being the United States proposal. If that were the case, the Drafting Committee could submit the text as presently worded and propose the United States text as an amendment originating from a delegation. He noted that the Chairperson of the Drafting Committee approved this procedure, and gave the floor to the United States delegation to respond to the questions raised by the delegation of the Russian Federation.

Mr BURMAN (United States of America), responding to the observations made by the delegation of the Russian Federation, considered that the cases described by it would all be covered by the shorter

proposal (CONF. 8/C.1/W.P. 55). He explained that in making these proposals his delegation had attempted to achieve a higher degree of clarity, while being well aware of and accepting the fact that some cases might be excluded from the scope of the future Convention. He thought that the details should be looked at by the Drafting Committee and that perhaps it would be able to find a form of wording that avoided those problems.

The CHAIRMAN stated that from this point on only the shorter proposal submitted by the United States delegation (CONF. 8/C.1/W.P. 55) should be given further consideration.

Mr ONWUGBUFOR (Nigeria) agreed that the proposed amendments should be looked at by the Drafting Committee since the Nigerian delegation would not be able to agree with the current wording of either of the proposals made by the United States delegation in CONF. 8/C.1/W.P. 55 and 56. He felt that there were several points in the latter proposal to which objections could be raised, and he was pleased that this proposal was no longer being pursued. Turning to CONF. 8/C.1/W.P. 55, he stated that he thought that those proposals would not add anything to the future Convention and that they would cause problems of interpretation.

Ms HUEBER (Netherlands) stated that her delegation favoured Article 9 as it stood and was opposed to the proposals in CONF. 8/C.1/W.P. 55 and 56. She explained that the term "habitual residence" was understood very differently in many countries. Using such a term with a very well defined meaning, despite variations from country to country, in an international instrument such as the future Convention would only give rise to interpretative problems. Secondly, she envisaged difficulties arising from the fact that the claimant would have to prove that it really was a "habitual resident" at the relevant time. Lastly, the international character of a claim should be determined in Article 1 and not in Article 9.

Mr WICHIENTHAROEN (Thailand) repeated that he could agree with the proposal in CONF. 8/C.1/W.P. 55 although he still thought that it should be integrated in Article 1 rather than Article 9 of the future Convention. He added that he would also agree to the shorter proposal in that document. He then turned to docu-

ments CONF. 8/C.1/W.P. 56 and CONF. 8/C.1/W.P. 28 explaining that these contained proposals that were completely different from those in CONF. 8/C.1/W.P. 55 and which were intended to include new articles in the future Convention. In his opinion their adoption would help to solve many problems of interpretation of the future Convention and he therefore suggested that they be examined by the Drafting Committee.

Mr FRAOUA (Switzerland) felt that the discussion on these procedural questions was floundering because of completely contradictory opinions being expressed which were of little help to the Drafting Committee. For this reason he proposed an indicative vote on the question of the inclusion in the future Convention of additional procedural rules to those already contained in Article 9. If such a vote were conclusive, a working group could be established to prepare the rules, to decide on the appropriate place in the text to insert them and subsequently to submit them to the Committee of the Whole.

The CHAIRMAN considered the proposal of the Swiss delegation to be in line with both his own suggestion and that of the Secretary-General of the Conference to hold an indicative vote for the attention of the Drafting Committee, taking account of the Thai delegation's observation. He recalled that unanimity had been achieved for the retention of Article 9(1), (2), and (3), but the question now raised was that of the addition of rules of procedure in accordance with the United States proposal which had not enjoyed the widespread support of those delegations which had spoken. Subject to the agreement of the Chairperson of the Drafting Committee and the observations of the Portuguese delegation, he would proceed to an indicative vote.

Mr MARQUES DOS SANTOS (Portugal) shared the views of the Netherlands delegation on the substance of the question and supported the Swiss delegation's proposal to proceed to an indicative vote.

The CHAIRMAN proposed that a purely indicative vote be taken, with a view to assisting the Drafting Committee and avoiding it unnecessary work, on the question of inserting an additional provision in Article 9 of the nature suggested by the United States delegation.

*The proposal to add further procedural rules to Article 9 was defeated by twenty-nine votes to four with fifteen abstentions.*

Mr KHODAKOV (Russian Federation) stated that he had intended to request the floor prior to the indicative vote on Article 9 in which his delegation had not been able to participate as the subject of the vote had not been clear. The question put to delegations had in fact been whether or not they considered a provision such as that proposed by the delegation of the United States to be advisable. However, that delegation had made at least two proposals (CONF. 8/C.1/W.P. 55 and CONF. 8/C.1/W.P. 56). The Russian Federation had been opposed to the proposal in CONF. 8/C.1/W.P. 56, but not necessarily to the shorter proposal in CONF. 8/C.1/W.P. 55 which defined the “international character”. For this reason the delegation of the Russian Federation had decided that it could not take part in the vote.

The CHAIRMAN, in order to clarify the situation, recalled that the United States delegation had made it clear that it was withdrawing the longer formula (CONF. 8/C.1/W.P. 56) in favour of the shorter formula (CONF. 8/C.1/W.P. 55). He considered that the misunderstanding was of little consequence since all the delegations would be able to express their opinions after the indicative vote on the proposals to be made by the Drafting Committee.

*Articles 6 and 7 (continued)*

The CHAIRMAN stated that an indicative vote on Article 7, which set up what could be called an *ordre public culturel*, should also be taken to enable the Drafting Committee to reflect the wishes of the Committee of the Whole. Meanwhile, he recalled the Swiss proposal to amalgamate Articles 6 and 7 and asked if in that light an indicative vote should also be taken on Article 6(1)(a) and (b). Firstly he gave the floor to the delegations which had requested it, expressing the hope that they would speak on that issue or on purely procedural questions. He asked delegations whether they wished to put the question of the deleting or maintaining of Article 6(1)(a) and (b) to an indicative vote.

Mr KHODAKOV (Russian Federation) thanked the

Chairman for his explanation and hoped that all delegations had understood the subject of the vote on Article 9, unlike the delegation of the Russian Federation which, in any case, was satisfied with the results of the indicative vote. He only opposed sub-paragraph (a) of Article 6(1), the rest being acceptable and possibly combinable with Article 7. Consequently he hoped that no proposal would be made to delete Article 6 in its entirety, but only the aforementioned sub-paragraph which had moreover been the subject of criticism by other delegations. His delegation would be placed in a difficult position if the deletion of the whole article were put to the vote.

The CHAIRMAN admitted that it would in fact be appropriate to put each point to a clear and separate indicative vote, but reminded delegations that indicative votes were solely aimed at facilitating the task of the Drafting Committee. He drew attention to the Swiss delegation’s proposal to amalgamate Articles 6 and 7, which would make retaining the *chapeau*, namely the first two lines of Article 6(1), technically difficult in view of the deletion of sub-paragraphs (a) and (b). Effectively, the common ground between Articles 6 and 7 was to limit the cases in which the future Convention would not be applicable; it was however one thing for Article 6 to limit those cases where the court could refuse to apply the prospective Convention, and quite another for Article 7 to provide for its non-application. He proposed that the Committee first take an indicative vote on Article 6 and then one on the Swiss proposal.

Mr MARQUES DOS SANTOS (Portugal) drew attention to the joint proposal on Article 6 made by the delegations of France, Angola and Portugal (CONF. 8/C.1/W.P. 44).

Mr HUBBARD (Mexico) suggested that an indicative vote should first be taken on the question of whether or not Article 6 of the draft Convention should be deleted completely. When dealing with Article 7 the question could be addressed of whether some amendments should be made to that provision. It would then be without any importance whether those amendments were in part taken from what was currently Article 6 of the draft Convention. If, however, the vote on Article 6 indicated that this provision was to be retained then

further discussion should concentrate on the contents of the future Article 6.

The CHAIRMAN agreed with the view taken by the delegation of the Russian Federation that it would be unfair to those supporting the proposals in documents CONF. 8/C.1/W.P. 44 and CONF. 8/C.1/W.P. 36 if a first indicative vote were taken on the deletion of Article 6 since if the vote indicated that the provision should be deleted there would be no further possibility of discussing the proposed amendments to Article 6.

Mr SAVOLAINEN (Finland) supported the Mexican proposal as to procedure. Referring to the Rules of Procedure of the Conference (CONF. 8/2 Corr.) he suggested that the first indicative vote to be taken should deal with the most far reaching proposal. In the event of that vote indicating that at least parts of Article 6 should be retained, further indicative votes could be taken on the question of which parts should remain in the future Convention and which parts should not. Another indicative vote could then be taken on the Swiss proposal to merge Articles 6 and 7 of the draft Convention.

The CHAIRMAN noted that this would mean returning to his initial proposal. He again drew attention to the problems that necessarily arose from such a procedure and repeated that some delegations might be put at a disadvantage if it were decided to delete Article 6.

Mr MARQUES DOS SANTOS (Portugal) advocated the proposal tabled jointly by his, the French and the Angolan delegations of maintaining Article 6 in a new wording with the aim of limiting the cases where *ordre public* could be invoked. He declared his delegation's opposition to the fusion of Articles 6 and 7 (CONF. 8/C.1/W.P. 36), but agreed with the Finnish and Mexican delegations on the procedural questions. Effectively, if a majority voted to delete Article 6, the other proposals would not need to be examined, which would prejudice the issue.

The CHAIRMAN asked whether delegations wished to give their views on the deletion of Article 6 before proceeding to an indicative vote, and specifically on the usefulness of the vote.

Mr YIFHAR (Israel) reminded delegations that there were two proposals to amalgamate Articles 6 and 7 of the draft Convention. The first of these had been submitted by the Japanese delegation (CONF. 8/C.1/W.P. 7) and the second by the Swiss delegation (CONF. 8/C.1/W.P. 36).

Mr BOMBOGO (Cameroon) drew attention to the proposal of the Cameroon delegation to redraft Article 6 (CONF. 8/C.1/W.P. 50) and stated his opposition to the merging of Articles 6 and 7.

Ms HUEBER (Netherlands) suggested that if an indicative vote on the deletion of Article 6 were taken immediately without giving further consideration to the other proposals concerning that article this might cause serious problems to the Drafting Committee since those proposals would certainly be reintroduced during the second reading. The Drafting Committee would then have to work with provisions that had never been discussed before. She therefore suggested that the other proposals concerning amendments to Article 6 be discussed before taking an indicative vote on the possible deletion of the article.

The CHAIRMAN put to the vote the question of whether an indicative vote should be taken immediately on the deletion of Article 6 rather than first discussing the various other proposals.

*Thirty five delegations voted in favour of voting immediately on the deletion of Article 6, seven against, and six abstained.*

The CHAIRMAN stated that there was a clear majority in favour of proceeding immediately to an indicative vote on the question of deleting an article such as Article 6, which limited the effects of *ordre public*, and established that the question was correctly formulated.

*Thirty delegations voted in favour of deleting an article such as Article 6, eighteen against and four abstained.*

The CHAIRMAN stated that the Drafting Committee would therefore submit a text in which Article 6 would be replaced by a blank space.

*It was so decided.*

Mr MARQUES DOS SANTOS (Portugal) recalled that the question of the merging of Articles 6 and 7 was still to be decided. In his opinion, the majority view as expressed by the vote in favour of the deletion of Article 6 did not imply that there would be no Article 7.

The CHAIRMAN confirmed that this was indeed the correct interpretation of the vote, given that once the proposals of the Drafting Committee were known, delegations could vote in favour of Article 7.

Mr EPOTE (Cameroon) recalled that Cameroon was in favour of Article 6, except for sub-paragraph (a) of paragraph (1) which he wished to see redrafted to provide for a limitation on the power to refuse the return of a cultural object.

Mr BUCKLEY (Ireland) asked what would happen to CONF. 8/C.1/W.P. 44 now that it had been decided by the indicative vote that Article 6 should be deleted.

Mr LE BRETON (France) considered that the proposal submitted jointly by France, Angola and Portugal (CONF. 8/C.1/W.P. 44) remained on the table despite the vote which had been concerned with the deletion of Article 6 as a whole. The French delegation remained in favour of the rewording of Article 6 as proposed by France, Angola and Portugal.

The CHAIRMAN thanked the French delegation for its intervention but questioned whether it was the moment to discuss those proposals or whether it was not preferable rather to await those of the Drafting Committee, given that in both cases delegations would have the opportunity of debating the proposals. He explained that the vote had only taken place at this point due to the imminence of the next session of the Drafting Committee and in order to make its task easier.

Mr FRAOUA (Switzerland) declared his disagreement with the French delegation's interpretation of the results of the vote which he understood as a deletion of the actual content of Article 6, contrary to the wishes of the Swiss delegation. For this reason he maintained his delegation's proposal on Articles 6 and 7 (CONF. 8/C.1/W.P. 36), except with regard to Article 6(1)(a) which had just been deleted by the indicative vote. For the rest, the Swiss proposal in effect corresponded,

with the exception of Article 7(2)(b), to the whole of the paragraph.

Mr LE BRETON (France) understood and shared the Swiss interpretation of the vote and agreed that the majority of delegations had indeed rejected the substance of Article 6 by the indicative vote. However, that vote had not dealt with the joint proposal of France, Angola and Portugal (CONF. 8/C.1/W.P. 44) which he hoped would be dealt with by the Drafting Committee.

Mr MARQUES DOS SANTOS (Portugal) agreed with the Swiss interpretation of the indicative vote, according to which the vote had concerned the question of whether Article 6 should be retained. Contrary to the Portuguese position, the majority had voted against such retention. Without Article 6, the joint proposal by France, Portugal and Angola could not be considered by the Drafting Committee, which for its part would make no proposal concerning that article. Clearly, no delegation was barred from raising the question again on second reading, given that the vote was purely indicative and in no way bound delegations.

The CHAIRMAN stated his agreement with the position expressed by the delegation of Portugal and understood the results of the vote to mean that the Drafting Committee would not reproduce any provision of the nature of Article 6. This did not prevent delegations from making proposals on the article, on the understanding that no such proposals would originate in the Drafting Committee.

Mr EVANS (Secretary-General of the Conference) regarded the problem as being one of a procedural nature. He explained that it had been the Chairperson of the Drafting Committee who had requested that a vote be taken on the retention or deletion of Article 6. This request had been made to avoid any unnecessary work for the Drafting Committee in relation to the proposals to amend Article 6 in the event of the provision not being retained on first reading. He added that he would have preferred that the proposals made with regard to Article 6 be debated since otherwise new proposals would have to be considered by the Drafting Committee with no guidance as to what to do with them.

Mr BURMAN (United States of America) suggested that the Committee of the Whole should not spend any more time on the proposals to amend Article 6 since there had been a clear majority in favour of deleting the provision. If any new proposals were to be made with regard to what had so far been Article 6 of the draft Convention, these would have to be considered on second reading.

The CHAIRMAN stated that as from now the debates should aim to give the Drafting Committee guidance for its next meeting. In answer to the United States delegation, he considered that it would not be possible on second reading to resume lengthy debates, and voting should be proceeded with rapidly. He gave the floor to delegations which wished to deal with questions such as those concerning Article 7, retroactivity or non-retroactivity, and the question of whether States could simply adopt one part of the future Convention, as had been suggested by the Japanese delegation, which in practice meant that they could apply Chapter II and not Chapter III.

Mr SAVOLAINEN (Finland) agreed with the United States delegation that no other proposals to amend Article 6 should be considered further.

Mr YIFHAR (Israel) agreed that there should be no further discussion on the proposal of the delegations of Angola, France and Portugal (CONF. 8/C.1/W.P. 44) since the article they wished to amend had vanished and thus there was nothing left to debate. He stated, however, that this was not the case with CONF. 8/C.1/W.P. 30 submitted by his delegation since that document referred to a new issue that in his view had not been covered by the vote on Article 6.

The CHAIRMAN asked the Chairperson of the Drafting Committee to comment on this suggestion.

Ms BALKIN (Chairperson of the Drafting Committee) replied that the suggestion of the Israeli delegation caused difficulty as no similar proposal had been discussed before. As of now the Drafting Committee had no indication as to what it should do with the proposal. It would of course be possible simply to include the proposed provision in the draft and leave it to be considered on second reading.

Mr SAVOLAINEN (Finland) stated that there had been a clear decision not to deal with topics such as recognition and enforcement of judgements. He agreed with the view taken by the representative of the Hague Conference on Private International Law that neither these problems nor the question of *lis alibi pendens* should be addressed by the future Convention.

The CHAIRMAN approved the statement of the Finnish delegation.

*The meeting rose at 4.30 p.m.*

CONF. 8/C.1/S.R. 12  
23 June 1995

## TWELFTH MEETING

Friday, 16 June 1995, 10.40 a.m.

*Chairman* : Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/5 Add. 1 and 3; CONF. 8/6; CONF. 8/C.1/W.P. 2, 7, 26 and 64; CONF. 8/C.2/W.P. 18)

The CHAIRMAN reminded delegations that the first reading should be finished by the end of the morning, as the second reading was scheduled for the afternoon meeting. Four basic issues remained to be dealt with during the morning meeting, namely the retroactivity or non-retroactivity of the future Convention; the proposals concerning an additional provision regarding the applicable law; the proposal elaborated by the working group with regard to Article 3(3) and (4) set out in CONF. 8/C.1/W.P. 26 and some proposals for additional provisions. He invited delegations which had received specific instructions to submit them at this stage as the second reading would suffer if additional proposals were to be made questioning the results already achieved. He underlined that much work remained to be done before the end of the Conference, as from a legal point of view the present Convention was more complex than previous Unidroit Conventions and he therefore urged delegations to achieve rapid progress in a constructive spirit.

Mr CAHN (International Association of Dealers in Ancient Art) expressed his appreciation for the presentation on the previous day by the Carabinieri Unit specially constituted to combat illicit traffic in cultural objects. This valuable lecture had made it very clear that recovery of cultural objects could only be successful if accompanied by appropriate photographic documentation. He stressed that having the object photographed was a *conditio sine qua non* for the possible recovery of an object threatened by theft. He drew attention to the importance of establishing an archive and inventory of cultural objects which was in the interest of the future protection of national heritage. He therefore underlined the need to maintain the term “inventoried” and to add the term “documented” in Article 3(4). He also suggested further discussion of the issue raised by the Netherlands delegation (CONF. 8/C.1/W.P. 2). More generally he emphasised that cases of theft should be reported to the various persons who might be confronted with stolen objects and stressed the importance for States to establish an archive of stolen art for museums and the relevant authorities which should be accessible free of charge.

#### *Temporal scope of application of the future Convention*

The CHAIRMAN opened the discussion with regard to whether the Convention should apply retroactively or not.

Ms HUEBER (Netherlands) recalled that this issue had been extensively discussed at meetings of the committee of governmental experts and stated that a provision on non-retroactivity was indispensable for her delegation. She insisted that since Article 28 of the Vienna Convention on the Law of Treaties left the issue open, it should be dealt with expressly in the text of the Convention in order to avoid any discussion and divergent interpretation in the future. She stressed that retroactivity would be unacceptable to the Netherlands delegation, especially with regard to the burden of proof laid on a possessor in good faith. She therefore introduced the wording proposed by her delegation as set out in CONF. 8/C.1/W.P. 2.

Mr FRIETSCH (Germany) strongly supported the Netherlands proposal.

The CHAIRMAN invited delegations to approach the discussions concerning retroactivity in a pragmatic way so as to reach a solution that would permit the greatest number of ratifications.

Mr NOMURA (Japan) fully supported the Netherlands proposal.

Mr FRAOUA (Switzerland) emphasised that in Switzerland non-retroactivity was a fundamental principle of the Constitution and no exceptions could be made to that principle, even partial ones, in the context of the future Convention. The issue of retroactivity, already the subject of lengthy discussions in both the study group and in the committee of governmental experts, was fundamental to the Swiss delegation. He underlined however that adopting the principle of non-retroactivity would neither legitimise nor legalise any events preceding the entry into force of the Convention. With regard to that period, it would be useful to contemplate certain measures for the restitution of objects, specifically through diplomatic channels or arbitration within the intergovernmental Committee of UNESCO.

The CHAIRMAN recalled that a text had already been prepared, providing a clear “non-legitimising” provision in the preamble, in the sense that nothing in the future Convention could be used or interpreted as legitimising or validating any illegal traffic that had occurred prior to its entry into force.

Mr ALAN (Turkey), although supporting the principle of retroactivity, suggested finding a compromise. In order to ensure that the future Convention would be applied in cases of theft and illegal export which had occurred prior to its entry into force, he proposed a new article which read: “Without prejudice to the provisions set forth in Article 3(3) and Article 5(4), this Convention shall apply to transfers of stolen and illegally exported cultural objects, that occurred after the effective date of the Convention, with respect to cultural objects stolen or illegally exported prior to the effective date of the Convention”.

The CHAIRMAN requested the Turkish delegation to make its proposal available in written form so as to permit its closer consideration.

Mr CREWDSON (International Bar Association) fully supported the statement of the Swiss delegation. He also considered that the Turkish proposal would not alleviate the fears of investors in the art trade. The removal of the previous non-retroactivity clause had turned a substantial body of opinion against the draft Convention. It was therefore absolutely essential to reintroduce the original Article 10(1) in the text of the draft Convention with the appropriate wording, and not simply to deal with the issue in the preamble.

Mr KHODAKOV (Russian Federation) strongly opposed the retroactive application of the future Convention and accordingly supported the proposal of the Netherlands delegation.

Mr HUBBARD (Mexico) supported the Turkish proposal although he indicated the possible existence of a compromise formula, as some constitutional systems prohibited the principle of retroactivity, while other systems admitted it at least in part. He therefore suggested inserting a provision allowing States, at the time of signing the Convention, to make a formal declaration on the retroactive application of the Convention and to define to what extent the principle would apply.

Mr BURMAN (United States of America) emphasised the importance of the retroactivity issue to his delegation. More generally, he shared the opinion expressed by the Swiss delegation that other means, such as diplomatic channels, could facilitate the restitution of objects stolen or removed before the Convention entered into force. He then introduced the proposal of his delegation as set out in CONF. 8/C.1/W.P. 64.

Mr VRELLIS (Greece) understood the concern of those favouring a general non-retroactivity clause. Nevertheless, he underlined that nothing could prevent any legislative body, whether national or international, introducing qualifications to the fundamental principle of non-retroactivity. He therefore asked for the different proposals to be submitted in writing. In the case of unlawfully excavated or lawfully excavated and unlawfully retained objects, proof of the date of excavation and its leaving national territory would be very difficult to determine. For doubtful cases, where it would be impossible to establish whether those events occurred before or after the entry into force of the

Convention, the Greek delegation proposed an additional provision allowing for the possibility of applying the Convention when the date of the excavation could not be proved.

Mr FALL (Guinea) underlined the importance of the issue of retroactivity in particular for exporting countries such as his own. He supported the need to include a provision qualifying the principle of non-retroactivity in the preamble and suggested that a clause encouraging co-operation between States with regard to the return of cultural objects should also be added.

Mr LE BRETON (France) supported the proposal of the Netherlands delegation.

Mr BEKSTA (Lithuania) supported the proposals by the delegations of Turkey, Mexico and Greece.

Mr FOROUTAN (Islamic Republic of Iran) favoured the inclusion of the principle of retroactivity in the draft Convention. However, if the principle were to be rejected by the Committee, he would support the Turkish compromise proposal that the Convention should be applied retroactively within the limitation period applicable to the claim.

Mr EPOTE (Cameroon) stated that the Cameroon delegation wished that certain concerns of the exporting countries, in particular his own, be taken into consideration not only by adding a provision to the preamble, as proposed by the delegation of Guinea, but also by providing the possibility for a State to make a solemn declaration. Furthermore he emphasised that Article 14(2) of Community Directive 93/7 of 15 March 1993 allowed States to apply some form of retroactivity to the provisions of the Directive. A compromise solution was therefore possible.

The CHAIRMAN recalled that the draft preamble also mentioned archaeological excavations.

Mr MARQUES DOS SANTOS (Portugal) expressed the view that non-retroactivity was a fundamental principle of law in a large majority of legal systems. Nevertheless, he wholeheartedly supported adding a provision in the preamble excluding any legitimisation of events prior to the entry into force of the Convention. He was also in favour of a specific non-

retroactivity clause in the Convention. With regard to proposals aimed at allowing countries the possibility of applying the Convention to situations prior to its entry into force, he declared that this possibility already existed under Article 10 of the draft Convention.

Mr YIFHAR (Israel) fully supported the proposal submitted by the United States delegation (CONF. 8/C.1/W.P. 64) and considered that Article 10 might offer a further way of solving the problem.

Mr WEIBULL (Sweden) associated himself with the statement of the Netherlands delegation. He strongly objected to any form of retroactivity and stressed that the insertion of a provision to that effect would be of crucial importance to Sweden when considering ratification of the future Convention.

Mr BUCKLEY (Ireland) supported the views of, and the text proposed by, the Netherlands delegation. He considered it essential to provide a specific provision on non-retroactivity in order also to enable ratification by States for which this principle was a constitutional rule.

Ms DIDIGU (Nigeria) supported the principle of retroactivity. She deemed the simple insertion of a non-legitimising provision in the preamble insufficient and supported the compromise proposed by the Mexican delegation allowing States to declare whether they would support retroactivity, a mechanism already made available in Article 14(2) of the aforementioned European Directive.

Mr PERL (Argentina) shared the opinion expressed by the Portuguese delegation.

Mr WICHIENTHAROEN (Thailand) suggested the inclusion of a "non-legitimising" provision in the preamble and further stressed the importance of introducing both a precise non-retroactivity principle in the draft Convention and a declaration clause whereby Contracting States could unilaterally express their desire to have some form of retroactive application. He also drew attention to the difficulty of pinpointing the moment of the illegal export.

Mr BANDA (Zambia) strongly suggested leaving the Convention open on this matter, as was presently the case in the draft. He agreed that the suggested

declarations might indeed offer an appropriate way of properly handling the consent of States to a retroactive application of the Convention.

The CHAIRMAN stressed the need to insert a non-legitimising provision in the preamble. Although proposals seeking to limit the principle of non-retroactivity were in his view quite legitimate, he suggested that they ought probably to be withdrawn if they were to risk resulting in fewer ratifications of the Convention.

Ms MEKHEMAR (Egypt) supported the proposals of the Turkish and Greek delegations.

Mr LAZAROU (Cyprus) fully endorsed the position of the Greek delegation. He stressed the importance of having both a provision in the text allowing the application of the future Convention in cases where it was impossible to pinpoint the moment of the removal of the object, and the proposed non-legitimising provision in the preamble.

Mr NIELSEN (Denmark) emphasised the importance of the non-retroactivity principle being expressly stated in the future Convention. He also shared the opinion that Article 10 of the draft did allow single States retroactively to apply the Convention, if they so wished.

Mr FRANCONI (Italy) saw no opposition to the principle of non-retroactivity as this was set out in the Vienna Convention on the Law of Treaties. Concerning possible exceptions to this principle, he stressed the desirability of taking into consideration the proposals made seeking to allow some forms of retroactive application of the future Convention in those cases where pinpointing the moment of the illegal export was impossible. More generally, he underlined the existence of a moral duty not to confer the benefit of the doubt on those who had engaged in illegal activities.

Ms KIM (Republic of Korea) supported the views expressed by the delegations of Turkey, Mexico and Greece, as well as those set out by UNESCO in CONF. 8/6. She agreed to the importance of inserting in the preamble a non-legitimising provision for any illegal event that occurred before the entry into force of the Convention.

Mr VIRGOS SORIANO (Spain) supported the inclusion of both a non-retroactivity provision in the text and a non-legitimising provision in the preamble.

Mr KHODAKOV (Russian Federation) supported the addition to the preamble of a non-legitimising provision regarding any events that took place prior to the entry into force of the Convention. Nevertheless, the principle of non-retroactivity must necessarily be included in the text of the Convention itself. At the same time, and in a spirit of compromise, he stated that he was willing to accept the proposal of the Mexican delegation which would allow retroactive application of the Convention by States wishing to do so. He had however to insist on the need to establish a clear provision regarding non-retroactivity, in order to avoid any risk of uncertainty *a posteriori* regarding the interpretation of the Convention.

Mr BURMAN (United States of America) stressed the importance of inserting a provision on non-retroactivity in the text of the draft Convention, and not simply in the Final Act.

Mr HE (China) agreed with the proposal by the Turkish and Greek delegations as well as the representative of UNESCO. He stressed the importance of finding a compromise on this fundamental issue.

Mr HELSTON (United Kingdom) fully supported the Netherlands proposal and stressed that his Government would have very serious difficulties in ratifying the future Convention if the principle of retroactivity were retained.

Ms KAMENOVA (Bulgaria) supported the opinion expressed by the Netherlands delegation.

Mr SAVOLAINEN (Finland) recalled that Article 10 of the draft did allow States to apply the Convention retroactively, if they so wished. Concerning the principle of the non-retroactivity of treaties, unless otherwise agreed, as set out in the Vienna Convention on the Law of Treaties, he stressed that this provision was conceived mainly for treaties of a different character from the future Convention which aimed at the unification of a branch of private law. He therefore emphasised that the non-retroactivity principle should not be taken as self-evident for the Convention and

consequently he considered that an express provision should be inserted in the text.

As to the difficulty of pinpointing the time at which certain events took place, he recalled that in Chapter III the triggering element was the crossing of an international frontier in the context of unlawful export, while in Chapter II, in spite of the different possible alternatives, a rule linked to theft should be worked out.

Mr GRINE (Algeria) declared his delegation's opposition to the insertion of a specific provision on non-retroactivity and expressed support for the Turkish position.

Mr YIFHAR (Israel) suggested establishing, with regard to cases where pinpointing the precise moment of unlawful export, as for instance of excavated objects, seemed impossible, a presumption in the sense of considering those events as having occurred after the entry into force of the Convention. The burden of proving that such an event had occurred prior to that date should be placed on the possessor.

Mr FRIETSCH (Germany) expressed serious doubts as to the need for, and feasibility of, a provision allowing States unilaterally to apply the Convention retroactively, which should be carefully considered in relation to the issue of reciprocity.

Ms HUEBER (Netherlands) stressed the importance of inserting a specific non-retroactivity provision in the text, rather than in the preamble or in the final clauses. She was not in favour of the proposal made by the delegation of the United States, which was in her view too restrictive for the scope of application of the Convention and would cause serious difficulties concerning the burden of proof.

The CHAIRMAN, in order to facilitate the task of the Drafting Committee, summarised the three alternatives that had come to light during the discussions. The first possibility, that of a specific provision establishing the principle of retroactivity, had never been put forward and could therefore be discarded, keeping the option of saying nothing in the text on the issue and leaving the matter open. The second possibility, widely supported, had been the inclusion of a specific provision of non-retroactivity along the lines of the former Article 10 which had appeared in the draft until

the fourth session of the committee of governmental experts. Lastly, the compromise options remaining contemplated either the retention of the fundamental principle of non-retroactivity with exceptions for certain situations, in particular unlawful excavations of archaeological sites or the adoption of an attenuated form of non-retroactivity. He suggested that a decision be taken only when the different options had been submitted in writing. With regard to the proposal that the Convention be silent on the issue, he underlined the risk of uncertainty with regard to the interpretation of the future Convention and above all the risk of a great number of States, whose legal systems already embodied the fundamental principle of non-retroactivity, regarding the future Convention with distrust.

Mr MARQUES DOS SANTOS (Portugal) recalled the possibility, underlined by the Israeli and Portuguese delegations, of applying Article 10 of the future Convention.

Mr BURMAN (United States of America) invited delegations to submit their proposals in writing in order to enable discussion before their consideration by the Drafting Committee. An indicative vote could then be taken during the second reading of the draft Convention in the light of the proposals of the Drafting Committee.

Mr HUBBARD (Mexico) supported the statement of the United States delegation. He recalled that his delegation's proposal constituted a compromise between the two extreme positions adopted during the discussions as it contemplated a declaration clause offering the possibility for Contracting States to accept the principle of retroactivity and to define to what extent they would accept it.

#### *Proposed additional provisions*

Mr SHIMIZU (Japan), recalling that the draft Convention dealt with illegally exported cultural objects, stated that frequently a cultural object covered by it would have to be retained by the competent authorities of a Contracting State in accordance with its domestic law, in connection with the exercise of the criminal jurisdiction of that State. In some cases the cultural object could then be transferred to another State in accordance with the relevant regulations concerning

judicial assistance in criminal investigation and in such situations the latter State might become the possessor of the cultural object. To ensure that the draft Convention would not interfere with such aspects of national criminal justice systems, he introduced the proposal by his delegation as set out in CONF. 8/C.1/W.P. 7.

Mr SAVOLAINEN (Finland) underlined the problem of reconciling the draft Convention with various instruments related to international judicial assistance in criminal matters. The relevance of the 1959 European Convention on Mutual Assistance in Criminal Matters appeared particularly in cases where the object had been illegally exported as well as smuggled into the State addressed, after which it was confiscated. He also recalled the relevance of the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in regard to this issue. The latter Convention contained a particular provision encouraging States in such situations to conclude bilateral arrangements or treaties in order to enable the confiscating State to return the object to the State of origin. Recalling the relevance of other important matters linked to the problem, he stressed that any attempt to deal with them in the context of the draft Convention would result in endless discussions. He therefore suggested mentioning the issue in the Explanatory Report on the Convention in order to clarify that the intention of the Conference had not been to draw up an exhaustive instrument dealing with all possible aspects of the question. However, he firmly objected to the inclusion of anything in the future Convention concerning international assistance in criminal matters.

The CHAIRMAN recognised the complex problem of conflicts of conventions with different purposes covering similar issues. If no Explanatory Report on the Convention were to be published, he suggested mentioning the proposal of the Japanese delegation in the preamble.

Mr WICHENCHAROEN (Thailand) suggested, as this issue was important to the Japanese delegation, that its Government might make a reservation concerning it at the time of ratification, which raised the more general question of whether Contracting States would be allowed to make reservations under the future Convention.

Mr SHIMIZU (Japan) appreciated the statements made by the delegations of Finland and Thailand. He further raised the question of whether there would be an Explanatory Report on the Convention.

Mr EVANS (Secretary-General of the Conference) pointed out there would certainly be an Explanatory Report if the Conference requested Unidroit to prepare one. However, he wished to return in further detail to this matter at the end of the Conference. The Drafting Committee had already suggested dealing with certain matters in the summary records of the Conference and specific points, such as that raised by the Japanese delegation, would naturally be reflected in the minutes as well as in an Explanatory Report if one were to be drawn up.

Mr SHIMIZU (Japan) stated that he was satisfied with the suggestion that his statement be reflected in the summary records of the Conference.

Mr BURMAN (United States of America) stressed the importance of discussing certain matters more thoroughly before concluding the first reading. Some suggestions concerning the final clauses should be discussed in the Committee of the Whole rather than in the Final Clauses Committee, such as the proposal by the delegation of Tunisia (CONF. 8/C.2/W.P. 18) and the proposal by Japan (CONF. 8/5 Add. 1).

Mr EVANS (Secretary-General of the Conference) recalled that it had already been agreed that questions deemed to be of sufficient substance were more appropriately dealt with in the Committee of the Whole than in the Final Clauses Committee.

Mr BURMAN (United States of America) suggested the appointment of an appropriate group to decide whether Contracting States should be permitted to accept only one of the two principal chapters of the Convention. He also recalled the proposal by his delegation (CONF. 8/5 Add. 3) concerning the issue of whether cultural objects acquired during periods of hostilities or occupation were intended to be covered by the future Convention.

The CHAIRMAN recalled, in relation to the last issue raised by the representative of the United States, the concern of several delegations on this point, in particular those of Croatia and Kuwait. It was his

understanding that there had been a general agreement that the present text would also cover the theft and illegal export of cultural objects during periods of hostilities or armed conflict. Without prejudice to the specific rules of public international law, such as those included in the 1954 Hague Convention, the Conference would have to decide whether to deal with the issue in the future Convention and the Drafting Committee would have to decide where to mention it.

Mr BURMAN (United States of America) stressed the importance of defining the exact scope of the future Convention in regard to the issue of armed conflict.

The CHAIRMAN emphasised the difficulty of defining the existence of a state of war and its exact starting point, in accordance with the principles of public international law. He therefore suggested dealing with the question in the future Convention and wondered to what extent delegations would be in favour of including a provision excluding the situations of hostilities or occupation.

Mr EVANS (Secretary-General of the Conference) pointed out that, since this matter had already been discussed by the Committee of the Whole, it was up to the Chairperson of the Drafting Committee to decide whether, at this stage, that Committee had a mandate to consider the issue, or whether it would await guidance from the Final Clauses Committee.

The CHAIRMAN returned to the first point raised by the delegation of the United States concerning the declaration clause as suggested by the Tunisian delegation (CONF. 8/C.2/W.P. 18).

Mr GHOMRASNI (Tunisia) noted with regard to that proposal that its purpose was to clarify that the declaration concerning the question of the determination of the competent authorities was to apply to both Chapters II and III and that it should not in any event contradict any agreements on mutual judicial assistance.

Mr EVANS (Secretary-General of the Conference) recalled that the possibility for States to apply Chapter II or Chapter III had still to be discussed and suggested that the issue be taken up by the Committee of the Whole as it related to the scope of application of the Convention.

The CHAIRMAN agreed on the importance of the so-called “opting out” provision, namely the possibility for a Contracting State to exclude the application of the Convention in part.

Mr AL NOURI (Kuwait) suggested that the amendment proposed by the Tunisian delegation should be discussed by the Final Clauses Committee.

Mr FRAOUA (Switzerland) shared the Chairman’s view that the discussion regarding “opting out” from Chapters II or III was a very important one and he suggested deferring consideration of the matter until the content of the two Chapters had been clarified.

*The meeting rose at 1 p.m.*

CONF. 8/C.1/S.R. 13  
23 June 1995

### **THIRTEENTH MEETING**

Friday, 16 June 1995, 3.15 p.m.

*Chairman* : Mr Lalive (Switzerland)

#### **AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS (CONF. 8/3; CONF. 8/C.1/W.P. 26 Corr., 28, 39, 67 and 69)**

The CHAIRMAN gave the floor to the delegation of the United States to make a statement on procedural questions and on the progress of the Committee of the Whole.

Mr BURMAN (United States of America) suggested that statements concerning adherence to either Chapters II and III would more properly be considered during the second reading of the draft Convention. He also requested that greater consideration be given to the proposal of the United States to include a provision concerning the applicable law in the final text of the Convention (CONF. 8/C.1/W.P. 28).

The CHAIRMAN agreed that delegations would be in a better position to consider possible declarations when they had the revised text of the draft Convention before them. He noted that the addition of a provision

on the applicable law was a matter for the Committee of the Whole and would be discussed after examination of the proposal of the working group on Article 3(4) and (5) (CONF. 8/C.1/W.P. 26 Corr.).

Mr MARQUES DOS SANTOS (Portugal) agreed with the procedure proposed by the delegation of the United States.

#### *Article 3 (continued)*

The CHAIRMAN asked the Chairman of the working group (composed of representatives of the delegations of Cameroon, Canada, France, Greece, the Islamic Republic of Iran, Japan, Mexico, the Netherlands, the Republic of Korea, Switzerland and the United States of America) to present its report on Article 3(3) and (4) to the Committee of the Whole.

#### *Paragraphs (3) and (4) (continued) and (5)*

Mr HUBBARD (Mexico), Chairman of the working group, explained that the group had attempted to dispense with as many of the brackets in its proposed text as consensus would allow. It had agreed that groups of cultural objects belonging to a Contracting State could fall within the definition of “public collection” and also that the term encompassed the cultural objects of a local or regional authority of a Contracting State. He pointed out that paragraph (5)(d) attempted to include non profit organisations that did not necessarily belong to a Contracting State. He explained that the group had been divided as to whether to include the word “inventoried” in Article 3(5) of its proposed text. Supporters of the term had argued that a public collection could not properly be identified without its inclusion while its opponents had pointed out that in many States listing or formal listing of public collections simply did not exist. The group had not considered itself to have a mandate to entertain the suggestion that Article 3(5) of its proposed text should include a reference to cultural objects belonging to a Contracting State whether or not they formed part of a public collection. Moreover, brackets surrounded the proposal of Australia, Canada and the United States concerning indigenous communities (CONF. 8/C.1/W.P. 67) because the group had had difficulty in deciding whether the proposal fell within the terms of reference that the Committee of the Whole had

entrusted to it. Finally, he observed that although the working group had had a mandate to consider the alternative limitation periods included in Article 3(3) of the draft Convention, the provision contained obvious choices that were better reserved for a decision by the Committee of the Whole.

The CHAIRMAN recalled that the observer of the I.A.D.A.A. had suggested that the word “documented” should replace the word “inventoried”.

Ms GAISER (International Association of Dealers in Ancient Art) stated that her association considered that collections must be listed to qualify for the special protection of Article 3, and furthermore suggested the use of the word “documented” as an additional requirement to facilitate identification of a cultural object by means of a photograph or drawing.

Mr McMANAMON (United States of America) introduced the proposal for a new Article 3(6) concerning the cultural objects of indigenous peoples (CONF. 8/C.1/W.P. 67). He explained that the proposal had post-dated the report of the working group and suggested a form of wording slightly different from the text of Article 3(6) appearing in that report. The new version attempted to resolve concerns that had been raised in the working group concerning the extension to cultural objects of indigenous communities of the special protection afforded to public collections. The proposal suggested three principal changes to the text of Article 3(6) proposed by the working group. First, the term “sacred and secret” was replaced by “sacred or communally important cultural objects”. Second, the word “use” was further modified by the words “traditional or ritual” use. Third, further to limit the types of cultural objects falling within Article 3(6), the proposal included an explanatory comment that could be inserted into the Explanatory Report on the Convention.

Mr WICHENCHAROEN (Thailand) objected to the omission from the proposed text of the working group of two qualifications of the meaning of “public collection” which had appeared in the original draft text: (a) the idea that the collection must be accessible to the public and (b) the requirement that the institution which owned the collection must be a non profit making organisation. In his view, the omissions would

allow a commercial institute to profit from the special protection that the draft Convention afforded to public collections. He also supported the inclusion of the word “inventoried” in the proposed text of Article 3(5).

The CHAIRMAN stated that a draft of the preamble currently under preparation referred to public access and to the possibility of limiting public access with respect to certain categories of cultural objects.

The CHAIRMAN of the working group explained that the view had been expressed in the working group that if the institution was public, then the collection was also public. He pointed out that in many cases collections belonging to a public institution were in storage.

Mr GHOMRASNI (Tunisia) referred to the intervention of the representative of the I.A.D.A.A. which had emphasised the necessity of documentation and photographs relating to cultural objects. He considered this justified if its aim was to facilitate the search for a stolen or illegally exported cultural object. However, he felt it necessary to point out that Article 3 was by definition applicable to an object that had already been found, and that at that stage there was no longer any need for such documentation. He objected to the definition given to the concept of public collection, as stolen cultural objects originating in unlawful excavations which had not yet been listed or photographed deserved equal protection. In countries such as Tunisia, the possibilities for the inventorying of cultural objects were very limited. There were twenty-five thousand archaeological sites in Tunisia and only five had been inventoried. Consequently, the Tunisian delegation was in favour of the deletion of the terms “inventoried” and “group of cultural objects” from Article 3(5) of the working group’s proposal, unless those terms were to have a wide meaning and not intended to pose any limitations.

Ms HUGHES (Canada) supported the addition to the draft Convention of the new Article 3(6). She noted that in the working group the view had been expressed that the word “inventoried” would encourage institutions to make lists of cultural objects. Such a consideration was not appropriate with respect to the narrow category of cultural objects in the proposed new Article 3(6) because those objects, by their very nature,

could not be inventoried. She stated that the Canadian delegation would consider it unacceptable if the preferential treatment afforded to public collections in Article 3(5) of the proposed text of the working group did not extend to cultural objects of indigenous communities.

The CHAIRMAN enquired whether the Canadian delegation would agree to the inclusion of the word “inventoried” with respect to public collections that could be inventoried if the term were excluded from the proposed new Article 3(6).

Ms HUGHES (Canada) stated that she would so agree.

Ms BALKIN (Australia) supported the proposal to include a new Article 3(6). She considered unacceptable and unrealistic any requirement that the cultural objects of indigenous communities be “inventoried”. She observed that the words “sacred or communally important” and “part of the community’s traditional or ritual use” restricted the scope of the cultural objects covered by the proposed new provision (CONF. 8/C.1/W.P. 67). She echoed the sentiment of the Canadian delegation that the exclusion of indigenous communities from the preferential treatment that public collections received under paragraph (5) would be unacceptable.

The CHAIRMAN asked whether there was any opposition to the proposal to add the new Article 3(6).

The CHAIRMAN of the working group expressed the view that the category of cultural objects referred to in the proposed new Article 3(6) did not form part of a “public collection” as described in Article 3(5) of the report of the working group. Consequently, if the term “inventoried” were retained in the final text of Article 3(5), it would not apply to the cultural objects covered by the proposed new Article 3(6).

Ms WECHSLER (United States of America) observed that the United States delegation considered that Article 3(5)(d) of the proposed text of the working group was too broad and suggested amendments to the provision (CONF. 8/C.1/W.P. 69).

Mr BOMBOGO (Cameroon) announced that his delegation had made clear the importance it attached to

the concept of a public collection throughout the meetings of the working group. However, he strongly urged that the word “inventoried” should not appear in the text of the future Convention. A distinction should be drawn between the different objects belonging to public collections. He cited the case of archives and other documents which had specific conditions applicable to their accessibility and, in reply to the concerns that had been expressed by the Thai delegation, recalled that the words “accessible to the public” had been omitted in order to take account of the special nature of archives. He alluded to the difficulties currently faced by his country, and noted that in some States an inventory of cultural objects belonging to the national heritage was very difficult to draw up. The term “inventoried” should not be retained as it could lead to States being forced to draw up an inventory of objects belonging to public collections.

The CHAIRMAN recalled that archives could also be subject to a specific provision in the preamble to the future Convention that should be as clear as possible.

Mr SHIMIZU (Japan) expressed the wish of his delegation that the final Convention be accompanied by an Explanatory Report. He observed that during the meeting of the working group the Japanese delegation had reserved its position on Article 3(5) of the proposed text which referred to religious institutions in Contracting States. He noted that while he had no objection to extending the special protection that Article 3 afforded to public collections to collections of established religions, he opposed its extension to other, more alternative, religions. He considered it problematic to entrust to a national judge the task of deciding which religious institutions should qualify for the protection of Article 3 and therefore had reluctantly to propose the deletion of Article 3(5)(c) of the proposed text of the working group (CONF. 8/C.1/W.P. 26 Corr.).

Ms BALKIN (Australia) stated that religious institutions were distinct from indigenous communities and consequently the objection of the Japanese delegation did not apply to the proposed new Article 3(6). She agreed that it was difficult to define a religious institution.

The CHAIRMAN of the working group explained that only religious institutions that the State recognised as serving the public interest would enjoy the special protection of Article 3(5)(c). He conceded that the wording of the proposed Article 3(5) did not make this point clear.

The CHAIRMAN observed that many groups called themselves religious institutions in order to enjoy tax exemptions.

Mr FRAOUA (Switzerland) recalled that the Swiss delegation had taken part in the working group and wished to speak on the problem raised by the reference to religious institutions in Article 3(5)(c) as proposed by the group. The original text had not included such a provision; the former sub-paragraph (c) had in fact dealt with both religious and secular institutions and the separate reference to religious institutions in the new sub-paragraph (c) had been made because one delegation had remarked that in its State there were religious institutions which were not necessarily recognised as being in the public interest. With regard to the Japanese intervention, he declared that the problem raised had been the subject of brief discussion in the working group. He understood the concerns of that delegation, but he considered that the question was not pertinent to the discussion of Article 3(5), which did not provide for a régime to protect religious institutions. The provision only stipulated that cultural objects belonging to religious institutions which made up a group of inventoried objects could, if they had a certain cultural importance, benefit from the specific protection granted to public collections. Finally, he noted that there was in his country no list of religious institutions and that it was not possible for the Swiss delegation to decide in an international convention which religious institutions merited protection as in Switzerland freedom of religion was a constitutional principle.

M. BEKSTA (Lithuania) made several observations with respect to Article 3(5) of the proposed text of the working group. First, he opposed any requirement of public access. Second, he considered that inclusion of the word “inventoried” was essential in order to identify the objects that formed part of a public collection. Third, he stated that he favoured the return to the

explicit reference to non profit making institutions which had appeared in the original text. Finally, his delegation had no objection to the inclusion of the cultural objects of religious institutions within the definition of public collections.

Mr WICHENCHAROEN (Thailand) observed that the exclusion of a reference to public access could be cured by the inclusion of an explicit reference to non profit making institutions. He considered that Article 3(4) and (5) of the proposed text of the working group should be deleted because the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property did not draw a distinction between private and public collections.

Mr KHODAKOV (Russian Federation) considered that the report of the working group served as a good basis for compromise. He supported the retention of the word “inventoried” but in the light of the concern of some delegations he proposed the addition of the words “or otherwise documented” directly after “inventoried”. He repeated the preference of his delegation for a limitation period of seventy-five years and supported the addition of the new Article 3(6), considering its wording superior to that of the proposed version in the report of the working group.

Mr BUCKLEY (Ireland) raised two concerns in regard to the wording of Article 3(5) of the proposed text of the working group. First, with respect to the word “owned”, he observed that it was not unusual for a museum to exhibit borrowed cultural objects. He pointed out that the original text had contained the words “the property of” and observed that while a museum could not argue that it “owned” objects that it had borrowed, it might plausibly argue that the objects it had borrowed were “the property of” the museum. Second, with respect to the word “institution” in paragraph (5)(d), he observed that in some jurisdictions tax benefits accrued to persons who displayed cultural objects to the public but were not institutions. Accordingly, he proposed the following alternative wording for Article 3(5)(d): “a person or an institution in a Contracting State recognised in that State as providing public access to cultural objects”.

The CHAIRMAN of the working group considered that an object was part of a public collection only if it was owned by the institutions listed in Article 3(5) of the proposed text of the working group. Second, he was of the view that the term “public access” was too broad because members of the public had access to collections in private galleries.

Mr ADENSAMER (Austria) observed that under the Austrian Constitution different limitation periods were permissible only if they had a rational justification and suggested that the justification for the preferential treatment accorded to public collections might lie in the higher risk of theft that they ran due to their public accessibility. Accordingly, he proposed that a collection should be accessible to the public in order to qualify as a public collection under paragraph (5). He considered that preferential limitation periods would not be justified simply because the collection belonged to a State. He pointed out that the special nature of cultural objects of indigenous communities was spelt out in the proposed new Article 3(6) but that no such justification could be found in paragraph (5). As it stood, Article 3(5) of the working group text did not provide an appropriate justification for the special protection that public collections enjoyed under Article 3.

Mr VIRGOS SORIANO (Spain) supported the report of the working group with two modifications. First, he favoured the inclusion of the proposed Article 3(6) concerning the cultural objects of indigenous communities. Second, he noted that many States had difficulties in accepting the word “inventoried” in Article 3(5) and suggested its replacement by the formula “inventoried or duly identified cultural objects”.

Mr VRELLIS (Greece) understood the concerns of certain delegations which wished to include the word “inventoried”, which was in square brackets in the working group text of Article 3(5). However, he felt that the importance of the term should not be exaggerated. It was advisable that all States proceed to the inventorying of the objects belonging to their cultural heritage, a task which UNESCO had undertaken. However, many States did not yet have such an inventory at their disposal. The question had to be

raised of the function of the inventory as an evidentiary one and the consequences of adopting such a concept. He considered that courts should not be obliged to deny an object the protection of Article 3(4) if it was clear that the object formed part of a public collection but had not been inventoried.

In relation to the working group’s proposal on Article 3(4) according to which a claim for restitution of a cultural object belonging to a public collection should not be subject to prescription or whose recovery should be limited to a period of seventy-five years, he stated his delegation’s preference for no limitation period at all. He recalled the existence of a proposal with which his delegation had been associated (CONF. 8/C.1/W.P. 39) which set out two alternatives to complete the list of categories of cultural objects not subject to prescription. The first proposed the extension of the category to those objects belonging to a Contracting State while the second sought to protect the integrity of cultural monuments.

Mr SÁNCHEZ CORDERO (Mexico) expressed support for the amendment of the term “inventoried” suggested by the delegation of the Russian Federation. He also called for the Committee of the Whole to discuss the proposal of Cameroon, Cyprus, Egypt, Greece, Mexico and Turkey concerning modifications to Article 3(4) (CONF. 8/C.1/W.P. 39).

Mr RENOLD (Switzerland) considered the working group’s proposed solution for Article 3(5) to be satisfactory, although the positions adopted by certain delegations in the course of the debates troubled him considerably. An attempt had been made clearly to define the concept of a public collection as those cultural objects should benefit from the exception of a longer limitation period or even no limitation period. The attempts to widen the scope of this provision which some delegations were making risked emptying the article completely of its substance. He considered that retaining the term “inventoried” in Article 3(5) was indispensable, and the Greek and Turkish proposal was unacceptable to him. Not all objects originating in archaeological excavations, those making up a monument and all cultural objects belonging to a State could benefit from the protection to be accorded to public collections.

Concerning the new Article 3(6) proposed by the delegations of Australia, Canada and the United States of America (CONF. 8/C.1/W.P. 67), he considered that an effort had been made in order to improve the definition of the sacred objects of indigenous communities and his delegation supported the proposal. He noted that objects making up the category of public collections needed to be clearly identified and determined. He supported the proposal of the United States delegation to define the public interest institutions covered by the protection laid down by paragraph (5) (CONF. 8/C.1/W.P. 69) and concluded that if this provision were emptied of its substance, the Swiss delegation would support the position of the Thai delegation and propose abandoning any provision according a special régime to public collections.

*The meeting was adjourned at 5 p.m.  
and resumed at 5.40 p.m.*

The CHAIRMAN sought clarification of the term “prescription” in the English text of Article 3(4) of the proposed text of the working group. He noted that while the term was used in French, the usual English translation was “statute of limitations”. He noted that even in French a distinction existed between “*prescription*” and “*prescription acquisitive*”.

The CHAIRMAN of the working group explained that “prescription” as used in the proposed text of the working group referred to the question of when, if ever, a claim would expire and therefore concerned limitation periods only.

Mr MARQUES DOS SANTOS (Portugal) congratulated the Chairman of the working group on the result achieved in relation to Article 3(3) and (4). He was favourable to maintaining paragraphs (4), (5) and (6) and to deleting the term “inventoried”. He stated that the term “inventory” was not a constitutive element of the definition of the concept of public collections and accepted the Spanish proposal to replace the term by the expression “duly identified” cultural object. He supported maintaining sub-paragraph (c), which provided that the special régime applicable to public collections should cover objects belonging to religious institutions as well as the proposal made by the delegations of Australia, Canada and the United

States concerning sacred objects belonging to indigenous communities and the United States proposal to restrict Article 3(5)(d) to institutions of a cultural character. He shared the concerns of the Swiss delegation and recalled that initially it had been considered that the distinction between a long limitation period or none at all would depend on the breadth of the definition of a public collection.

Mr MAURO (Holy See) considered that religious institutions should be viewed in the same way as the other institutions covered by Article 3(5). The ambiguous nature of the provision resulted from the use of the term “public”, which could be interpreted in the sense of public property or public ends and he enquired whether the intention here was to refer to a religion in the widest sense or to a legal person which was part of a religious institution.

He did not share the views of those delegations which considered it difficult to define a religious institution. In some States there was an official religion, in others there was no official recognition of one religion but it was possible to identify certain religious institutions which benefited from an official position or special status. It would consequently be preferable to specify that religious institutions should have special relations with a Contracting State in order for the objects belonging to such institutions to constitute a public collection. He wondered whether a religious institution could not itself confer on a collection of cultural objects owned by it the character of a public collection and supported the proposals made to find a more precise wording for the provision. He was in favour of taking into account public access to a collection in order to determine the existence of a public collection and specified that, in relation to cultural objects belonging to a religious institution, the access of representatives of other religions could be a factor.

Mr YIFHAR (Israel) proposed that the reference to religious institutions in Article 3(5)(d) of the proposed text of the working group should be confined to religious institutions that were recognised by a Contracting State. With respect to Article 3(5)(b), he proposed the insertion of the word “national” before the word “regional”.

The CHAIRMAN asked the Chairman of the working group if it could be considered that a common trait of the institutions defined in sub-paragraphs (b), (c) and (d) was that they had to be recognised by a Contracting State.

The CHAIRMAN of the working group explained that the group had intended Article 3(5)(d) to include every institution recognised by the State. He noted that for a religious institution to enjoy the benefits of Article 3, it must be recognised by the State and he believed that the proposal to amend Article 3(5)(d) in CONF. 8/C.1/W.P. 69 would clarify the provision.

Mr ZIMBA CHABALA (Zambia) repeated that his delegation would prefer no limitation periods to apply to a claim for restitution of a cultural object that belonged to a public collection. He objected to the use of the word “inventoried” because it would pose practical difficulties for many States and supported the proposal of the Portuguese delegation that the term be replaced by the words “duly identified”. With respect to paragraph (5)(a)-(d), he endorsed the text proposed by the report of the working group and also supported the proposal to add a new Article 3(6) concerning the cultural objects of indigenous communities. In this regard, he stated that Article 3(5) should, like Article 3(6), not contain the word “inventoried”.

Ms HUEBER (Netherlands) considered that the word “inventoried” was essential to lend certainty to the meaning of the term “public collection”. She agreed with the proposed revision of Article 3(5)(d) (CONF. 8/C.1/W.P. 69). With respect to the proposal to add a new Article 3(6), she suggested deletion of the word “or” appearing between “traditional” and “ritual” because she feared that objects such as cooking spoons would otherwise fall within the scope of the provision. She questioned whether the word “needed” in the proposed commentary on new Article 3(6) (CONF. 8/C.1/W.P. 67) implied that totem poles made for tourists would fall within the definition. She recalled that the extended limitation periods in Article 3(4) were an exception to the general rule in Article 3(3). As an exception, they should be applied to a narrow category of cultural objects. She noted, however, that the definition of the term “public collection” was fast departing from the parallel definition in EEC Directive

93/7 to which the exception in the draft Convention owed its origins. Proposals had been made to remove the word “inventoried” and to extend the benefits of Article 3(4) to indigenous communities and to objects owned by a State (CONF. 8/C.1/W.P. 39). In short, the exception in Article 3(4) was in danger of becoming the rule. Accordingly, she proposed the deletion of Article 3(4)-(6) so that the limitation periods in Article 3(3) would apply to all cultural objects.

The CHAIRMAN, with the full agreement of the Secretary-General of the Conference and the Chairman of the working group, suggested that an indicative vote be taken on two issues: (a) whether the word “inventoried” should be deleted or retained; and (b) whether to insert the proposed new Article 3(6) (CONF. 8/C.1/W.P. 67). With respect to the second issue, he enquired whether a vote was necessary because it seemed that the Committee of the Whole had already tacitly accepted the provision.

Mr EPOTE (Cameroon) recalled the proposal submitted by the delegations of Cameroon, Cyprus, Egypt, Greece, Mexico and Turkey (CONF. 8/C.1/W.P. 39) which provided for the absence of any limitation period for certain objects. As to the question of religious institutions, he did not consider that there would be any difficulty in applying Article 3(5)(c). In each country, domestic legislation organised the activities of religious institutions and there was therefore no need to debate which religious communities, of greater or lesser importance, should be considered religious institutions for the purposes of the future Convention. On the subject of sacred objects belonging to indigenous communities, he specified that cultural objects used ritually or during ceremonies had special importance in relation to the philosophy of a community. The delegation of Cameroon was not in favour of the term “inventoried” but was ready to accept a compromise, i.e. that the term “inventoried” be replaced by “duly documented” or “otherwise identified” as had been proposed by some delegations.

The CHAIRMAN enquired whether there was support for the deletion of paragraph (5)(c) of the report of the working group concerning religious institutions.

Mr MARQUES DOS SANTOS (Portugal) recalled that the delegations of Thailand and the Netherlands had proposed the deletion of Article 3(4)-(6).

The CHAIRMAN stated that consideration of the fate of Article 3(5)(c) would not prevent delegations voting on the issue of the deletion of Article 3(4)-(6) at a later stage and asked whether any delegation called for the deletion of Article 3(5)(c). In the absence of any objections to the provision, he deemed it to have been accepted. He then called for an indicative vote on the question of whether delegations supported retention of the word “inventoried” accompanied by an expression such as “or duly documented” or “or otherwise identified”.

*Fifteen delegations voted in favour of such a formulation.*

He then called for an indicative vote on the question whether delegations supported deletion of the word “inventoried” with or without accompanying words.

*Fourteen delegations voted in favour of deletion.*

Mr FRAOUA (Switzerland) questioned whether the meaning of the vote had been clear to all delegations. He proposed that a vote be taken first in order to clarify whether a majority of delegations had been in favour of retaining the term “inventoried”, how many against and how many had abstained. Subsequently, if the vote was in favour of keeping the term, it could be decided whether the provision should be completed by other more specific terms of the kind that had been proposed by some delegations.

The CHAIRMAN stated that the proposal of the Swiss delegation followed the procedure that he had originally advocated.

Mr PRUSZYNSKI (Poland) disagreed with the definition of “public collection” contained in the report of the working group on the ground that it was too specific. He proposed instead that the laws of Contracting States should determine the meaning of the term. In his view, a public collection was one which was recognised by the State or local authority and supported in law by public funds in the public interest. With such a

definition, he considered it to be immaterial who owned the collection or whether it was inventoried.

The CHAIRMAN, in agreement with the Chairman of the working group, stated that he would call a vote either during the current meeting or the following day on the issue of whether the word “inventoried” should be deleted or retained in Article 3(5).

Mr ALAN (Turkey) supported the observations of the delegations of Greece and Tunisia on the word “inventoried”.

Mr ONWUGBUFOR (Nigeria) proposed votes on the following issues: (a) the retention or deletion of the word “inventoried”; (b) the limitation periods to be applied in Article 3(4); and (c) the retention of Article 3(5)(c) concerning religious institutions.

The CHAIRMAN stated that no delegation had opposed the inclusion of Article 3(5)(c) in the final text of the Convention and that he would therefore not call an indicative vote on the subject. He would call for an indicative vote on limitation periods later.

Mr ONWUGBUFOR (Nigeria) stated that he was not opposed to the addition of the proposed new Article 3(6) concerning indigenous communities. However, he would favour exclusion of the provision unless the term “indigenous community” was clarified.

Mr CREWDSON (International Bar Association) urged the Chairman to take an indicative vote on the issue of whether Article 3(4) and (5) should be deleted altogether.

The CHAIRMAN stated that he would call an indicative vote on this issue at a later stage. He asked the Chairman of the working group if he considered it opportune to call a vote on the retention or deletion of the word “inventoried” in Article 3(5).

Mr YIFHAR (Israel) observed that the Committee of the Whole had already agreed by an indicative vote to extend special protection to public collections. He was therefore surprised that the representative of the International Bar Association had requested a vote to delete a reference to public collections in the final text of the Convention.

The CHAIRMAN disagreed with the interpretation of the Israeli delegation. He stated that the focus of the discussion was the report of the working group and that was the text which would be submitted to the Drafting Committee.

Ms HUEBER (Netherlands) considered it inappropriate to call an indicative vote since many delegations had already left the meeting.

The CHAIRMAN agreed and stated that an indicative vote would be postponed until the following day.

*The meeting rose at 6.45 p.m.*

CONF. 8/C.1/S.R. 14  
21 June 1995

#### **FOURTEENTH MEETING**

Saturday, 17 June 1995, 9.45 a.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/2 Corr.; CONF. 8/3; CONF. 8/4; CONF. 8/5 Add. 3; CONF. 8/6; CONF. 8/6 Add. 1; CONF. 8/C.1/W.P. 7, 26 Corr., 28, 39, 46, 67, 69 and 74; CONF. 8/C.2/W.P. 6 Corr.; CONF. 8/D.C./Doc. 1 Corr.)

*Article 3 (continued)*

Mr EVANS (Secretary-General of the Conference) outlined the agenda for the meeting. He recalled that the redrafts of Article 3(1) and (2) prepared by the Drafting Committee in CONF. 8/D.C./Doc. 1 Corr. were not intended to prejudice the results of the work carried out by the working group on Article 3(3) and (4) (CONF. 8/C.1/W.P. 26 Corr.). As regards the votes to be taken with regard to Articles 3(3) and 3(4), he added that these were merely indicative votes since they formed part of the first reading of the draft Convention.

*Paragraph (5) (continued)*

The CHAIRMAN proposed examining the working group's report and the alternative texts proposed by it

before proceeding to the indicative votes which were essential for the Drafting Committee to continue its work.

He noted that, in the absence of objections, the Committee approved the suggestions of the Secretary-General and proposed proceeding to indicative votes on the proposals, on the understanding that each delegation would be free to express its views during the second reading.

As a first indicative vote, he enquired whether delegations wished to retain or delete the word "inventoried".

*Thirteen delegations favoured the retention of the word and fifteen delegations its deletion, with six abstentions.*

*On a second indicative vote the Committee agreed, by thirty votes to two with nine abstentions, that if retained, the word "inventoried" should be accompanied by such words as "or otherwise documented" or "identified".*

The CHAIRMAN suggested a further indicative vote on the proposal to amend the *chapeau* of Article 3(5) as certain delegations, and in particular that of Ireland, found the language inappropriate with regard to categories of collections such as loaned or stored collections.

Mr KHODAKOV (Russian Federation) underlined the linguistic difficulty concerning the words in the English version "owned by" and the French version "appartenant à" in the *chapeau* of Article 3(5). He considered that the exact translation into English of the French term "appartenant à" was "belonging to". The term "owned by" implied possession or the right of possession whereas the expression "appartenant à" simply indicated in whose hands the object was situated, without attaching any legal significance thereto.

The CHAIRMAN agreed that the term "appartenant à" was approximately equivalent to "belonging to" as those two words did not embody the legal notions of ownership unlike "owned by". He considered however that the wording "appartenant à" and "belonging to" were sufficiently ambiguous to cover both the notion of ownership and a relationship to the object which did not necessarily imply ownership.

Mr RENOLD (Switzerland) declared that the intention of the working group set up on Article 3 had been to focus on ownership alone and that the term “appartenant” should consequently be understood as meaning “étant la propriété de” (owned by).

Mr BUCKLEY (Ireland) expressed his concern regarding the words “owned by” in the new Article 3(5) as proposed by the working group on Article 3(3) and (4) in its report (CONF. 8/C.1/W.P. 26 Corr.). He explained that it was very common for objects to be lent to museums on a long term basis and that in such cases it was often difficult to determine the person owning the object after a considerable period of time had elapsed. He felt that there was a danger that those cases might not be covered by the future Convention and he therefore suggested adding language to the introductory part of the provision so that it would read “... cultural objects owned by/or in the custody of: ...”. He added that his concern with regard to this problem had been considerably increased by the comments of the delegation of the Russian Federation.

Ms WECHSLER (United States of America) replied to the remarks made by the Irish delegation that all cases in which the object had been loaned to a public collection by another public collection would be covered by the provision, since the object would be considered as belonging to the first of those public collections. If, however, the object had been loaned to the public collection by a private person, the object would not and should not be covered by the provision.

Mr BUCKLEY (Ireland) stated that although he fully understood which cases were covered by the current wording of the provision, he still could not accept the distinction that was made there. He felt it unacceptable that a painting in a public collection would be covered by the provision because it was owned by a museum while another painting on display in the same collection would not be covered for the sole reason that the owner could not be identified with the required certainty.

Mr FRAOUA (Switzerland) considered that the question raised by the Irish delegation had been discussed at length by the working group which had made a conscious choice, given that it had a mandate to define objects of a public collection and not objects in

private or public museums which had in their possession private or publicly owned cultural objects. The criterion for the definition distinguishing between them was therefore ownership. In fact either a public or a private museum or even a State could be the owner of a cultural object as defined without being in possession of it. The question of whether there should be a distinction between public or private cultural objects had been raised during the working group meetings and the view had been taken that to include privately owned objects in the definition of public collections would empty the term “public” of all meaning so that only the word collection would need defining.

The CHAIRMAN observed that the proposal of the Irish delegation to broaden the scope of application of the paragraph related to a question of substance and, in agreement with the Chairman of the working group, he suggested proceeding to an indicative vote to ascertain how many delegations supported the proposal of the Irish delegation and how many favoured that of the working group, subject to improving its drafting.

Mr ONWUGBUFOR (Nigeria) agreed with the view taken by the Irish delegation, likewise finding the distinction unacceptable. The provision should be drafted in such a way as to include any object in the custody of a public collection irrespective of its owner. He suggested that a different expression should be used to describe the objects covered by the provision such as “controlled by”, “in the custody of” or “belonging to”.

The CHAIRMAN of the working group stated that one should always bear in mind the fact that the distinction drawn in the proposed Article 3(5) was only important to determine whether or not an object was covered by Article 3(4). This distinction did not in any way affect the question of whether the object was covered by the future Convention as a whole. He explained that the distinction in Article 3(5) was only intended to provide a special kind of protection for certain objects. If the definition in Article 3(5) were to include privately owned objects then no reasonable distinction would be left.

As a member of the Mexican delegation he believed that the whole provision would lose its significance and its justification if the Irish proposal were to be adopted. He therefore thought that there was no need to take an indicative vote on the question.

The CHAIRMAN noted that the observations put forward by the Chairman of the working group reflected those of the Netherlands delegation which emphasised the importance of the general context.

*On an indicative vote, the Irish proposal was supported by seven delegations, while twenty-eight preferred the text of the working group and ten abstained.*

The CHAIRMAN enquired whether there were any proposals to amend Article 3(5)(a) and in the absence of any declared that it was superfluous to proceed to an indicative vote on that sub-paragraph.

Mr CREWDSON (International Bar Association) once again drew attention to Article 3(5)(b) stating that according to his recollection the Israeli delegation had suggested at the previous meeting the addition of the word “national” to the present text of the provision.

The CHAIRMAN stated that if this suggestion had been made the Drafting Committee would perhaps bear this in mind and give it due consideration. He asked whether there were any proposals to amend sub-paragraph (c). Since this was not the case, he proposed passing on to sub-paragraph (d).

Ms WECHSLER (United States of America) drew attention to CONF. 8/C.1/W.P. 69 that had just been distributed.

Mr KHODAKOV (Russian Federation) explained that according to Article 28 of the Rules of Procedure of the Conference (CONF. 8/2 Corr.) no proposal should be discussed or put to the vote unless copies of it had been distributed to all delegations at the latest on the day preceding the meeting. He was nevertheless prepared to consider the proposal if there was a possibility of discussing it. He then asked those delegations which had submitted the proposal in CONF. 8/C.1/W.P. 69 to explain what was meant by a cultural institution. He was concerned that this term would not include scientific institutions although these should be covered by the provision since they also might hold cultural objects. To avoid any problems in the interpretation of the provision he suggested that the word “scientific” be added to the proposed text so that it would then read “(d) an institution that is established

for an essentially cultural, scientific or educational purpose”.

The CHAIRMAN of the working group stated that this was merely a question of interpretation. He considered that scientific institutions were covered by the current wording. Since, however, this was a matter of drafting there should be no difficulty in including the word as suggested.

The CHAIRMAN stated that the proposal of the Russian Federation to add the term “scientific” to the term “cultural” would be examined by the Drafting Committee without the need for an indicative vote.

Mr MARQUES DOS SANTOS (Portugal) asked for the United States proposal to be submitted to an indicative vote since the proposed text differed from the current text, with or without the addition put forward by the delegation of the Russian Federation.

Mr EVANS (Secretary-General of the Conference) suggested that it might be desirable first to take an indicative vote on the question of whether Article 3(5) should be retained with the wording as suggested in CONF. 8/C.1/W.P. 26 Corr. or with that suggested in CONF. 8/C.1/W.P. 69. If a majority of the delegations favoured the wording in CONF. 8/C.1/W.P. 69, then a second vote could be taken on the proposal made by the delegation of the Russian Federation.

*Twenty delegations voted in favour of the working group text, three in favour of the modifications proposed by the United States delegation and five delegations abstained.*

Mr MARQUES DOS SANTOS (Portugal) underlined that the vote concerned Article 3(5)(d).

The CHAIRMAN enquired of the delegation of the Russian Federation whether it wished an indicative vote on its proposal.

Mr KHODAKOV (Russian Federation) stated that in the absence of objections to his delegation’s proposal, he saw no need for such a vote.

#### *Paragraph (6)*

The CHAIRMAN called for three indicative votes, the first concerning the retention of Article 3(6) in

principle, leaving aside the issue of limitation periods or imperscriptibility.

*Twenty-six delegations voted in favour of such maintenance, two delegations against and sixteen abstained.*

The CHAIRMAN put a second indicative vote concerning the amendment proposed by the delegations of Australia, Canada and the United States (CONF. 8/C.1/W.P. 67).

*The amendment was adopted by twenty-one votes to none, with twenty seven abstentions.*

The CHAIRMAN enquired whether there were any other proposals to amend the drafting of paragraph (6).

Mr FRAOUA (Switzerland) asked for an indicative vote on the addition to the text adopted by the Committee of the words “inventoried” or “otherwise identified”.

Mr MARQUES DOS SANTOS (Portugal) specified that the term “inventoried” was absent from the text proposed by Australia, Canada and the United States (CONF. 8/C.1/W.P. 67). However this proposal had just been adopted by the Committee of the Whole. Consequently, the term “inventoried” should not be submitted to a vote.

Ms HUEBER (Netherlands) repeated the proposal made by her delegation at the previous meeting to delete the word “or” between the words “traditional” and “ritual” in the text proposed in CONF. 8/C.1/W.P. 67.

Mr FRAOUA (Switzerland) stated that the first vote had clearly referred to Article 3(6) as put forward by the working group without taking into account the language in square brackets. However, in the working group’s proposal, the term “inventoried” had appeared in square brackets. The Swiss delegation had therefore abstained on the first question pending the indicative vote on the words in square brackets.

The CHAIRMAN proposed an indicative vote on the Swiss proposal, which the Swiss delegation was asked to repeat.

Mr FRAOUA (Switzerland) emphasised that his delegation’s proposal consisted in adding the words

“inventoried or otherwise identified or documented” to the text proposed jointly by Australia, Canada and the United States.

The CHAIRMAN stated that in the absence of objections, he would put the Swiss proposal to an indicative vote.

*The proposal was defeated by eighteen votes to twelve, with sixteen abstentions.*

Ms HUEBER (Netherlands) repeated her prior proposal to delete the word “or” in the proposal in CONF. 8/C.1/W.P. 67. She explained that otherwise objects such as cooking spoons would be covered by the wording, which should not be the case.

Mr McMANAMON (United States of America) felt that the wording “traditional or ritual” was quite appropriate. He agreed that this category should only include a limited number of objects. As to the particular example of cooking spoons, he thought that it might well be the case that one or two cooking spoons might in fact be traditionally used by indigenous communities and that they might have a sacred or otherwise communally important status within those communities. The number of such objects was however very small and he drew attention to the proposed explanatory note on the provision (CONF. 8/C.1/W.P. 67).

Mr MARQUES DOS SANTOS (Portugal) asked what specifically was to be deleted and where.

The CHAIRMAN requested the Netherlands delegation to clarify its proposal.

Ms HUEBER (Netherlands) recalled that her delegation had made a proposal to delete the word “or” immediately before the square brackets in CONF. 8/C.1/W.P. 67. She added that it might even be better not to delete the word “or” but to replace it by the word “and”. Accordingly she asked that the indicative vote be taken on her proposal to replace the word “or” by the word “and”, her proposal to delete the word “or” no longer being on the table.

The CHAIRMAN enquired, before the vote, if all delegations had understood the Netherlands proposal, which now consisted in replacing the word “or” by “and”, in the sentence “... part of that community’s traditional or ritual use”.

Mr KHODAKOV (Russian Federation) stated it to be his understanding of the Netherlands proposal that it sought to eliminate the overlapping of the two adjectives “traditional” and “ritual”. However, replacing the words “or” by “and” would make the provision unclear, as the word “and” could be interpreted as establishing both a cumulative and an alternative condition in each of the language versions.

The CHAIRMAN noted that the turn the discussion was taking showed the need for the clarification called for by the Portuguese delegation. This being said it was quite clear to him that a cumulative condition would be established by the word “and” and an alternative condition by the word “or”. In the absence of objections from the authors of the joint proposal of Australia, Canada and the United States (CONF. 8/C.1/W.P. 67), he proposed an indicative vote on the Netherlands proposal.

*Eleven delegations voted in favour of the Netherlands proposal, twenty-one against, and eighteen abstained.*

*Paragraph (4)*

The CHAIRMAN proposed that the Committee consider the choice before it, in connection with Article 3(4), between imprescriptibility, a time bar of seventy-five years or another period for public collections as defined.

Ms PROTT (UNESCO) found the word “prescription” in the proposed text of Article 3(4) (CONF. 8/C.1/W.P. 26 Corr.) to be ambiguous. She explained that certain countries used the word “prescription” in their legislation or even in their Constitution. This could give rise to problems of interpretation in those countries since the impression might be given that the use of the word “prescription” would refer to that law. To be precise she recalled that the proposed provision did not deal with prescription but rather with limitation periods for certain claims. It should therefore be made quite clear that the provision would have no effect on the status of imprescriptibility for certain categories of goods in national legal systems.

The CHAIRMAN agreed and recalled that this concern had already been expressed in other words by

the Chairman of the working group on Article 3(3) and (4).

Mr ALAN (Turkey) recalled the proposal in CONF. 8/C.1/W.P. 39 and asked whether it would be discussed before taking an indicative vote on the limitation periods.

The CHAIRMAN stated that it was his understanding that the proposal in CONF. 8/C.1/W.P. 39 had already been dealt with by the indicative vote on the question of imprescriptibility. He therefore suggested that subject to the outcome of the indicative vote, the proposal in CONF. 8/C.1/W.P. 39 should be referred to the Drafting Committee. He noted that the Turkish delegation agreed with this procedure.

Mr RENOLD (Switzerland) saw the issue of imprescriptibility as being a major problem for many States present, including Switzerland, for constitutional reasons. However, in the interests of reaching a compromise acceptable to all delegations and in conformity with the EEC Directive, the Swiss delegation proposed a new drafting of Article 3(4) (CONF. 8/C.1/W.P. 74) which States in favour of imprescriptibility and those in favour of a seventy-five year period of limitation could find satisfactory as it combined both solutions.

Mr GHOMRASNI (Tunisia) stated his delegation’s approval of the Turkish proposal (CONF. 8/C.1/W.P. 39) and observed that the Committee of the Whole had already voted on the issue of imprescriptibility so that another vote was superfluous.

Mr MARQUES DOS SANTOS (Portugal) recalled that the position of the Portuguese delegation on limitation periods was subject to the breadth of the definition of a public collection. The notion of a public collection being much better defined following the indicative vote, and since cases of theft, an internationally condemned act, of objects belonging to a public collection were at issue, Portugal was in favour of no limitation periods but could also accept the Swiss proposal if a majority of delegations supported it.

The CHAIRMAN, in reply to the Tunisian delegation, recalled that the voting concerning the length of limitation periods or the absence of them had been deliberately left aside pending agreement of the

Committee regarding the definition of a public collection.

Mr VRELLIS (Greece) stated that it did not seem necessary to return to the debate regarding the length of limitation periods because this had been thoroughly discussed and a definition of public collection had been agreed on. An indicative vote could consequently take place without any further discussion.

In any event, the proposal of the Swiss delegation could not be considered a true compromise solution. It was important for Greece that with regard to certain categories of cultural objects the State of origin could always bring a claim for restitution of the stolen object, without this claim being subject to limitation periods established by the domestic law of the State addressed. The Swiss proposal did not establish a compromise solution but merely a linguistic variation. Greece was also opposed to the European Directive on this point and persisted in its support of imprescriptibility even if this meant standing alone.

The CHAIRMAN observed that what seemed a compromise for some was not always a compromise for others. However, he recalled that the vote was only indicative and would facilitate the Drafting Committee's task. The Swiss proposal seemed to him to be an amendment and should therefore be put to the vote. He furthermore reminded delegations of the comments of the representative of UNESCO and of the Chairman of the working group.

Mr GHOMRASNI (Tunisia) did not consider the Swiss proposal to be a compromise solution since his delegation concluded that the applicable law should be that of the State of origin.

Mr MARQUES DOS SANTOS (Portugal) repeated his delegation's support for imprescriptibility but, if the majority did not agree on this, it would support the Swiss proposal. He therefore proposed submitting to a vote the choice between the principle of imprescriptibility and the adoption of a limitation period of seventy-five years.

The CHAIRMAN thanked the Portuguese delegation for his procedural proposal and asked the Swiss delegation clearly to state its proposal.

Mr RENOLD (Switzerland) repeated the Swiss proposal (CONF. 8/C.1/W.P. 74).

The CHAIRMAN asked whether the Swiss delegation agreed to proceed as suggested by the Portuguese delegation.

Mr FRAOUA (Switzerland) replied in the affirmative.

The CHAIRMAN accordingly proposed a first vote on the limitation period of seventy-five years, followed by a second vote on imprescriptibility and lastly, if a majority supported the latter proposal, then on the Swiss proposal. In the absence of objections he began the voting procedure.

*Fourteen delegations supported the limitation period of seventy-five years for public collections as defined by the working group, thirty-five the principle of imprescriptibility, and four abstained.*

Mr ADENSAMER (Austria) stated that he had wished prior to the taking of the vote to declare that this was a very important question for his country. He believed that following the decision that had just been taken, it had also been decided that Austria would not be able to become party to the future Convention as any kind of imprescriptibility would be unacceptable for his country.

The CHAIRMAN offered to repeat the vote.

Mr ADENSAMER (Austria) indicated that he did not wish the vote to be repeated.

The CHAIRMAN hoped that the risk of certain countries like Austria not becoming party to the future Convention would be one of the factors to be taken into consideration on the occasion of the final vote on the question of imprescriptibility during the second reading. He further stated that notwithstanding the remarks made by the Greek delegation, it seemed to him that the Swiss proposal in CONF. 8/C.1/W.P. 74 did represent a compromise solution as it reflected a notion of "qualified imprescriptibility". He added that this proposal would now be put to the vote.

Mr SÁNCHEZ CORDERO (Mexico) expressed the view that putting the Swiss proposal to a vote would no longer have any sense.

The CHAIRMAN suggested that the decision whether or not the proposal should be voted should be left to the Swiss delegation.

Mr FRAOUA (Switzerland) stated that this vote was as important for the Swiss delegation as for the Austrian delegation. His delegation would accept the outcome of the indicative vote but would have to draw its own conclusions as to the consequences.

Ms HUEBER (Netherlands) fully shared the sentiments of the Austrian and Swiss delegations but recalled that a vote had still to be taken on the proposal to delete paragraphs (4), (5) and (6) of Article 3. If those provisions were to be deleted altogether, the problem would no longer exist.

Mr VIRGOS SORIANO (Spain) supported the view of the Swiss delegation as he thought it extremely important for every country to be able to become a party to the future Convention; this would be very difficult for those countries whose domestic legal systems did not provide for *imperscriptibility* with regard to their own public collections. For those countries, the consequence would be that they would have to recognise and enforce a rule of *imperscriptibility* with regard to foreign public collections, which would thereby be placed in a more favourable position than their own national collections.

Mr VRELLIS (Greece) stated that the Greek delegation regretted the statements of certain delegations. He underlined that Greece would never have reacted in that manner had the outcome of the indicative vote not corresponded to its wishes and this notwithstanding the great importance of the issue of public collections for all States. He recalled his reticence regarding the Swiss proposal, which had been motivated by another reason: on a practical level, an exporting State like Greece which recognised *imperscriptibility* would in fact allow an importing State to benefit from this régime when bringing a claim before a Greek court, whereas an exporting State would be met by the time bar provided for by the national law of an importing country when bringing a claim before the latter's courts.

The Swiss proposal was therefore not a compromise solution as it did not admit reciprocity. He considered it wise to abstain from making general declarations of principle and not to forget that States

which were the victim of the export of cultural objects were also importing countries.

The CHAIRMAN observed that all the delegations agreed that the issue of the public collections was a very important one and he stated that he had been impressed by the attitude of the Spanish delegation, a country which was nevertheless a victim of illicit traffic and theft, especially from public collections. The choice faced by the exporting States was however simple: either the limitation period of seventy-five years would be accepted and the future Convention would have a good chance of being signed by a vast majority of importing States, or *imperscriptibility* would be chosen and some of those importing States would not ratify the future Convention, in which case this would not in fact constitute any great step forward as the Convention would not be accepted by those States whose ratification was of importance to the exporting States.

Mr MARQUES DOS SANTOS (Portugal) recalled that for the moment indicative votes were being taken and that only on second reading would the votes be binding. All States present wished to see the Netherlands, Austria and Switzerland accede to the future Convention, aware as they were of the importance of ratification by those countries with regard to the protection of cultural objects and to trade in them. The fate of public collections could definitely give rise to different opinions, but this was a very specific aspect of the future Convention, not its main feature.

Furthermore, *imperscriptibility* did not cover all objects, but only a limited category which were public collections and these only within the context of theft. The issue therefore was not so dramatic and furthermore the proposals of the Netherlands and Thailand concerning the question of whether or not the future Convention should contain specific provisions dealing with public collections remained to be voted on. Furthermore, the Community Directive allowed *imperscriptibility* in this matter in some cases and this should not therefore be an obstacle at least for the Netherlands and Austria, as they were members of the European Union.

Mr LE BRETON (France) shared the view expressed by the Portuguese delegation and reminded

the Netherlands and Austrian delegations that this was only an indicative vote and that there was enough time before the second reading to discuss the issue again, not forgetting that France had voted in favour of imprescriptibility. He considered that some form of compromise could still be reached. For linguistic reasons he proposed replacing the word “claim” by “action” at the beginning of Article 3(4).

The CHAIRMAN stated that this drafting proposal was fully in line with the explanations given in this connection by the working group.

Mr BURMAN (United States of America) agreed with the French delegation. He added that no delegation should take up doomsday positions after each vote that came to a result different from its own position. He felt this to be even more important having regard to the fact that so far no final voting was under way. He added that the laws of the United States provided for imprescriptibility. Finally, he expressed his hope that a little more patience would be shown by all participants.

*The meeting was adjourned at 11.30 a.m.  
and resumed at 12.15 p.m.*

Mr KHODAKOV (Russian Federation) expressed his concern with regard to the very poor attendance at the meetings of the Final Clauses Committee. He also felt that problems discussed in that Committee went beyond the classical scope of final clauses and thought that matters such as the proposal by the United States delegation concerning armed conflict (CONF. 8/C.2/W.P. 6 Corr.) should be discussed in the Committee of the Whole, rather than in the Final Clauses Committee. Issues such as reservations or limitations on the scope of application of the future Convention, for example by regional agreements, should also be discussed by the Committee of the Whole to which they should be immediately referred. Otherwise there was a risk of a large amount of time being lost when those clauses were presented to the Committee of the Whole for the first time on second reading.

The CHAIRMAN agreed that many, if not all, of the points mentioned by the delegation of the Russian Federation were very important and should therefore be dealt with by the Committee of the Whole. He suggested, however, that a practical procedure should

be worked out to ensure that those questions were dealt with as quickly as possible.

Mr EVANS (Secretary-General of the Conference) recalled that there had already been extensive discussion on the question of armed conflicts and that this problem had then been referred to the Drafting Committee. He had no recollection that this question had ever been referred to the Final Clauses Committee. With regard to the question of regional agreements, he explained that the Secretariat of Unidroit had initially felt that the most appropriate solution was to refer this question to the Final Clauses Committee. At that time, however, the level of attendance in the Final Clauses Committee had of course not been known. He added that if it was felt that the question should be dealt with by the Committee of the Whole, a short meeting of the Conference should be called for Monday morning since only the Conference had the authority to decide which Committee should deal with a particular issue.

Mr BURMAN (United States of America) indicated that another way of resolving the problem might be to discuss informally the issues in the Committee of the Whole and then refer the questions back to the Final Clauses Committee to make the final determinations. This would at least ensure that the issues had already been dealt with in the Committee of the Whole prior to the second reading.

The CHAIRPERSON of the Drafting Committee stated that questions concerning the Hague Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 had already been discussed in the Committee of the Whole and had then been referred to the Drafting Committee. She added that she considered it inappropriate to reopen discussion on this point now.

The CHAIRMAN fully agreed with the view taken by the Chairperson of the Drafting Committee. He added that the matter had already been discussed on several occasions.

Mr BURMAN (United States of America) stated that the discussions on this point had not been limited to the 1954 Hague Convention and its Protocol as several other Conventions had also been considered.

The CHAIRMAN agreed with the United States delegation that there were of course many other Conventions that had been mentioned in the course of the discussions. Nevertheless he was convinced that the matter should not be discussed any further at this juncture.

Mr GIACALONE (Italy) stated that Italy was both an exporting and an importing State at the same time and that Italian law provided for a rule of imprescriptibility for those cultural objects that had been under discussion. He thought that as this was an important question of substance it should not be referred to the Drafting Committee and a decision should therefore be taken by the Committee of the Whole itself. He added that because of the importance of the matter the question should always be considered in the perspective of the future Convention as a whole.

Ms HUEBER (Netherlands), in answer to the remarks made by the Greek delegation, stated that although the Netherlands was an exporting country she objected to a rule of imprescriptibility as well as to a very long period of limitation. Nor did she agree with the view taken by the Portuguese delegation that the definition of public collections could in any way be regarded as being restrictive.

She also disagreed with the remarks by the Portuguese delegation regarding the Swiss proposal. Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State could for several reasons not be compared with the future Unidroit Convention since on the one hand it contained a very restricted definition of public collections and, on the other, the Directive was a regional regulation between States recognising each others' legal systems. She added that a further substantial restriction on the scope of application of the Directive resulted from its being limited to the field of illegally exported cultural objects. She added that it should also be borne in mind that ongoing and rapid technical developments provided quicker means of communication thus allowing it to be speedily determined whether a certain object had been stolen or illegally exported. She therefore asked for the phrase excluding any limitation periods to be placed in square brackets.

The CHAIRMAN suggested that by drawing attention to the thefts or illegal exports of which the Netherlands was a victim, the Netherlands delegation had shown, with regard to the issue of imprescriptibility, the traditional and in some ways simplistic distinction drawn between importing and exporting countries. Amongst the importing States, which were also in part exporting countries, some were in favour of imprescriptibility, while others were unfamiliar with the notion. In comparative law this distinction was never therefore as clear-cut as some would have it.

Mr GHOMRASNI (Tunisia) declared that, in an attempt at reaching a consensus and finding a compromise solution, his delegation could support the Swiss proposal if it were amended as follows: "unless the law of the requesting Contracting State provides for imprescriptibility". This addition went further in the direction of a compromise solution as States which did not apply the rule of imprescriptibility should not benefit from greater protection under the Convention than that afforded by their own domestic law.

The amendment proposed by the French delegation of replacing the word "claim" by "action" was acceptable on legal grounds, but did not reflect the essence of the text which comprised all claims, not only legal, but also diplomatic or others. The word "claim" was therefore more appropriate.

The CHAIRMAN stated that the French proposal for substituting the word "claim" by the word "action" would be considered by the Drafting Committee.

Mr ALAN (Turkey), referring to preceding statements, considered that no delegation should take up a threatening position during the discussions. Everyone had to seek a compromise. He therefore agreed with the view taken by the United States. As to the matter under discussion he added that there were always persons that would try to utilise every possible loophole in the future Convention for their own benefit. For this reason there should be no limitation periods. He also thought that further consideration should be given to the proposal of the Tunisian delegation.

The CHAIRMAN strongly objected to any implication that there had been any threats. All the interventions made so far had been perfectly legitimate

as every delegation was entitled to state that its respective country would be unable to sign the future Convention if certain provisions were included.

Ms PROT (UNESCO) suggested that what had been stated by some States very succinctly was perhaps the expression of a much more complex consideration. She repeated that it should not be forgotten that the legal or constitutional systems of certain countries did not allow for a rule of imprescriptibility. It should therefore be accepted that there were certain limits beyond which those countries could not go. Countries with a constitutional guarantee of private property were not able to adopt a rule according to which an object that had been acquired lawfully could be taken from that person. This was not only a constitutional rule but one of fundamental political philosophy and it was very difficult to change such a position.

The fact that those States had been represented at a three-week long diplomatic Conference and had also participated in all of the prior meetings of the committee of governmental experts was for her clear evidence of a very strong wish that there be a Convention. She therefore drew the conclusion that the earlier remarks were not intended to set any ultimatum but only to point out that there were some limits beyond which a compromise for those countries was simply not possible.

Finally, she added that the provision concerning public collections had only been introduced at the fourth meeting of governmental experts and that there had in consequence not been such extensive consideration of it as of other provisions of the draft Convention. She regarded the provision as merely an addition to the main achievements of the future Convention. In these circumstances it would be a major disaster if the provision were, despite the significant achievements that had already been made, to cause the project to break down.

The CHAIRMAN fully agreed with the sentiments expressed by the representative of UNESCO.

Mr ADENSAMER (Austria) thanked the representative of UNESCO for her statement. He underlined that it would be to his great regret if no agreement were to be reached at the Conference. He stressed that he had never intended to threaten anybody but that his

remarks had been made simply to inform the Committee that, for constitutional reasons, the future Convention could not be signed by his country if it contained a rule of imprescriptibility.

The CHAIRMAN proposed bringing the debate to an end, in the light of the clarifications of many delegations and in particular of the UNESCO representative. So as to permit the Drafting Committee to expedite its work, he proposed indicative votes on certain proposals that had been made, after which votes should be taken on the proposals of the Islamic Republic of Iran (CONF. 8/C.1/W.P. 46) and the United States (CONF. 8/C.1/W.P. 28) on a clause regarding applicable law.

He proposed a first indicative vote concerning the Swiss proposal (CONF. 8/C.1/W.P. 74), on the understanding that the suggestion of the Tunisian delegation would be taken into account by the Drafting Committee if the Swiss proposal passed, which would be a compromise in that it provided for a certain degree of imprescriptibility for States which did not already provide for it.

*Fourteen delegations voted in favour of the Swiss proposal, twenty-five delegations against and eleven abstained.*

The CHAIRMAN stated that the Swiss proposal would not be referred to the Drafting Committee. He then proposed an indicative vote on the question of whether the Committee of the Whole supported the retention of Article 3(4), (5) and (6) together: if there was a majority to that effect, the text would then be referred to the Drafting Committee.

Mr WICHENCHAROEN (Thailand) wondered what would happen to the rule of imprescriptibility in case that the next indicative vote to be taken showed a majority in favour of the deletion of Article 3(4), (5) and (6). He took the view that in that case a final clause should be included in the future Convention allowing each State to accommodate the future Convention to its own provisions of national law. He insisted that the future Convention should be drafted in such a way as to allow every country to adopt it.

Mr EVANS (Secretary-General of the Conference) replied that the decision to be made in the next

indicative vote was whether or not the future Convention should contain any special régime for public collections. If the decision were to be that Article 3(4), (5) and (6) were to be deleted then there would be no special régime for public collections whatsoever. In that case there would be no imprescriptibility and the periods of limitation contained in Article 3(3) would apply irrespective of whether or not the object had been part of a public collection.

The CHAIRMAN of the working group expressed the view that Article 3(6) was not limited to objects in public collections but that the provision dealt with different items. He therefore thought that the vote should be taken on the separate paragraphs.

Ms HUEBER (Netherlands) agreed that paragraph (6) dealt with a different question. She explained that this provision had been taken up only after some delegations had stated that if there were to be an exception for public collections then there should also be an exception for the objects specified in Article 3(6). Having regard to this close nexus the vote should be taken on all the exceptions to the general rule.

Mr MARQUES DOS SANTOS (Portugal) considered that the vote would thus cover the issue of whether public collections would benefit from a special régime, as favoured by Portugal. He pointed out that his delegation constantly bore in mind the fact that the ultimate aim of the Conference was to result in a Convention and that delegations still had enough time to reflect on all the provisions, including those that had been the subject of indicative votes, and more specifically on the issue of imprescriptibility.

The CHAIRMAN agreed with the comments of the Portuguese delegation and recalled that indicative votes were not dramatically important and binding, as the UNESCO observer had pointed out.

Ms HUGHES (Canada) agreed with the Netherlands delegation that Article 3(6) had only been taken up because of the exception for public collections.

The CHAIRMAN proceeded to an indicative vote on the maintenance of Article 3(4), (5) and (6).

*Thirty-seven delegations voted in favour, seven against and four abstained.*

The CHAIRMAN declared that those paragraphs would be maintained and submitted to the Drafting Committee.

Mr SAVOLAINEN (Finland) remarked that his delegation wished to make a minor drafting proposal concerning Article 3(3) and (4) which would be distributed later to the Drafting Committee.

Mr BURMAN (United States of America) inquired how it was intended to deal with the question of retroactivity, since it was unclear to him which body would deal with the question.

The CHAIRMAN stated that it was his understanding that this question should be put to a vote during the second reading since there had been lengthy discussions with more than forty interventions on the matter during the first reading.

Mr EVANS (Secretary-General of the Conference) suggested that the question of armed conflict be pursued in the Committee of the Whole and that for the time being the question of regional agreements remain before the Final Clauses Committee since the Committee of the Whole did not have the competence to take up the matter. He added that there were two possibilities for submitting the question to the Committee of the Whole. One was that the Final Clauses Committee decide not to pursue the question any further, the other being to call a short meeting of the Conference on Monday morning to transfer consideration of the matter to the Committee of the Whole.

Mr SÁNCHEZ CORDERO (Mexico) asked the Drafting Committee to consider the proposal contained in CONF. 8/C.1/W.P. 39.

The CHAIRPERSON of the Drafting Committee stated that the Mexican proposal in CONF. 8/C.1/W.P. 39 would be considered by the Drafting Committee. With regard to the question of retroactivity, she agreed with the statement by the Chairman of the Committee of the Whole that the question had been referred to the Drafting Committee to suggest draft language having regard to the various interventions in the Committee of the Whole.

*The meeting rose at 1.05 p.m.*

CONF. 8/C.1/S.R. 15  
22 June 1995

### FIFTEENTH MEETING

Monday, 19 June 1995, 9.10 a.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/5 Add. 2; CONF. 8/C.1/W.P. 28, 46 and 56; CONF. 8/D.C./Doc. 2)

The CHAIRMAN thanked the members of the Drafting Committee for the revised texts prepared by them, which would be of the greatest assistance in expediting the second reading of the draft Convention.

With regard to the discussion that was to follow, he stated that consideration of Article 3(3) would take place in the course of the second reading, and that during the present session the articles proposed by the Drafting Committee (Articles 1 to 9) (CONF. 8/D.C./Doc. 2) would be examined. He suggested that proposals relating to the inclusion of a conflict rule be discussed immediately, as it had not been possible to take them up during the consideration of Article 9. On this point, he reminded delegations that if the future Convention were to contain no conflict rule, then under private international law the authority before which a claim was brought under Article 9(1) would apply its own system of private international law to questions not covered by the future Convention. Conversely, the principle of the primacy of international law over national law would in any case apply to questions covered by the Convention. Faced with a result that would be essentially the same, he questioned the necessity of providing for conflict rules as proposed by the Iranian (CONF. 8/C.1/W.P. 46) and United States (CONF. 8/C.1/W.P. 28) delegations.

#### *Applicable law*

Mr BURMAN (United States of America) agreed with the conclusions of the Chairman as to the effect of not including a conflict rule. He therefore introduced his delegation's proposal set out in CONF. 8/C.1/W.P. 56, which aimed at clarifying what was in his view the

general rule of private international law applied in practice. More generally, the proposal should increase ratifications and avoid misunderstanding as to the effect of the Convention.

Mr FOROUTAN (Islamic Republic of Iran), speaking to his delegation's proposal (CONF. 8/C.1/W.P. 46), reminded the Committee of the possibility of practical difficulties for a requesting State to prove that a cultural object had been stolen from its territory. Article 1(b) of the draft made express reference to a Contracting State's export regulations. This enabled the State addressed to take the relevant law of the requesting State into account. However, Article 1(a) did not contain a definition of the theft of an object. In his view, the law of the requesting State should define whether a crime had been committed and he suggested that this be expressly stated in the text. He relied on the Drafting Committee to find the most appropriate location for such a provision in the text of the future Convention.

Mr SHIMIZU (Japan) observed that Japanese private international law accepted the principle that the law applicable to the ownership of moveables was the law of the State where the object was located. When an object was located in Japan after having been stolen in another State, the effect of this rule would be to render applicable both the law of the foreign State and Japanese law. Title to property acquired under the law of the State where the object was stolen could not therefore be recognised in a forum where the object was later located. If the claimant were in fact the owner, his legal title would generally be recognised by the *lex rei sitae*. In other cases, however, his title might not be recognised by the forum State. He therefore wished an express provision to be included in the future Convention making the law of the forum, usually the *lex rei sitae*, applicable to the settlement of questions of this nature. Although he considered it rather imprecise, he supported the proposal of the United States delegation as it sought to clarify the mechanism for claims under the future Convention.

The CHAIRMAN considered this to be a fairly uncomplicated technical question.

Mr MARQUES DOS SANTOS (Portugal) pointed out that if no conflict rule were to be laid down in the

future Convention, the court would be required to apply its own system of private international law, which would lead either to the designation of the *lex fori* or a foreign *lex causae*. Referring to the proposals made by the delegations of the United States and of Iran, one in principle designating the *lex fori* (and only exceptionally a foreign *lex causae*), the other preferring the law of the requesting State, he recalled more generally that in the absence of the establishment of a conflict rule, the Convention would allow the application by the forum court of the public law of the requesting State.

Mr KHODAKOV (Russian Federation) stated, in connection with the proposal of the United States delegation which sought to clarify the interpretation of the future Convention, that he was puzzled because, by virtue of the 1969 Vienna Convention on the Law of Treaties, treaty interpretation could not be undertaken by reference to a specific domestic law, the latter being more appropriate in relation to questions outside the scope of a future Convention. As worded, the United States proposal did not take account of the necessary distinction between the substantive provisions of the Convention and of the additional or external questions. As to the Japanese proposal, he recalled that the only truly applicable law was that of the location of the stolen object at the time of its disappearance, usually the law of the country of origin, given that the main goal of the future Convention was to encourage the return of the stolen or illegally exported object. He thereby distanced himself from the proposal which gave jurisdiction to the law of the forum State.

The CHAIRMAN emphasised that questions of fact, i.e. if a cultural object was stolen, should not be confused with questions of law, such as the existence and the validity of the transaction by which a good faith possessor acquired an object. For the latter questions, the court before which the action was brought would determine the applicable law through the use of a domestic conflict rule. He therefore suggested that a conflict rule should not be included in the future Convention, as it would apply automatically.

Mr BURMAN (United States of America) reiterated the importance of thoroughly discussing this issue. After having listened to the various statements, and in spite of the previous proposal of his delegation, he recommended that no provision on the applicable law

be included and that reliance be placed on the general rule of interpretation, as any other solution might hinder the implementation of the future Convention.

Mr SAJKO (Croatia) noted that a provision concerning the applicable law could only cover private law matters. Thefts and the illegal export of objects could not be considered as falling within the realm of private law. Such a provision should therefore be confined to matters regarding the application of domestic or foreign private law. As to a possible provision on the applicable law, he suggested that the question be dealt with according to the choice of law rules of the forum State and not by application of the substantive rules of the *lex fori*.

The CHAIRMAN suggested that the proposal of the Iranian delegation be mentioned in the Explanatory Report.

Mr ZIMBA CHABALA (Zambia) opposed the inclusion of a provision on the matter. In his view, the essence of the future Convention was to ensure the restitution of stolen, and the return of illegally exported, objects. More generally, he stressed the importance of Article 10, which allowed the law most favourable to this end to be applied.

## SECOND READING

The CHAIRMAN, following the withdrawal by the delegation of the United States of its proposal on applicable law, and in the absence of any other proposals, opened the second reading of the draft Unidroit Convention.

He specified that unlike other bodies, in particular the Hague Conference on Private International Law, Unidroit Conferences did not provide for the presence of a *rapporteur*. Given the participants' varying levels of familiarity with the specific difficulties raised by private international law, he felt that he should assume the task of *rapporteur* in order to illustrate the background to the solutions contained in the draft and to explain their effects.

As work was behind schedule, he reminded delegations that they were under an obligation to deploy their best efforts in order that a Convention be adopted on 24 June. He emphasised the negative consequences that would result from a failure to do so. It was likely that

for the next twenty years or so States would no longer be interested in making any efforts to protect cultural heritage on the basis of a treaty. Furthermore, the failure of the Conference would be interpreted as a lack of interest of States in the international protection of cultural heritage, and as tacit, but clear, encouragement for the development of illegal traffic. The failure of the Conference would have even more serious consequences on substantive law. Regarding stolen cultural objects, the subject of Chapter II, illegal traffic was most certainly encouraged by numerous factors: in private international law by the almost universal conflict rule of the *lex rei sitae*; in substantive law by the widespread protection afforded to the good faith acquirer or possessor, and also by reason of the few cases in which a distinction was drawn between cultural objects and commercial goods in general, especially as regards their non-transferability. In connection with illegally exported cultural objects, the subject of Chapter III, private international law refused in principle the application of export prohibitions on cultural objects of the State of origin. Except for rare exceptions, those rules, which were by definition breached in the State of origin, would not be taken into account by the court of the forum. In this respect, the contribution of Chapter III was particularly desirable. The adoption of the draft Convention was, therefore, an obligation for the international community.

In response to the fairly frequent statements made by some delegations which considered that if certain solutions were to be adopted in the future Convention their Governments would not be able to ratify it, he emphasised that other delegations should in no way take those statements as threats. On the contrary, they should see them as the result of an objective view of reality, which should be taken into account when certain choices were made. Effectively, each delegation could, and moreover should, inform the other delegations when a particular solution could compromise the ratification of the future Convention by its country, precisely in order to enable delegations to make reasoned decisions concerning the substance of the different options.

Ms PROTT (UNESCO) recalled that there was a long history of illegal trade which had often occurred in periods of war and colonisation to the disadvantage

of exporting States, and that pursuant to its mandate, which sought to stimulate cultural exchanges and to protect cultural heritage, UNESCO had closely co-operated with Unidroit in order to establish a Convention which would complement the 1970 UNESCO Convention. However, the various criticisms of the Unidroit draft, which varied from its being too protective of the exporting States to its being overly supportive of the free market position, proved that the draft Convention represented a compromise. She reiterated that the Unidroit Convention would simply offer another tool with which to combat illicit trade and that it would not be a complication for States Parties to the 1970 UNESCO Convention. While believing in the possibility of closer and better negotiations to establish a Convention which would reflect a compromise between the different points of view and be ratified by as many States as possible, she called on delegations to make certain reciprocal sacrifices.

Mr HUBBARD (Mexico) called upon the delegations not to focus simply on their own interests but instead to seek agreement on a workable, rather than an ideal Convention.

Mr FRANCONI (Italy) noted that the Conference bore witness to a new climate of co-operation between importing and exporting States, based on the recognition of a general interest in preserving the integrity of the cultural heritage and protecting it against illegal traffic. He underlined the importance of further negotiations, as a Convention with only a few ratifying States would be regarded as a failure. He further stated that issues relating to the substance of the future Convention should be decided by the Committee of the Whole rather than by the Drafting Committee.

Mr ONWUGBUFOR (Nigeria) agreed with the previous statements and stressed the importance of concluding a successful Convention. As the present draft was the result of many years of analytical study by several working groups, he encouraged delegations not to raise radical new points and underlined the necessity of striking a balance. He also recalled that the mandate of the Drafting Committee was simply to give expression to the decisions of the Committee of the Whole.

Ms HUEBER (Netherlands) emphasised the necessity of reciprocal sacrifices. She drew attention to the

fact that her delegation had yielded on issues such as the restitution or return of cultural objects acquired by a good faith purchaser, and the limitation period, two extremely delicate issues for the Netherlands legal system. She further pointed out that the Netherlands was both an importing and an exporting State, and that consequently it had a strong interest in the establishment of a Convention. This would only be possible if States continued in realistic debate directed towards a compromise. Reiterating the willingness of her delegation to make concessions on certain important issues, she called upon other delegations to do the same.

Mr LE BRETON (France), agreeing with the views expressed by the Italian and Netherlands delegations, recalled that France was called upon to make important sacrifices in order to accept the solutions in the draft Convention. He emphasised that although reaching solutions on the basis of concessions was normal practice, especially when balancing the interests of countries which were victims of the regrettable phenomenon of the pillage of their cultural heritage, France could make no further concessions.

Ms GAISER (International Association of Dealers in Ancient Art) endorsed the statements of the Chairman and of the UNESCO representative. She noted however with some surprise an earlier reference to a supposed purchaser in good faith, since the great majority of acquisitions clearly were made in good faith. Nevertheless, she agreed with the statement of the representative of UNESCO and called for the encouragement of legal trade and its recognition in a framework conducive to its proceeding in a spirit of harmony and co-operation.

Mr ZIMBA CHABALA (Zambia) complimented the Chairman for his adept direction of the meeting. Stressing the obvious objective of the Conference, he noted that the ambiguous goals pursued by different States could explain a certain frustration experienced by the exporting States. He was however aware of the importance of establishing a workable Convention in order to defeat illegal trade. He therefore urged delegations to continue the search for a compromise and reminded them that the main goal of the future Convention was to ensure that major steps forward were made in this connection.

*The meeting was adjourned at 10.50 a.m.  
and resumed at 12.05 p.m.*

The CHAIRMAN announced that the Steering Committee had decided that statements made during the second reading should henceforth be limited to three minutes, and that in principle only two interventions would be allowed on each question put to the vote, one in favour and one against.

#### **REPORT OF THE DRAFTING COMMITTEE**

##### *Title*

The CHAIRPERSON of the Drafting Committee recalled that all written proposals, as well as oral statements made in the Committee of the Whole, had been considered by the Drafting Committee. She also made it clear that the Drafting Committee had not taken decisions on matters of substance which were still pending before the Committee of the Whole. Those matters would be presented to the Committee in the form of two different versions, on which it would have to decide.

She stated that the present title of the Convention, as set out in CONF. 8/D.C./Doc. 2, was a result of a compromise between short and extensive titles. The term "international" had been left out intentionally, as it seemed self-evident that the Convention would apply only to international situations.

Ms HUEBER (Netherlands) stated that although her delegation had proposed a more extensive title, she could support the suggestion of the Drafting Committee.

The CHAIRMAN declared the title adopted, and opened discussion on the proposed articles drawn up by the Drafting Committee.

##### *Article 1*

The CHAIRPERSON of the Drafting Committee introduced the three Variants of Article 1. She noted that the *chapeau* had remained unchanged. The Drafting Committee had considered different alternatives to clarify the scope of the term "international", but as these had not brought about any improvement it had left the term unchanged.

Mr SHIMIZU (Japan) expressed his gratitude to the Drafting Committee for its hard and invaluable work. In his opinion, however, the term “international” remained too vague, for which reason his delegation did not support it.

Mr LE BRETON (France) stated that he was in favour of maintaining a provision on the “international character”.

The CHAIRMAN put to the vote the question of whether the words “of an international character” should be maintained.

*Forty-nine delegations favoured such retention, one voted against and five abstained.*

*Sub-paragraph (a)*

The CHAIRPERSON of the Drafting Committee explained the three Variants in greater detail. She pointed out that Variant I would give the future Convention a broad scope of application. Variant II contained the narrowest scope of application and Variant III offered an intermediate solution.

The CHAIRMAN drew attention to the different wording in the English and French versions. The English version spoke of “the restitution of stolen cultural objects moved to the territory of a Contracting State”, while the French version read “restitution de biens culturels volés dans la mesure où ils sont déplacés d’un Etat contractant”.

Ms SCHNEIDER (Executive Secretary of the Conference) explained that the Drafting Committee had worked in English and that a more precise French translation was under preparation, which could entail modifications to the English version where necessary.

Mr MAROTTA RANGEL (Brazil) drew attention to the fact that according to Article 2 of the Vienna Convention on the Law of Treaties, the expression “Contracting State” designated a State which had consented to be bound by a treaty, whether or not that treaty had entered into force, whereas the expression “Party” signified a State that had consented to be bound by a treaty and for which that treaty was in force. Given the obvious differences in the two cases, he suggested that the words “Contracting State” be

placed in square brackets until a decision could be reached as to what was the appropriate language.

The CHAIRMAN sought the preferences of delegations in relation to the three variants.

*Thirty-four delegations favoured Variant I(a), fifteen Variant II(a) and five Variant III(a).*

Mr GHOMRASNI (Tunisia) suggested that Variant II did not cover the case of cultural objects stolen while on exhibition in a non-Contracting State and then removed to a Contracting State.

The CHAIRPERSON of the Drafting Committee confirmed that the issue had been considered by the Drafting Committee but that it had been felt that it complicated the drafting. However, Variant 1 would probably offer the best solution to the concern voiced by the Tunisian delegation.

The CHAIRMAN put Variant I(a) to the vote.

*Forty-eight delegations voted in favour of the provision, two against, and six abstained.*

Mr EVANS (Secretary-General of the Conference) explained that this second vote ensured that there was a two-thirds majority in favour of the provision.

*Sub-paragraph (b)*

The CHAIRPERSON of the Drafting Committee pointed out that only one text was suggested for Article 1(b). As regards the law governing the export of cultural objects, the Drafting Committee had decided to replace the words “because of their cultural significance” by “for the purpose of protecting its cultural heritage”, as the latter better clarified that those laws did not just control exports, but were aimed at protecting the cultural heritage of the State. The addition of the wording “(hereinafter ‘illegally exported cultural objects’)” was designed to avoid repetition in the text of the Convention.

Mr EPOTE (Cameroon) considered that the drafting of the French version could be improved and rendered more faithful to the English version.

Ms SCHNEIDER (Executive Secretary of the Conference) explained that the French version would

also have brackets around the words “ci-après dénommés ‘biens culturels illicitement exportés’ ”.

*The CHAIRMAN noted that the provision was unanimously adopted, with two abstentions.*

#### *Article 2*

The CHAIRPERSON of the Drafting Committee pointed out in connection with Article 2 that Variant I referred to the UNESCO list which appeared in the Annex to the draft Convention. The wording “[whether of a religious or a secular character,]” had been only slightly changed. Variant II contained the two following sub-variants, either the inclusion of “[such as those objects belonging]”, which would result in the UNESCO list not being an exhaustive one, or the inclusion of the words “[and belong]”.

Ms PROTT (UNESCO) explained that the list reproduced in the Annex would be the categories of the UNESCO definition in Article 1(a) to (k) of the 1970 Convention, without the inclusion of the *chapeau*.

Mr WICHENCHAROEN (Thailand) suggested clarifying the meaning of cultural objects in Variant I by replacing the words “those belonging to one” by “those belonging to the”.

Mr ALAN (Turkey) strongly supported maintaining the words “such as” in Article 2 of the text of the draft Convention (CONF. 8/3) and opposed the inclusion of the UNESCO list, which he considered to be exhaustive and far too limited. He did not support Variant I, as the abovementioned words were not included.

Ms JOHNSTON (United States of America) raised a point of order and suggested voting first on the variants within each paragraph, and then on each separate paragraph.

The CHAIRMAN put to a vote the question of whether delegations wished to maintain the language “of a religious or secular nature” in Variants I and II.

*Twenty-five delegations voted in favour, fourteen against and sixteen abstained.*

The CHAIRMAN then put to the vote the question of whether the language “such as those objects belonging” should be maintained in Variant II.

*Thirty-nine delegations voted in favour, nine against and six abstained.*

Ms JOHNSTON (United States of America) raised a point of order concerning the nature of the previous vote which she had interpreted as being simply an indication of preference between the words “such as those objects belonging” and “and belong” in Variant II.

Mr FALL (Guinea) shared the views expressed by the United States delegation and stated that he had understood the vote as referring to the retention of the words “such as those objects belonging”.

Ms DASCALOPOULOU-LIVADA (Greece) raised a point of order, noting that the words “such as those objects belonging” and “and belong” were mutually exclusive. It was therefore unnecessary to vote on the latter, as the previous vote had already indicated a clear preference for the former language.

Ms HUEBER (Netherlands) opposed the wording “such as those objects belonging”, as it was not a clear definition.

The CHAIRMAN enquired of delegations their preference as between the words “such as those objects belonging” and “and belong” in Variant II.

*Forty-four delegations favoured the first formula and twelve the second.*

Mr FRIETSCH (Germany) enquired whether the Drafting Committee had considered the proposal of his delegation (CONF. 8/5 Add. 2) concerning the insertion of the word “outstanding” before “importance”.

The CHAIRPERSON of the Drafting Committee confirmed that this had been the case. However, the Drafting Committee had deemed that the proposal had not received sufficient support within the Committee of the Whole to be retained.

The CHAIRMAN put the German proposal to the vote.

*Ten delegations voted in favour, forty-two against and three abstained.*

Mr MARQUES DOS SANTOS (Portugal) proposed that the words “such as those objects

belonging” be included in Variant I before voting on Variant II.

Mr KHODAKOV (Russian Federation) raised a point of order against the Portuguese proposal, pointing out that since they were alternatives it would be sufficient to vote in favour of either Variant I or Variant II.

Mr ONWUGBUFOR (Nigeria) suggested that Variant I be voted on first, and then Variant II.

The CHAIRMAN put to an indicative vote the question of which Variant should be maintained.

*Twelve delegations voted in favour of Variant I, forty-four in favour of Variant II as completed by the wording “such as those objects belonging”, and four abstained.*

*The meeting rose at 1.30 p.m.*

CONF. 8/C.1/S.R. 16  
22 June 1995

#### **SIXTEENTH MEETING**

Monday, 19 June 1995, 3.30 p.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/C.1/W.P. 39, 72 Corr. and 79; CONF. 8/D.C./Doc. 2)

#### **REPORT OF THE DRAFTING COMMITTEE** (continued)

##### *Article 3*

##### *Paragraph (1)*

The CHAIRMAN called upon the Chairperson of the Drafting Committee to introduce Article 3(1) as prepared by the Drafting Committee and contained in CONF. 8/D.C./Doc. 2.

The CHAIRPERSON of the Drafting Committee noted that the Report of the Drafting Committee contained two variants of Article 3(1). She explained,

however, that both variants reflected the same basic principle. The first left the original text unchanged. It reflected the view that it would be difficult to define the word “possessor” in an international text and that a court or competent authority would interpret the term in the broadest possible sense. The second avoided any reference to the term “possessor” and responded to the concerns of some delegations as to the precise meaning of the word.

Mr WICHENCHAROEN (Thailand) stated that the second variant was problematic because it omitted a reference to the word “possessor”. Without the term, a borrower could be ordered to return the object. Under the first variant, conversely, only the person who had proper custody of the object could be ordered to return it.

Mr KHODAKOV (Russian Federation) confirmed that there was a substantial difference between the two variants proposed in the report of the Drafting Committee. The first clearly indicated *who* was to return the stolen object, thereby establishing a substantive norm. This was the crux of the problem for many States with legal systems which gave direct effect to international treaties once adopted. Variant II, however, did not specifically designate the person under an obligation to return the stolen object, which implied that Contracting States would have to adopt a rule to govern the matter. He therefore considered that while no State would have difficulty in applying Variant I, Variant II could cause difficulties to some.

Mr FRANCONI (Italy) supported Variant II. He noted that it did not restrict the definition of the holder and that national courts could implement the provision directly by ordering the person holding the object to return it.

The CHAIRMAN called for a vote on the two variants of Article 3(1) in the Report of the Drafting Committee.

*Forty delegations voted in favour of Variant I, eighteen in favour of Variant II and one delegation abstained.*

The CHAIRPERSON of the Drafting Committee noted that in that Committee the United States delegation had advocated the addition of the following words

to whatever version of Article 3(1) the Committee of the Whole would adopt: “in accordance with the terms of this Convention”. The Drafting Committee had reserved consideration of the proposed addition for the Committee of the Whole. She noted that a written proposal had been submitted to add those words (CONF. 8/C.1/W.P. 79).

Mr BURMAN (United States of America) explained that the Drafting Committee had not discussed the additional language because his delegation had considered that it would substantively change Article 3(1) if the provision as drafted were to be understood as incorporating procedures outside the framework of the Convention. He suggested that the concerns of his delegation would be allayed if the Explanatory Report on the final Convention reflected the agreement of the Committee of the Whole that the obligation to return arose under the procedures of the Convention.

The CHAIRMAN understood the concern of the United States delegation and thought that its suggestion could be included in the Explanatory Report on the future Convention. Nevertheless, he considered it unlikely that a court or competent authority would apply the article out of context. He enquired whether the Committee of the Whole was prepared to accept the proposal to include the clarification in the Explanatory Report and, in the absence of objections, he took this to be the case.

*Paragraph (2)*

The CHAIRPERSON of the Drafting Committee stated that the Committee had made two small changes to the text of Article 3(2). She stressed that the changes did not alter the substance of the provision. First, the word “cultural” had been added before the word “object” in the first line. She noted that such a change had been made throughout the text of the draft Convention. Second, the word “but” had been substituted for the word “and” in the final sentence because at least one delegation had had enormous difficulty translating the term into its own language.

The CHAIRMAN suggested, so as to avoid any misunderstanding, that the word “theft” be defined in terms of the future Convention and that it would be possible, if the majority of delegations so wished, to do so at the end of paragraph (2).

Mr CREWDSON (International Bar Association) supported the deletion of Article 3(2). He reasoned that the situation referred to in the provision was already covered by Article 3(1). He recalled that in the debate on the first reading of the draft Convention the vast majority of delegations supporting the provision represented States where cultural objects located in the ground were State property and therefore automatically covered by Article 3(1).

Mr KHODAKOV (Russian Federation) questioned the legal consequences under the draft Convention if a cultural object was left in the place from which it had been unlawfully excavated.

The CHAIRMAN observed that in such a situation the Convention would not apply because the conditions of Article 3(1) would not have been satisfied.

The CHAIRPERSON of the Drafting Committee stated that the Committee had not considered the issues raised by the representative of the International Bar Association and the delegation of the Russian Federation. However, she agreed with the Chairman that the Convention would not apply in the situation to which the Russian delegation had referred. With respect to the question raised by the representative of the International Bar Association, she noted that the issue was beyond the competence of the Drafting Committee because it raised substantive rather than purely drafting issues.

The CHAIRMAN considered that Article 3(2) was intended to ensure that Chapter II applied to objects that were unlawfully excavated or lawfully excavated and unlawfully retained. To reflect that intention, he noted that the words “shall be governed by the provisions of this Convention” could replace the words “shall be deemed to have been stolen”. He noted that either formulation would achieve precisely the same result. However, his suggested alternative formulation would assuage the concerns of museums which feared that, under the present wording, the press would accuse them of housing stolen objects.

Mr WICHENCHAROEN (Thailand) raised two points. First, he noted that the original text of the Drafting Committee had contained Article 3(2). Second, it was his understanding that the provision had been already been approved by an indicative vote.

Consequently, he questioned whether any further vote was necessary.

Ms HUEBER (Netherlands) proposed the deletion of Article 3(2). She stated that the situation referred to in the provision was already covered in Article 1(c) of the UNESCO Convention which would form part of the Annex to the final Convention.

Mr FRANCONI (Italy) supported the text of Article 3(2) proposed by the Drafting Committee. He observed, however, that if the Committee of the Whole adopted the Chairman's alternative formulation, reference should be made to the present Chapter rather than to the present Convention.

Mr MASSA (Peru) stressed the importance of Article 3(2) for his delegation. He pointed out that more than ninety per cent of cultural archaeological objects in Peru were located underground and were regular targets of illegal, clandestine excavations. He considered that the provision would have a salutary effect on international trade in illegally excavated cultural objects.

Mr FRAOUA (Switzerland) stated that his delegation was favourable to the deletion of Article 3(2) as it considered that, in the majority of States rich in cultural objects, domestic legislation provided for objects that were illegally excavated or legally excavated but illegally retained to be assimilated to stolen objects.

The CHAIRMAN put to the vote the retention of Article 3(2) as proposed in the Report of the Drafting Committee.

*Forty-two delegations voted in favour of retaining the provision, twelve against and three abstained.*

#### *Paragraph (3)*

The CHAIRPERSON of the Drafting Committee observed that the Committee had considered paragraphs (3) and (4) together and had proposed two variants. She made two drafting observations with respect to paragraph (3). First, in both variants, the Drafting Committee had reserved for the Committee of the Whole the question of which limitation periods would apply. Second, the Drafting Committee had

placed brackets around the words "or ought reasonably to have known" in response to support for deletion of that language.

The CHAIRMAN proposed that a decision first be taken on the words in square brackets in the text proposed by the Drafting Committee.

Mr ALAN (Turkey) supported deletion of the words. In his opinion, they were not easy to apply and could be used to limit return or restitution in specific cases. He cited in support of this view proceedings in which a court had held that a claim by an 80 year old owner of a Monet painting stolen during the Second World War was time-barred because she should have known that her painting had been exhibited briefly in New York even though the exhibition was not publicised in Germany where she was living.

The CHAIRMAN questioned whether deletion of the words would make any practical difference because a judge might apply the "ought reasonably to have known" standard even where the text required actual knowledge.

Mr MARQUES DOS SANTOS (Portugal) considered that there could be cases where the claimant's lack of diligence was truly unacceptable. The words in square brackets "or ought reasonably to have known" set an objective criterion that was often employed by domestic courts and which referred to the diligence of an average person. He thought that this concept would not create difficulties for the court or competent authority, and that even in the absence of the language, it would still have to determine in each particular case whether or not diligence had been exercised.

The CHAIRMAN considered the two variants to be very different from a technical and legal standpoint.

Mr HE (China) supported the deletion of the words "or ought reasonably to have known".

The CHAIRMAN proposed that three votes be taken on the different possibilities.

*Thirty-five delegations voted to delete the words "or ought reasonably to have known" from Article 3(3), with twenty-one against and one abstention.*

*Forty delegations voted in favour of an absolute limitation period of fifty years under Article 3(3), fifteen in favour of thirty years and five delegations abstained.*

*Forty-nine delegations voted in favour of a relative limitation period of three years under Article 3(3), eight in favour of one year and four delegations abstained.*

*Paragraph (4)*

The CHAIRPERSON of the Drafting Committee made several observations with respect to Article 3(4). First, she noted that the Committee had removed the limitation period of seventy-five years that had appeared in brackets in the original text because, through an earlier indicative vote, the Committee of a Whole had expressed its preference that no limitation periods should apply to claims for the return of cultural objects forming part of a public collection. Second, she noted that in both variants the Drafting Committee had replaced the words appearing in brackets in the previous text “shall not be subject to prescription” by the words “shall not be subject to time limitations”. She noted that the change sought to clarify that the provision referred to the time limits within which claims could be brought and to answer concerns about the uncertain meaning of “prescription” in English. Third, in Variant II of Article 3(4), the words “provided for in this paragraph” had been added in order to align it on Variant I of Article 3(4). She stressed that the addition of those words did not amount to a substantive difference between the two variants.

The CHAIRMAN noted that the Drafting Committee had not mentioned in its report the original variant, which had provided for a limitation period of seventy-five years. He therefore asked those delegations which had suggested that their Governments would be unable to ratify the future Convention if it contained no absolute limitation period if they wished to comment on the issue.

Ms JOHNSTON (United States of America) disagreed with the interpretation given by the Chairperson of the Drafting Committee of the meaning of the earlier indicative vote on the limitation periods applying to

public collections. She recalled that some delegations in the Drafting Committee had expressed the view that the indicative vote meant that public collections would not be subject to any time limitation. Others had understood the vote to mean that while no absolute limitation period would apply, a relative time limit would apply where the claimant knew or ought to have known of the location of the object and the identity of the holder. She stated that the two variants reflected those different views.

The CHAIRPERSON of the Drafting Committee agreed with the understanding of the delegation of the United States. She explained that the first variant provided that no limitation period would apply to a claim for return of a cultural object belonging to a public collection even if the claimant knew the location of the object and the identity of the possessor. Under the second variant, a claimant was obliged to bring a claim within three years if he or she knew of the location of an object belonging to a public collection and the identity of the possessor.

Mr JENKINS (United Kingdom) supported the second variant. He noted that although the first did not pose constitutional problems for the United Kingdom, his delegation would have difficulty accepting the final Convention if it established no limitation period for public collections.

The CHAIRMAN took account of the observations of the Greek delegation referring to the proposed amendment of Article 3(4) (CONF. 8/C.1/W.P. 39). However it would not be advisable to vote on the inclusion or absence of limitation periods concerning public collections without first considering the variants, which could represent a less radical version than the current text. In this connection he recalled the objection of the Irish delegation to the term “belonging to”.

The CHAIRPERSON of the Drafting Committee observed that the Committee had considered the alternative proposals in CONF. 8/C.1/W.P. 39. However, it had declined to redraft Article 3(4) along the lines suggested by that proposal until the Committee of the Whole had considered the matter.

The CHAIRMAN noted that the document to which

the Greek delegation had made reference could be considered as an amendment to the Drafting Committee proposal and that it should be discussed prior to the examination of the provision as a whole.

Ms DASCALOPOULOU-LIVADA (Greece) proposed that Alternative B of CONF. 8/C.1/W.P. 39 should be added to Article 3(4). She stressed that the proposal was of great importance to the States tabling it as the removal of an integral part of an historical or archaeological monument or site destroyed the integrity of the whole.

Mr FRAOUA (Switzerland) saw the Greek proposal as seeking to widen the scope of the limited exception provided for cultural objects belonging to public collections which would be protected by a longer limitation period or none at all. He considered that the definition of public collection was already very broad. His delegation was opposed to such an extension of the scope of application of the provision and to the absence of limitation periods.

Mr EMARA (Egypt) supported the proposal of the Greek delegation to add Alternative B to the text of Article 3(4).

Mr WEIBULL (Sweden) stated that it would be very difficult for Sweden to consider ratification of the Convention if it did not include limitation periods for public collections.

The CHAIRMAN put to the vote the Greek proposal to add Alternative B to the text of Article 3(4).

*Thirty-four delegations voted in favour of the proposal, twenty against and five delegations abstained.*

Mr GHOMRASNI (Tunisia) drew the attention of delegations to the inexact translation of the French term "action", which was rendered in the English version of Article 3(4) by the word "claim".

Ms JOHNSTON (United States of America) strongly supported Variant II which applied limitation periods where a claimant knew of the location of the object and the identity of the possessor. She stated that Variant II was applied in United States law and that it would be difficult for her delegation to accept a provision that did not impose a time limit on a claimant

who had all the facts necessary to bring the claim at his or her disposal.

Mr MASSA (Peru) observed that it would be difficult for his delegation to accept a Convention that established any limitation periods with respect to public collections.

The CHAIRMAN put to the vote Variant I of Article 3(4) (no limitation period) and Variant II (a relative time limit of three years where the claimant knew of the location of the cultural object that formed a part of a public collection and the identity of the possessor).

*Twenty-six delegations voted in favour of Variant I, fourteen in favour of Variant II and fourteen delegations abstained.*

The CHAIRPERSON of the Drafting Committee enquired whether the words "shall not be subject to time limitations" should replace the words "shall not be subject to prescription", in Article 3(4) as the Drafting Committee had suggested.

*It was so agreed.*

#### *Paragraph (5)*

The CHAIRPERSON of the Drafting Committee explained that the Committee had been of the view that the Committee of the Whole had conferred upon it a clear mandate to retain the word "inventoried" in Article 3(5). It had also considered that it had a clear mandate to add words to qualify the term. The Drafting Committee had suggested two alternative qualifying terms: "or otherwise documented" and "or otherwise identified". She noted that the first alternative established a more formal requirement than the second.

The CHAIRMAN put to the vote the question of whether the words "or otherwise documented" or those "or otherwise identified" should follow the word "inventoried" in Article 3(5).

*Thirty-five delegations voted in favour of the addition of the words "or otherwise identified", twenty-one in favour of the addition of the words "or otherwise documented" and three delegations abstained.*

The CHAIRPERSON of the Drafting Committee referred to Article 3(5)(b), recalling that the delegation of Israel had proposed the insertion of the word “national” before “regional or local”, although the Drafting Committee had had difficulty in understanding the purpose of the proposed addition.

Mr YIFHAR (Israel) stated that his delegation had proposed the inclusion of the word “national” because Israel had a National Antiquities Authority.

The CHAIRPERSON of the Drafting Committee stated that the Drafting Committee had considered the possibility raised by the Israeli delegation but had believed it unnecessary to add the word “national” because if a cultural object belonged to a Contracting State, it would automatically be covered by Article 3(5)(a).

Mr KHODAKOV (Russian Federation) drew attention to the Explanatory Report (CONF. 8/3) and noted that Article 3(5)(a) and (b) did not cover the situation which existed in his country, which was composed not only of regional and local authorities but also of federal States.

The CHAIRPERSON of the Drafting Committee noted that the Drafting Committee had left untouched Article 3(5)(c) concerning the cultural objects of religious institutions because it was difficult to define “religious institution” in any concise form as some delegations had advocated. With respect to Article 3(5)(d), the Drafting Committee had added the word “scientific” to the categories of cultural objects covered in response to a proposal by the delegation of the Russian Federation. She recalled that no delegation in the Committee of the Whole had objected to the inclusion of that word.

The CHAIRMAN put to the vote the adoption of Article 3(5) as a whole in the Report of the Drafting Committee as amended.

*Forty-five delegations voted in favour, six against and five abstained.*

*The meeting was adjourned at 5.15 p.m.  
and resumed at 6 p.m.*

*Paragraph (3) (continued)*

The CHAIRMAN put to the vote Variant I of Article 3(3) as amended by previous votes.

*Twenty-nine delegations voted in favour, twelve against and eight abstained.*

*Paragraph (4) (continued)*

The CHAIRMAN put to the vote Article 3(4) as amended by Alternative B of the Greek proposal (CONF. 8/C.1/W.P. 39).

*Thirty-two delegations voted in favour, sixteen against and three abstained.*

*Paragraph (6)*

The CHAIRPERSON of the Drafting Committee explained that, as instructed by the Committee of the Whole, the Drafting Committee had redrafted Article 3(6) along the lines proposed in CONF. 8/C.1/W.P. 67. The Drafting Committee text contained two sets of square brackets which contained alternative limitation periods to ensure that whatever periods the Committee of the Whole applied to cultural objects belonging to public collections, those periods would also apply to cultural objects of indigenous communities.

Mr WICHENCHAROEN (Thailand) observed that under the wording of Article 3(6) a single member of an indigenous community could enjoy the protection it afforded. He proposed the deletion of the words “a member or”.

The CHAIRPERSON of the Drafting Committee conceded that the Committee had not addressed the issue although it could consider it at a later date. She noted, however, that the Drafting Committee believed that the Committee of the Whole had endorsed the text proposed in CONF. 8/C.1/W.P. 67.

The CHAIRMAN agreed with the representative of Thailand that Article 3(6) was designed to protect only those objects collectively used by indigenous communities.

Ms HUGHES (Canada) pointed out that a single member of an indigenous community might occupy an important position in the community.

The CHAIRMAN enquired of the Canadian delegation whether it was really necessary for the provision, which sought to protect objects of communal importance for indigenous communities, to cover the case of an object used by a single member of such a community.

Ms HUGHES (Canada) suggested that the member in question might be the chief who used a cultural object to lead the community and although he or she might personally own or use the object, it would still be “communally important”.

Ms PROTT (UNESCO) stated that she was aware of communities where important cultural objects formed part of traditional use of the community but were used by, or belonged to, a single individual. She cited the examples of objects belonging to or used by medicine men, and objects that acted as title deeds in aboriginal communities in Australia which could only belong to particular individuals.

Mr SHIMIZU (Japan) expressed the fear that a community in one Contracting State might seek recognition of its status as indigenous in a court of another Contracting State. He therefore suggested that qualifying words be added to ensure that only communities recognised as indigenous in the Contracting State in which they were located could invoke that status in the courts of another Contracting State.

Mr McMANAMON (United States of America) supported retention of the provision as drafted. He noted that there was a proposed explanatory comment on Article 3(6) which would restrict and clarify the scope of the provision. He observed that in certain indigenous communities, individual members had responsibility for practices and rituals that were communally important.

The CHAIRMAN asked whether clarification in the Explanatory Report on the final Convention would satisfy the concerns of the delegation of Thailand.

Mr WICHIENTHAROEN (Thailand) agreed that the words “a member or” could be retained if the text made it clear that the words referred only to objects that were used by leading members of the community for communally significant purposes.

The CHAIRMAN put to the vote the question of whether the words “a member or” in Article 3(6) should be deleted.

*Twenty-one delegations voted to retain the words, ten delegations to delete them and twenty-two abstained.*

The CHAIRMAN put to the vote Article 3(6) as proposed by the Drafting Committee.

*The paragraph was adopted by forty-three votes to six, with fifteen abstentions.*

Mr YIFHAR (Israel) recalled that the Drafting Committee version of Article 3(6) contained two alternative limitation periods in brackets.

The CHAIRPERSON of the Drafting Committee observed that no indicative vote was necessary on the alternatives because the limitation periods that the Committee of the Whole had already adopted with respect to cultural objects belonging to public collections would automatically be applied to cultural objects belonging to indigenous communities.

Ms HUGHES (Canada) noted that the purpose of Article 3(6) was to ensure that cultural objects belonging to indigenous communities would receive the same protection as cultural objects forming part of a public collection. She accordingly supported adoption of the following of the two alternatives: “shall be subject to the time limitation applicable to public collections”.

#### *Article 4*

##### *Paragraph (1)*

The CHAIRPERSON of the Drafting Committee observed that its Report contained two variants of Article 4 which differed with respect to paragraph (1) only. Several delegations had considered that the term “possessor” should be defined in order to clarify who would receive compensation. The Drafting Committee had however decided not to define the term since it would be liberally interpreted in accordance with the facts of the situation. Instead, in both variants, the Drafting Committee had considered that deletion of the words “who is required to return it” appearing in brackets in the original text would vest in the court or competent authority a discretion to decide which

person most deserved to receive compensation in the circumstances of the case. However, a small number of delegations had favoured retention of the words and the Drafting Committee had therefore reserved the matter for decision by the Committee of the Whole. Similarly, with respect to the issue of who should pay compensation, the Drafting Committee had considered that the issue could be left to the court or competent authority and that the words appearing in brackets in both variants “payment by the claimant of” could be deleted. A view had also been expressed that the deletion of the words might satisfy the concern of some delegations on the issue of subsidiarity. However, the Drafting Committee had once again decided that the matter should be reserved for decision by the Committee of the Whole.

Mr SIEV (Ireland) opposed inclusion of either set of words because they would limit the discretion of the courts to decide who should pay and receive compensation.

Mr BURMAN (United States of America) considered that the issues of who should pay and who should receive compensation should be treated separately.

Mr STIENON (Belgium) considered the term “who is required to return it” to be useful as the situation was that of a possessor who could assert a right to compensation under a judicial decision ordering the return of an object. The language clarified who had a right to compensation.

The CHAIRMAN put to the vote the question of the retention of the words “who is required to return it” appearing in brackets in both variants in the Report of the Drafting Committee.

*Twenty-six delegations voted to retain the words, thirteen delegations to delete them and eleven abstained.*

Mr KHODAKOV (Russian Federation) considered that a mistake had been made in retaining the words. It meant that certain possessors were not required to return a stolen object, which was contrary to Article 1 of the draft Convention. He was, however, favourable to the deletion of the second phrase of Article 4 in square brackets as he believed that compensation could in certain cases be paid not by the claimant but by the

State of the claimant or by other persons, and in consequence a certain flexibility should be allowed.

Ms HUEBER (Netherlands) supported retention of the words on the ground that they lent clarity to the provision.

The CHAIRMAN put to the vote the retention of the words “payment by the claimant of” appearing in brackets in both variants in the Report of the Drafting Committee.

*Thirty-five delegations voted for deletion, sixteen for retention and two abstained.*

The CHAIRPERSON of the Drafting Committee explained that the two variants allocated the burden of proof differently. The original text remained unchanged in Variant I and the Drafting Committee had been divided as to whether the variant placed the burden of proof on the possessor or on the claimant. In Variant II, the Drafting Committee had inserted the words “can prove that it” so as to make it clear that the burden of proof would lie on the possessor in all cases. The Drafting Committee had considered the choice between the two variants to be a matter for decision by the Committee of the Whole.

Mr VRELLIS (Greece) considered that the two variants of Article 4 should be considered in the light of the document submitted by certain delegations including that of Greece (CONF. 8/C.1/W.P. 72 Corr.).

Mr ALAN (Turkey) considered that the Committee of the Whole should discuss CONF. 8/C.1/W.P. 72 Corr. at the same time as the choice between the two variants.

The CHAIRPERSON of the Drafting Committee preferred to consider the proposal in the context of a discussion of Article 4(2) concerning due diligence. However, she agreed that the proposal could be considered during the discussion of Article 4(1) as it was unclear whether it referred to Article 4(1) or Article 4(2). She noted that the proposal contained useful indicators to decide whether the claimant had exercised due diligence.

Mr BURMAN (United States of America) expressed the view that Variant I could not be read as shifting the burden of proof. He considered that the

addition of further factors which would render it more difficult for the possessor to prove that the acquisition had been made in good faith would upset the delicate balance that the provision sought to strike. For these reasons, he opposed the proposal in CONF. 8/C.1/W.P. 72 Corr.

The CHAIRMAN noted in connection with Article 4 that the terms “or ought reasonably to have known”, which had raised difficulties elsewhere, had not been discussed. In the interest of consistency, he questioned the clarity of the provision and wondered whether it might not pose difficulties of interpretation to courts or competent authorities.

Mr EVANS (Secretary-General of the Conference) recalled that the Committee of the Whole had voted to exclude the words “or ought reasonably to have known” with respect to limitation periods in Article 3. In Article 4, however, the words were used in relation to compensation. He recalled that the Chairman had pointed out that in some situations the words would favour the claimant while in others they would favour the possessor. The Drafting Committee had been of the view that the Committee of the Whole had not expressed sufficient support for deletion of the words in Article 4(1).

The CHAIRMAN considered that delegations which had objected to the words in the context of limitation periods might equally wish to oppose their use in relation to compensation.

Mr GHOMRASNI (Tunisia) drew the attention of delegations to the proposal in CONF. 8/C.1/W.P. 72 Corr.

The CHAIRMAN suggested that the proposal was not yet under consideration.

Mr GHOMRASNI (Tunisia) raised a point of order. He expressed the opinion that the Committee of the Whole should first vote on the proposal in CONF. 8/C.1/W.P. 72 Corr. as it was an amendment to the text of the Drafting Committee.

The CHAIRPERSON of the Drafting Committee recalled that the proposal in CONF. 8/C.1/W.P. 72 Corr. contained two different provisions. The second concerned due diligence and therefore related to

Article 4(2). The first proposed the insertion in the text of Article 4(1) of the words “that it (the possessor) has no available legal or other remedy against its transferor or any prior transferor”. The Drafting Committee had considered that the addition of those words would alter the substance of Article 4(1) and that it was therefore a matter for the Committee of the Whole to decide.

The CHAIRMAN announced that in view of the point of order raised by the Tunisian delegation, the proposal in CONF. 8/C.1/W.P. 72 Corr. would be discussed and voted on first. If the proposal were adopted, a subsequent decision would have to be taken on the wording of Article 4 and whether it was appropriate to insert the new provision in paragraph (1).

Mr KAYE (Turkey) questioned the recollection of the Chairman of the Drafting Committee regarding the purpose of the changes that the proposal sought to make to the text of Article 4(1). The proposal was intended to address the concerns that the Greek delegation had raised on the issue of subsidiarity during the first reading of the draft Convention. Paragraph (1) of the proposal was designed to serve as an alternative to the subsidiarity principle. He recalled that the Drafting Committee had advised the supporters of the proposal to distribute a written proposal and that the matter would be discussed in the Committee of the Whole.

Mr BURMAN (United States of America) raised a point of order. He observed that the proposal represented a significant change to the text of Article 4 and merited a longer discussion than the Chairman appeared willing to dedicate to it.

Mr KHODAKOV (Russian Federation) spoke to the point of order raised by the United States delegation. He noted that under the Rules of Procedure, the Committee of the Whole should vote first on amendments and then on proposals. As the variants that the Drafting Committee had submitted were amendments and CONF. 8/C.1/W.P. 72 Corr. contained proposals, the variants should first be put to a vote.

The CHAIRMAN agreed with the analysis of the Russian delegation and considered that the proposal effectively strayed considerably from the text proposed by the Drafting Committee.

Mr ALAN (Turkey) noted that CONF. 8/C.1/W.P. 72, in which the proposed Article 4(1) was identical to that in CONF. 8/C.1/W.P. 72 Corr., was dated 17 June 1995 and therefore preceded the Report of the Drafting Committee which was dated 19 June 1995.

The CHAIRMAN agreed with the interpretation of the representative of the Russian Federation and ruled that an indicative vote would be taken on the amendments proposed in the Report of the Drafting Committee before proceeding to a vote on the proposal.

Ms BAUR (France) stated her preference for Variant I. She observed that Variant II provided for an impractical system of evidence as it was impossible for anyone to prove that he or she was not aware of something.

Mr VRELLIS (Greece) considered the fundamental interest of Variant II to lie in the fact that it defined where the burden of proving good or bad faith lay. The poor drafting of the provision, seemingly requiring proof of a negative, which as the French delegation had pointed out was impossible, was but a secondary aspect of Variant II.

The CHAIRMAN put to the vote the choice between Variants I and II of Article 4(1), as amended by the earlier vote of the Committee of the Whole.

*Variant I was adopted by twenty-six votes to twenty-five, with two abstentions.*

*The meeting rose at 7.30 p.m.*

CONF. 8/C.1/S.R. 17  
23 June 1995

## SEVENTEENTH MEETING

Tuesday, 20 June 1995, 9.15 p.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/2 Corr.; CONF. 8/6; CONF. 8/C.1/W.P. 2, 6, 21, 24, 70 Corr., 72 Corr. and 75; CONF. 8/D.C./Docs. 1 and 2)

## REPORT OF THE DRAFTING COMMITTEE (continued)

*Article 4 (continued)*

*Paragraphs (1) (continued) and (2)*

The CHAIRMAN recalled that the joint proposal submitted by Albania, China, Egypt, Greece, Hungary, the Islamic Republic of Iran, Mexico, Pakistan, Peru, and Turkey (CONF. 8/C.1/W.P. 72 Corr.) had not yet been discussed and in consequence had not been submitted to the Drafting Committee. He proposed that its authors present it and that opposing views be given before it was put to a vote.

The CHAIRPERSON of the Drafting Committee stated that since there had been no discussion in the Committee of the Whole as to any changes to Article 4(2), the Drafting Committee had not suggested any changes to the provision.

The CHAIRMAN recalled that the UNESCO representative had on first reading suggested that the term “due diligence” should not be employed as it had a very precise meaning in several countries. He agreed that it would be preferable to avoid the use of the term.

The CHAIRPERSON of the Drafting Committee explained that it had been the unanimous view of the members of the Committee that the term was sufficiently clear. It had therefore been retained notwithstanding the view taken by the representative of UNESCO.

The CHAIRMAN considered that this should not cause any problems provided that the Explanatory Report made it clear that the term was not meant in a sense proper to any particular legal system, but that “due diligence” should be construed autonomously under the future Convention.

Mr EL-ZEIN (International Criminal Police Organisation – INTERPOL) emphasised the importance attached by INTERPOL to Articles 3 and 4 of the future Convention and particularly to the obligation of restitution of stolen cultural objects. INTERPOL would have been quick to propose that those provisions be made more widely applicable to objects subject to offences other than theft, but had refrained from doing so in order to avoid overburdening the task of the

Committee. As Article 10 gave States a discretion to apply legislation that was more favourable to restitution, the limited objective of the provision relating to stolen cultural objects was reasonable. INTERPOL was therefore favourable to the retention of Article 3.

Article 4(2) was of equal importance for INTERPOL which had to decide on the question of access to its records, whether it could be extended to private persons, or if it should be limited to the police. This important decision would depend on the wording of the provision and the breadth of its language.

Although the expression “neither knew nor ought reasonably to have known” in Article 4(1) would not have given rise to concern if it had related only to the question of diligence, in fact it affected the principle of the presumption of innocence. It was not for the possessor to prove that it had not committed a criminal act (handling stolen property), but for the court to determine if the possessor was in good or bad faith in the light of specific circumstances. Should there have been particularly serious fault in the circumstances of the case, the possessor would risk a criminal conviction. He therefore suggested that a form of wording be found for the paragraph which reflected the goal of the future Convention, in other words placing emphasis on the importance of due diligence without at the same time leading to a reversal of the burden of proof.

The CHAIRMAN thanked the INTERPOL observer for drawing attention to the fundamental concept of the presumption of innocence which had until then been somewhat neglected. He was surprised by the inconsistency of delegations which had opposed the phrase “or ought reasonably to have known” in a different context, as they had not raised an objection to it here.

He asked the authors of the proposal in CONF. 8/C.1/W.P. 72 Corr. if they would object to dealing with the two paragraphs separately, as according to its Chairperson, the Drafting Committee had not modified Article 4(2).

Mr ALAN (Turkey) did not consider that discussing the proposal in CONF. 8/C.1/W.P. 72 Corr. paragraph by paragraph rather than in its entirety would make any difference.

The CHAIRMAN agreed and considered it clearer and easier to discuss the proposals in CONF. 8/

C.1/W.P. 72 Corr. paragraph by paragraph. He then asked the Turkish delegation to introduce and explain the proposal for paragraph (1).

Mr ALAN (Turkey) explained that since his country had accepted the fact that the award of compensation was a fundamental principle of the future Convention it did not intend to question that principle by the proposal. It should nevertheless be borne in mind that certain countries could face major problems in connection with it. Turkey and a number of other source nations might be unable to sign the future Convention because of this principle. He stated that the principle of compensation was fundamentally incompatible with Turkish cultural property legislation. The text proposed in CONF. 8/C.1/W.P. 72 Corr. attempted to provide a solution which was compatible with Turkish law as well as with the laws of many other countries. The proposal responded directly to the problems mentioned by several delegations concerning subsidiarity, burden of proof and compensation. The key element of the proposal was to shift the focus to the person who had transferred the object to the current possessor. That person might well be the wrongdoer and should therefore bear the burden of proof and be liable to pay compensation in the first instance. Only where for reasons other than the possessor’s default it proved to be impossible to obtain compensation from the transferor should the claimant bear any responsibility. He further stated that under the proposal the court or other competent authority could refuse to grant compensation where it felt that such payment would be inappropriate. The burden of proof concerning good faith should be on the possessor since he alone could prove his own state of mind.

The CHAIRMAN asked whether CONF. 8/C.1/W.P. 72 Corr. differed from CONF. 8/C.1/W.P. 72 with respect to the first paragraph.

Mr ALAN (Turkey) replied that paragraph (1) was identical in both versions of the proposal.

Mr VRELLIS (Greece) explained that the joint proposal (CONF. 8/C.1/W.P. 72 Corr.) dealt with the principle of subsidiarity in a slightly different way from that of Greece in CONF. 8/C.1/W.P. 24 according to which the good faith possessor of a stolen cultural object would always receive compensation, but not

necessarily from the claimant. The latter would only be under an obligation to pay the compensation if the possessor had established that it was impossible for him to bring a claim against the transferor, whose identity only he knew.

The good faith possessor could be paid compensation by his transferor who could then claim from his transferor and so on until the original offender was reached. Such a chain of claims was not impossible as each transferee would know his transferor, and all domestic legal systems had some means of procedure which permitted the joining of third parties in an action.

The joint proposal (CONF. 8/C.1/W.P. 72 Corr.) would not be subject to the criticism concerning the burden of proof levelled by INTERPOL and the French delegation. As the latter had pointed out, it was impossible for a possessor to prove a negative, and this was also the case in Greek law. The joint proposal did not require the possessor to prove a negative of which he neither knew or ought to have known, but rather required him to prove that he had done all that was necessary to know whether or not the object had been stolen. Knowledge, or lack of it, was a question only the court could decide.

Mr MARQUES DOS SANTOS (Portugal) stated that he opposed paragraph (1) of the joint proposal (CONF. 8/C.1/W.P. 72 Corr.) as it was significantly more restrictive than the Drafting Committee text. The joint proposal did not in fact allow for a right to compensation, but for a simple claim for compensation. Furthermore, it gave the possessor the right to bring an action against the transferor, while this was a question for each State's domestic law.

The question of the burden of proof had already been resolved as Article 4(1) had been the subject of an indicative vote. In consequence he questioned whether it was appropriate to put to the vote a wording of Article 4(1) different from, if not opposite to, that which had already been agreed.

Mr FRAOUA (Switzerland) explained that the joint proposal (CONF. 8/C.1/W.P. 72 Corr.) should be seen in the general context of the future Convention as it resulted from the discussions over the previous sessions. Particular regard should be had to the wide definition of cultural objects and public collections,

and also the principle of no limitation periods which a majority had voted for on previous indicative votes.

Swiss law protected the good faith acquirer. The joint proposal, however, required new conditions to be met in this connection: (i) the right to compensation was transformed into a possibility; (ii) the burden of proof of its good faith lay on the possessor; (iii) even when in good faith, the possessor had to prove the impossibility of bringing a recourse action against, for example, the transferor and (iv) compensation depended on the claimant's ability to pay. This text lay down four conditions for the award of compensation, and hence could not be considered a compromise.

He reminded delegations that as Switzerland had an art market, collectors, museums which depended on that market and those collectors, and therefore the greatest interest in cultural objects, it was ready to make efforts, and that it expected to be a party to the future Convention which represented multilateral unification. According to the provisions of the Swiss Constitution, the future Convention would nevertheless have to be the subject of a referendum. It was clear that the text of the joint proposal would not gain the approval of the Swiss Parliament and even less that of the Swiss people.

Mr ALAN (Turkey) stated that the text proposed in CONF. 8/C.1/W.P. 72 Corr. as a new paragraph (2) was intended to clarify the meaning of due diligence so as to enable the courts to apply the rule in the way intended by the Conference. The proposal should thus ensure that the number of cases in which compensation was awarded was reduced to the minimum envisaged by the representative of UNESCO. The text further attempted to require the purchaser to take reasonable steps to ascertain whether the cultural object had been stolen or not.

Mr BUCKLEY (Ireland) was unhappy with the wording of the proposal. He considered it far too detailed and added that for him it represented the worst features of Anglo-American legal drafting. He thought that the determination of the meaning of the term "due diligence" should be left to national courts.

The CHAIRMAN observed that Article 4(1) of the joint proposal seemed to lay a burden of negative proof on the possessor and that paragraph (2) seemed to make compensation subject to numerous conditions. In

this respect he drew the Committee's attention to the statements made by delegations for whom the absence of compensation would make the future Convention unacceptable.

The CHAIRMAN put the joint proposal in CONF. 8/C.1/W.P. 72 Corr. to the vote.

*Eighteen delegations voted in favour of the joint proposal, twenty-eight against and seven abstained.*

*Paragraph (3)*

The CHAIRPERSON of the Drafting Committee stated that the Committee had suggested no changes to the wording of paragraph (3). She explained that it had considered changing the word "it" as for linguistic reasons the use of the word did not seem to be very elegant. The word had not however been replaced by any other because it had been the impression of the Drafting Committee that it would be more important to keep the wording of the text gender-neutral.

The CHAIRMAN noted the absence of opposition to Article 4(3) which he declared duly adopted.

*New paragraphs (4) and (5)*

The CHAIRPERSON of the Drafting Committee informed the Committee of the Whole that the Drafting Committee had considered a proposal made by the Japanese delegation in CONF. 8/C.1/W.P. 6 to add two new paragraphs to Article 4 but that it had been felt in the Drafting Committee that the proposal for the new paragraph (4) which would have provided reimbursement of costs for preservation or repair had not been supported by the Committee of the Whole when it had first been discussed. Another reason not to include the proposal had been, as the representative of UNESCO had pointed out, that such a provision might be injurious as it could encourage harmful repairs. With regard to the proposed new paragraph (5), she explained that the Drafting Committee had been under the impression that procedural questions such as the right to retain the object until compensation had been paid should not be dealt with in the future Convention and left rather to the courts.

The CHAIRMAN agreed that the future Convention should not be overloaded with details.

Mr BOMBOGO (Cameroon) presented his delegation's proposal to add a paragraph to Article 4 covering legal costs and punitive damages (CONF. 8/C.1/W.P. 70 Corr.).

The CHAIRMAN recalled that the concept of punitive damages was contrary to public policy in many States. He called on delegations to comment on the proposal submitted by the delegation of Cameroon, and in the absence of any reaction he requested the Chairperson of the Drafting Committee to present Article 5.

*Article 5*

*Paragraphs (1), (1bis) and (1ter)*

The CHAIRPERSON of the Drafting Committee first pointed out that there was a typing error in the text of Article 5(1) as it had been submitted to the delegations in the First Report to the Committee of the Whole in CONF. 8/D.C./Doc. 2. The word "illegally" should be inserted in the second line after the word "object" so that the text would read "to order the return of a cultural object illegally exported". She then explained that this redraft had been made to amalgamate the text of the *chapeau* of paragraph (i) with sub-paragraph (a) of the original text. This had become possible by using the phrase "illegally exported" that was now defined in Article 1(b) of the draft Convention in lieu of the long phrase "[objects] removed from the territory of the requesting state contrary to law regulating the export of cultural objects because of their cultural significance". She stressed that the change was intended only to provide a more elegant wording. No change in substance had been intended.

She then turned to Article 5(1bis) explaining that the provision corresponded to Article 5(1)(b) of the initial draft. With regard to the two sets of square brackets in the text she stated that the text within the first set of square brackets had initially been inserted to clarify the cases to which the provision should apply. The Drafting Committee had, however, felt that this phrase might also be omitted without any change to the substance of the provision. Regarding the second set of square brackets surrounding the words "issued according to its law regulating its export for the purpose of protecting its cultural heritage", she stated that this phrase had been introduced by the Drafting Committee

to ensure that the provision corresponded to Article 1(b) and to the new Article 5(1) of the draft Convention. With regard to the word “deemed” in the last line of the proposed text, she explained that the Drafting Committee had thought it necessary to make sure that temporarily exported objects which were not returned on time would also be covered by this provision. This should make it absolutely clear that Article 5(1bis) fell within the scope of the definition in Article 1(b).

Moving on to Article 5(1ter) she stated that here the same drafting technique had been used as in Article 5(1bis). Therefore the word “deemed” had again been inserted to ensure that the provision corresponded to the former Article 5(1)(b). Finally, she added that apart from the language of the provision no change of substance had been intended.

The CHAIRMAN suggested that these were all minor drafting questions that did not affect the substance of the provision.

Mr BEKSTA (Lithuania) stated with reference to CONF. 8/C.1/W.P. 21 that an object which had been temporarily exported and not returned in time should in his view necessarily be regarded as having been stolen. If, however, it was intended that those cases be covered by Article 5, it should be made clear that the return of the object would have to be ordered without any further conditions. He added that he would prefer Article 5(1bis) and (1ter) to be deleted.

The CHAIRMAN asked for clarification of whether the Lithuanian proposal was ultimately to replace Article 5(1bis) and (1ter) by the proposed text in CONF. 8/C.1/W.P. 21.

Mr BEKSTA (Lithuania) repeated that he sought the deletion of Article 5(1bis) and (1ter) as being unnecessary since the cases they were intended to deal with would already be covered by Article 3 of the future Convention.

The CHAIRMAN considered the proposal of the Lithuanian delegation to be an amendment which he consequently put to the vote.

*The proposal was defeated by fourteen votes to four with forty abstentions.*

The CHAIRMAN enquired whether paragraphs (1), (1bis) and (1ter) should be voted on separately.

Mr RENOLD (Switzerland) recalled that the Thai delegation had proposed replacing the word “order” in Article 5(1) by the term “decide on the return” for reasons based on the principle of the separation of powers.

The CHAIRMAN replied that the Chairperson of the Drafting Committee had just pointed out to him that this problem had only been raised in the context of paragraph (2) but not with reference to paragraph (1). He therefore proposed that Article 5(1) and (2) should use the same language and should therefore both contain the word “decide” instead of the word “order”.

Mr WICHENCHAROEN (Thailand), after expressing his uncertainty as to whether the current discussion dealt with Article 5(1) or with Article 5(2), stated that the use of the words “shall order” would cause constitutional problems in his country in connection with the separation of powers. He therefore suggested that the wording of Article 5(2) be amended, for instance by including the word “For” at the beginning of the text, by replacing the word “shall” by the word “to” and finally by deleting the word “if” so that the text would then read “For the court or other competent authority of the State addressed to order the return of an illegally exported cultural object the requesting State establishes... ”.

The CHAIRPERSON of the Drafting Committee replied that the Committee had considered this proposal sympathetically in the context of Article 5(2). It had, however, not considered it in connection with Article 5(1) since the problem had only been raised in connection with Article 5(2). It had therefore been the impression of the Drafting Committee that the Thai delegation did not have any problems with the wording of Article 5(1). As far as Article 5(2) was concerned, the Drafting Committee had felt that it would be very difficult to change the provision as suggested without changing the sense of the text. She finally added that it had been the impression of the Drafting Committee that the proposed change was not even necessary since the provision did not directly address courts but States.

Mr KHODAKOV (Russian Federation) considered that the principle of the separation of powers was not relevant once a duly ratified international Convention became a norm directly applicable to a State and to all

its institutions, be they legislative, executive or judicial. Consequently, the term “order” could be retained.

Ms PROT (UNESCO) added that the Drafting Committee had also felt that the court would only have to order the return of the object after all the necessary evidence had been properly established, according to the procedural laws of the *lex fori*. She added that it had further considered replacing the word “shall” by the word “may”. The Drafting Committee had however considered that such an amendment would have implied that the court might have a discretion going beyond its assessment of the evidence, as to whether or not it should order the return of an object.

Mr FRIETSCH (Germany) believed that the text of Article 5(1) should track the language used in Article 1(b). He therefore suggested that Article 5(1) should read: “The return of an illegally exported cultural object exported from ...”.

Mr BOMBOGO (Cameroon) proposed adding at the end of paragraph (1) the words “when this object:” and that paragraphs (1bis) and (1ter) be converted into two sub-paragraphs, (a) and (b), beginning respectively “has been temporarily exported” and “has been taken from a site”.

Mr WICHENCHAROEN (Thailand) said that the reason why he had only raised the point in connection with Article 5(2) had been that there was a substantial difference between Article 5(1) and Article 5(2). Whereas in Article 5(1) the requesting State “may request the court to order” Article 5(2) directly addressed the court with the words “The court or other competent authority of the State addressed shall order ...”.

Mr FRAOUA (Switzerland) admitted that the proposal to substitute “decide on the return” for the word “order” was only a question of drafting and not of substance; it should however be retained if it permitted the ratification of the Convention by the States supporting it. From a legal point of view, it was true that a court did not give an order, but a decision, and such decisions could be subject to appeal.

The CHAIRMAN suggested that the Thai proposal need not be put to the vote, which would not preclude

the Drafting Committee from reviewing the question in the light of the observations that had been made.

The CHAIRPERSON of the Drafting Committee considered that it would assist the Drafting Committee if votes could be taken on whether to retain the words in the two sets of square brackets in Article 5(1bis).

The CHAIRMAN put the different questions raised by Article 5(1bis) to a vote. First he asked delegations to consider the language in square brackets beginning: “for purposes such as exhibition ...”.

*Twelve delegations voted in favour of deleting the language, forty-five against and two abstained.*

He announced that the language in square brackets was thereby retained.

The CHAIRMAN then put to the vote the question of the second phrase in square brackets in Article 5(1bis) beginning: “issued according to its law”.

*Six delegations voted in favour of deleting the phrase, thirty-seven against and eight abstained.*

He accordingly declared the language to be retained.

The CHAIRMAN proposed that the phrases in square brackets in Article 5(1ter) be put to the vote according to the same procedure.

Mr HUBBARD (Mexico) raised a point of order, stating that his delegation was uncertain as to the precise subject of the next vote to be taken.

The CHAIRMAN explained that the next vote would be taken on Article 5(1ter). He recalled that the whole provision was currently drafted in square brackets and put to the vote the question of whether Article 5(1ter) should be deleted.

*Article 5(1ter) was retained by thirty-two votes to twenty-one with three abstentions.*

#### *Paragraph (2)*

The CHAIRPERSON of the Drafting Committee stated that the proposal by the Thai delegation that had been the subject of prior discussion would again be considered by the Drafting Committee. She then

explained that the only change to the original wording of the introductory language of the provision was that the word “significantly” had very reluctantly been placed in square brackets since there had been some discussion in the first reading that had indicated that certain delegations might wish the term to be deleted.

The CHAIRMAN noted that this was not the only term to have been placed in square brackets.

Mr KHODAKOV (Russian Federation) drew attention to the proposal of the delegation of the Russian Federation (CONF. 8/C.1/W.P. 75) on Article 5(2) which constituted an amendment and which should therefore be put to the vote before the text proposed by the Drafting Committee.

The CHAIRMAN enquired of the delegation of the Russian Federation whether the proposal concerned the term “significantly”.

Mr KHODAKOV (Russian Federation) stated that his delegation’s proposal did not contain the word “significantly”

The CHAIRMAN stated that he had been informed by the Chairperson of the Drafting Committee that the Committee had been unaware of this proposal.

Mr KHODAKOV (Russian Federation) replied that the proposal had only been submitted after the distribution of the first Report of the Drafting Committee (CONF. 8/D.C./Doc. 1) and that it could not therefore have been considered by the Drafting Committee.

The CHAIRMAN requested the UNESCO representative to recall the conditions under which the original text had been drafted and why the term “significantly” had been included, as this was a substantive question which could affect the general balance of the whole text. The Committee of the Whole should be aware of the importance of the question that was to be put to the vote.

Ms PROTT (UNESCO) explained that the initial draft had been the well balanced result of lengthy and difficult negotiations. The balance of this compromise was based on the word “significantly”, the word “or” instead of “and” and finally the word “outstanding”. She believed that the deletion of any of those words could endanger the whole compromise. She therefore

suggested that any possible change be considered very carefully.

The CHAIRMAN proposed that the proposal of the Russian Federation be put to the vote, although he was concerned that the entire future Convention could be endangered by such an amendment to the drafting, and also that Article 5(1) and (2) might thereby be emptied of their substance.

Mr KHODAKOV (Russian Federation) explained that his delegation’s intention, far from imperilling the fragile consensus thus far achieved, was simply to modify the arrangement of the words without altering the actual terms of the provision, which were reproduced in the proposal. The suggestion of the Russian Federation was based on the idea that a State would not engage in proceedings for the return of a cultural object of minor value, and this simple consideration should suffice for that State’s request to be taken seriously. Sub-paragraphs (a) to (d) were in no way modified by the proposal, which served only to highlight in the paragraph the importance of the cultural value of the protected objects. If the proposal were to affect the construction or philosophy of the future Convention, the delegation of the Russian Federation was ready to withdraw it.

Furthermore, the word “établir” in the French version of the proposal drafted by the delegation of the Russian Federation was incorrectly translated in the English version by “proves”, the more appropriate term being “established”.

The CHAIRMAN took note of the fact that the spirit of the amendment was not to endanger the painstakingly achieved balance resulting from the preparatory work, while observing that this might nevertheless be the effect. Firstly, it did not reproduce exactly the language proposed by the Drafting Committee as it no longer used the word “significantly”, despite that being an essential phrase, with the consequence that neither the “impairment” nor the “importance” was qualified. Secondly, the Drafting Committee text was more concerned with the point of view of the requesting State than that of the State addressed. It was important to clarify the conditions under which States were prepared to modify the universally adopted current practice of refusing to give effect to foreign public law.

Mr KHODAKOV (Russian Federation) announced the withdrawal, in a spirit of compromise, of the proposal of the Russian Federation if the Chairman considered that it affected the balance of the future Convention.

Mr MARQUES DOS SANTOS (Portugal) considered that a vote should be taken on the word “significantly” in square brackets in the first sentence of Article 5(2).

Ms BAUR (France) regretted the discussion on the square brackets surrounding the word “significantly”, which she saw as stemming from her statement in the Drafting Committee that the correct translation of the English word “significant” did not seem to be the French word “significatif”, but rather “important”. She had consequently called for square brackets in the French version for what seemed to her to be a problem of translation rather than a matter of substance.

The CHAIRPERSON of the Drafting Committee stated that the square brackets around the word “significantly” had not been inserted only because of the translating difficulty referred to by the French delegation but by reason of the close link between the words “significantly” and “outstanding”. She added that the word “or”, which had also been placed in square brackets, would have to be considered together with the two other words. She considered that the possible deletion of either of those words was a decision that had to be taken by the Committee of the Whole. The matter should therefore be decided by that Committee rather than referred back to the Drafting Committee. Finally, she added that given the close link between all three words, they should be voted on together.

The CHAIRMAN considered the discussion to be the result of a misunderstanding, but nevertheless an indicative vote on the question should be taken.

Ms PROTT (UNESCO) suggested that a vote should be taken whether or not to retain the original text with regard to the three words. In no event should separate votes be taken on each single word.

The CHAIRMAN asked whether the vote should proceed on all the terms in square brackets and on

Article 5(2) as a whole, or whether each word should be the subject of a separate vote.

Mr BURMAN (United States of America) supported the suggestion of the representative of UNESCO. He suggested, however, that if it was not decided to retain all three words then separate votes should be taken on each single word.

Mr SAVOLAINEN (Finland), recalling the solution that had been adopted in Article 7 where the last sentence had been moved to a completely new paragraph, suggested that the same procedure might be followed here.

Mr FRANCONI (Italy) withdrew the proposal that had been made by his delegation during the first reading to change the wording of Article 5(2) by replacing the word “outstanding” by the word “significant”. Although he still considered the word “outstanding” too restrictive, the retention of the initial language seemed to be the only possible compromise.

Mr FRIETSCH (Germany) stated that his Government would have major difficulties in signing the future Convention if the words in question were to be deleted.

Mr HUBBARD (Mexico) stated that his country might have difficulties not so much with the word “significantly” but rather with its combination with the word “impairs”. Mexico would also have difficulties with the word “outstanding” if it were not discussed properly since it would be difficult for his country to accept that the State addressed should decide whether or not a particular object was of outstanding cultural importance for the requesting State.

Ms HUEBER (Netherlands) stressed that the retention of the words “significantly” and “outstanding” was of major importance for her country. Given that a compromise was clearly only possible if the word “or” was also retained, she withdrew her proposal to replace it by the word “and”. She suggested that a vote now be taken on the retention of the original text.

Mr MARQUES DOS SANTOS (Portugal) requested that the procedure hitherto observed be followed, and therefore that after the floor had been given for an allotted time to delegations to speak for

and against the proposal, a vote be taken on the words in square brackets, and then on the text as it stood subsequent to that vote.

The CHAIRMAN stated that the subject matter did not justify the respect of allotted speaking times, and considered the Portuguese delegation to be opposing the procedure suggested by the UNESCO representative.

Mr VRELLIS (Greece) supported the procedure proposed by the Portuguese delegation.

Mr GHOMRASNI (Tunisia) also supported the procedure proposed by the Portuguese delegation.

The CHAIRMAN considered that in these circumstances a vote should be taken on the procedure to be followed.

He put to the vote the proposal of the Portuguese delegation to place the words in square brackets and Article 5(2) in its entirety to separate votes, and the suggestion of the UNESCO representative to put to a single vote all the square-bracketed language.

*Twenty-three delegations voted in favour of the Portuguese proposal and twenty-three in favour of the UNESCO suggestion, with five abstentions.*

The CHAIRMAN declared that in application of Rule 20 of the Rules of Procedure the Portuguese proposal had been rejected and that the vote be taken according to the procedure suggested by the UNESCO representative.

Mr YIFHAR (Israel) disagreed with view taken by the Chairman. He stated that from his point of view it was not the Portuguese proposal which had been rejected but the prior proposal by the UNESCO representative.

Mr EVANS (Secretary-General of the Conference) read out rule 20 of the Rules of Procedure of the Conference (CONF. 8/2 Corr.) in reply to the intervention of the Israeli delegation.

The CHAIRMAN stated that he thought the rule to be clear and that his ruling in support of the suggestion made by UNESCO had not been overruled by the vote on the Portuguese proposal.

Mr YIFHAR (Israel) asked that the question to a vote whether the Committee of the Whole shared the Chairman's view that the Portuguese proposal had been overruled be put to a vote as this was a question that had to be decided by delegations.

The CHAIRMAN first read out rule 31 of the Rules of Procedure of the Conference (CONF. 8/2 Corr.) and then put to a vote the Israeli proposal for reconsideration of the previous vote rejecting the Portuguese proposal.

*The Israeli proposal was defeated by twenty-seven votes to fifteen, with six abstentions.*

The CHAIRMAN then put to a vote the substantive provisions of Article 5(2) and, according to the procedure suggested by the UNESCO representative, the question of whether the square-bracketed language in the text proposed by the Drafting Committee should be retained.

*Thirty-one delegations voted to maintain the words in square brackets, fourteen against and six abstained.*

The CHAIRMAN requested the Chairperson of the Drafting Committee to present the other proposals of that Committee.

The CHAIRPERSON of the Drafting Committee stated that the text of Article 5(2)(a) and (c) of the initial draft had remained unchanged. With regard to Article 5(2)(b) she explained that the words "or of a collection" had been added since this amendment had been suggested by several delegations. The amendment had, however, only been included in square brackets because the Drafting Committee had had the impression that the inclusion of those words would bring about some substantive changes to the meaning of that sub-paragraph. Finally, she explained that draft Article 5(2)(d) currently contained two alternative suggestions as to drafting. The square brackets indicated only that it had to be decided which of the two formulations should be retained. She added that the Drafting Committee believed the two proposals to be identical in substance but that the second proposal was clearer.

The CHAIRMAN requested the delegations which had proposed the addition of the words "or of a

collection”, which appeared in square brackets in Article 5(2)(b), to present their proposal.

Mr KHODAKOV (Russian Federation) stated his opposition to adding the words “or of a collection” as it effectively changed the meaning of the paragraph. The term “collection” was moreover not defined for the purposes of the future Convention and would be inappropriate.

The CHAIRMAN enquired whether any delegations supported the language in square brackets.

Mr KAKOURIS (Greece) stated that the words “a complex object” and “of a collection” referred to different things since the former described an entity consisting of movable and immovable objects whereas the latter by definition consisted only of movable objects. He recalled that there was currently a tendency to sell single pieces from collections rather than to sell collections as a whole. He insisted that the words “or of a collection” be included in the future Convention because collections had to be protected as a whole.

The CHAIRMAN noted that arguments for and against the wording had been heard, and he put to the vote the words in square brackets in Article 5(2)(b) of the text proposed by the Drafting Committee.

*Twenty delegations voted for the deletion of the language in square brackets, thirty-four against and four abstained.*

The CHAIRMAN declared the language to have been retained and requested the Drafting Committee to find the appropriate place for its inclusion.

Mr YIFHAR (Israel) stated that the Israeli people regarded itself a living culture although in some countries that view might not be shared. He therefore insisted that the express reference to a “living culture” be retained in Article 5(2)(d) irrespective of the wording of the remainder of the text.

Mr McMANAMON (United States of America) favoured the second alternative wording proposed for Article 5(2)(d) since he considered that text to be more specific and clearer than the initial draft which had been too broad and thus not very helpful. As to possible concern regarding the words “indigenous community” in the second alternative, he drew

attention to the UNESCO comments on the draft Convention (CONF. 8/6) where this term was clearly defined.

The CHAIRMAN put to the vote the two versions of Article 5(2)(d) proposed by the Drafting Committee.

*Nine delegations voted in favour of the first version in square brackets, thirty-nine in favour of the second, and seven abstained.*

*The meeting was adjourned at 11.35 a.m.  
and resumed at 12.15 p.m.*

### *Paragraph (3)*

The CHAIRMAN asked the Chairperson of the Drafting Committee to introduce the text of Article 5(3) prior to a vote on the provision which, he noted, had no square-bracketed language.

The CHAIRPERSON of the Drafting Committee explained that no changes whatsoever had been made to the text of the paragraph. She added that the Drafting Committee had seen the Netherlands proposal in CONF. 8/C.1/W.P. 2 as including an obligation that any cultural object whose return was to be claimed be reported to the police and a photograph of that object provided before any claim could be made. This proposal had, however, not been taken up in the new draft since it would have implied numerous substantive changes for which there had not been sufficient support in the Committee of the Whole.

The CHAIRMAN enquired of the Netherlands delegation whether it considered any amendments to the provision to be appropriate.

Ms HUEBER (Netherlands) stated that no amendments were required since she thought that the proposal in CONF. 8/C.1/W.P. 2 referred to by the Chairperson of the Drafting Committee could be dealt with in the preamble.

The CHAIRMAN asked whether there were any observations on Article 5(3).

Mr BURMAN (United States of America) stated that his delegation had no objections to Article 5(3). He suggested, however, that the Explanatory Report on the future Convention should clearly reflect that the provision was not intended to preclude the State

addressed from requiring such additional evidence as its courts might deem necessary.

The CHAIRMAN confirmed that Article 5(3) entailed no changes in relation to evidentiary requirements.

Mr MARQUES DOS SANTOS (Portugal) stated that the Portuguese delegation was in favour of the Drafting Committee's proposed text for Article 5(3). He enquired whether a vote had been taken on Article 5(2)(a) to (d) .

The CHAIRMAN, after conferring with the Chairperson of the Drafting Committee, stated that both of them were of the view that in voting on each of the sub-paragraphs, the retention of the group of sub-paragraphs as a whole had also been voted on .

Mr EMARA (Egypt) agreed with the Portuguese delegation that it had not been completely clear as to what had been voted on in connection with Article 5(2). He expressed the hope that such confusion would be avoided in the future.

The CHAIRMAN put to the vote Article 5(2)(a) to (d), including the words in square brackets previously voted.

*Thirty-one delegations voted in favour of retaining the four sub-paragraphs as a whole as they stood following the votes on the words in square brackets, nine against and eight abstained.*

As no other delegation had asked for the floor on Article 5(3), the CHAIRMAN put the provision to the vote.

*The paragraph was adopted by thirty-nine votes to five, with four abstentions.*

Mr FALL (Guinea) enquired whether a vote had been taken on the proposal to replace the words "or" by "and" in the expression "traditional or ritual" in Article 5(2)(d).

The CHAIRMAN recalled that a vote taken during the previous meeting had decided in favour of the word "or".

*Paragraph (4)*

The CHAIRPERSON of the Drafting Committee

stated that the limitation periods in Article 5(4) had remained unchanged. A decision on them had still to be taken by the Committee of the Whole, as had been the case with the words "or ought reasonably to have known", placed in square brackets on the first reading as the Drafting Committee had been unclear as to whether or not those words should be retained.

Regarding the words "or from the date on which the object should have been returned" she explained that they had been added simply to clarify that in cases where the object had been temporarily removed from the requesting State, and not returned on the requisite date, the period of limitation began on that latter day and not on the day of the lawful export.

The CHAIRMAN stated that he intended first to put the words "or ought reasonably to have known" to the vote, the absolute limitation period of thirty or fifty years to a second vote, and the short period of one or three years to a third vote. He called for comments on the first question.

Mr CREWDSON (International Bar Association) thought that there would be a basic inequity if the words "or ought reasonably to have known" were retained in Article 4(1) when they had been deleted in Article 3(3). The reason for this difference had not been satisfactorily explained by the Secretary-General of the Conference. He thought that a judge looking at the future Convention for the first time might be inclined to see a distinction in the privilege accorded to a State and the treatment accorded to a private individual claiming compensation. He asked the Chairman whether there really was a justification for such a lack of consistency in the future Convention. If the Chairman were to agree with his view that there was no such justification, he suggested that the question be referred back to the Drafting Committee so that a text providing the appropriate consistency might be drawn up.

Mr ALAN (Turkey) suggested that the text of Article 5(4) should follow that of Article 3(3) as adopted on second reading.

The CHAIRMAN asked the Turkish delegation whether the parallelism it called for was in the interests of consistency, and therefore required the deletion or retention of the words "or ought reasonably" each time

the verb “to know” appeared in the draft Convention, or whether it was inspired rather by a sense of equity and justice as suggested by the representative of the International Bar Association.

Mr ALAN (Turkey) replied that these were different issues and that his suggestion was not to be viewed as corresponding to the observations made by the representative of the International Bar Association.

The CHAIRMAN enquired whether any delegations wished to speak on the notions of consistency or justice implicit in the expression “or ought reasonably to have known”.

Mr FRANCONI (Italy) believed that it was of course important to maintain a degree of consistency and since his delegation had voted in favour of the deletion of the words “or ought reasonably to have known” in the context of Article 3(3), it now felt somewhat uneasy about the wording of Article 5(4). He favoured, however, a text that did clearly refer to actual knowledge. He left it to the Chairman to provide guidance as to how this problem resulting from a lack of consistency could be resolved.

The CHAIRMAN noted that the text was subject to two lines of criticism. The first related to a lack of consistency and parallelism, and the second, which was more substantial, to the notions of justice and equity. Consequently, the deletion of the language in question could prejudice the award of compensation of the good faith possessor and favour restitution without compensation, whereas its retention could have the opposite effect.

He put to a vote the square-bracketed language “or ought reasonably to have known” in Article 5(4) of the text proposed by the Drafting Committee.

*Thirty-three delegations voted in favour of deleting the expression, eighteen against, and four abstained.*

The CHAIRMAN, after noting that there were no observations on the question, put to a vote the absolute limitation period of thirty or fifty years.

*Forty delegations voted in favour of the limitation period of fifty years, sixteen in favour of thirty years and two abstained.*

The CHAIRMAN then put to a vote the limitation period of one or three years.

*Forty delegations voted in favour of a limitation period of three years, ten in favour of one year and three abstained.*

Mr CLARK (Canada) suggested that the words “under a temporary permit” be added after the drafting amendment at the end of Article 5(4) as proposed by the Drafting Committee. The proposed amendment would then read “or from the date on which the object should have been returned under a temporary permit”. He thought that the additional amendment would further clarify the provision.

The CHAIRPERSON of the Drafting Committee stated that it had certainly been intended by the Drafting Committee that the proposed amendment to Article 5(4) should refer to objects that had been exported under a temporary permit and had not been returned in accordance with the provisions of that permit. The Drafting Committee would reconsider the text of the proposed amendment if it was felt by delegations that there was a need for still further clarification.

The CHAIRMAN stated that the proposal of the Canadian delegation, on which no decision had been taken, would be submitted to the Drafting Committee.

Mr KHODAKOV (Russian Federation) pointed out that the French term “rendu” did not correspond to the English word “returned” and asked that the Drafting Committee consider the question.

The CHAIRMAN agreed that the Drafting Committee should examine the question and then put to the vote Article 5(4) as a whole as it stood subsequent to the votes on the language in square brackets.

*Article 5(4) was adopted by forty-seven votes to one with eight abstentions.*

Mr KHODAKOV (Russian Federation) inquired whether a second meeting of the Final Clauses Committee was necessary at this stage.

Mr EVANS (Secretary-General of the Conference) replied that the Drafting Committee had finished its work on the final clauses and that those clauses would

normally be referred back to the Final Clauses Committee for a second reading.

The CHAIRMAN of the Final Clauses Committee stated that he favoured a second reading.

Mr BURMAN (United States of America) asked whether it was intended by the Chairman of the Final Clauses Committee to consider the preamble on the following day.

The CHAIRMAN considered that the draft preamble should be examined either by the Drafting Committee or by the Final Clauses Committee.

*The meeting rose at 1.00 p.m.*

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23 June 1995

#### **EIGHTEENTH MEETING**

Tuesday, 20 June 1995, 3.25 p.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/C.1/W.P. 36, 71 and 76; CONF. 8/D.C./Doc. 2 and 2 Corr.)

#### **REPORT OF THE DRAFTING COMMITTEE** (continued)

##### *Article 6*

Mr STIENON (Belgium) raised a point of order and, before the beginning of discussion on Article 7, drew attention to the proposal tabled by the delegations of Angola, Belgium, Croatia, and Portugal (CONF. 8/C.1/W.P. 76). The effect of the proposal was to reinsert Article 6 in the draft Convention, as it had been deleted without the ample debate that such a decision warranted. The deletion had upset the previously achieved balance of the draft. He reminded delegations that in the absence of such a provision, the court of the State addressed would be deprived of any discretion in the application of the public law of a foreign State pursuant to Chapter III.

The CHAIRMAN recalled that if a Convention remained silent on the question of *ordre public*, then each State remained free to apply the principle when faced with the application of foreign public law. He emphasised that there was in any case widespread consensus on the need to limit to the greatest extent possible the scope of the aforementioned exception, specifically through the inclusion of the word “manifestly” as was the practice of the Conventions adopted by the Hague Conference on Private International Law.

Mr STIENON (Belgium) explained that the aim of the proposal was simply to make express provision, in restrictive terms, for what was in any event a means for courts of the State addressed to refuse to apply foreign public law.

Mr FRANCONI (Italy) stated that he was confused by the proposal, as the reference to international public policy could only be invoked in relation to a foreign law judged to be totally unacceptable in accordance with fundamental principles of the law of the forum court. There was however precisely no such designation of a foreign law here as a Convention dealing with substantive law such as the Unidroit draft did not contain genuine conflict rules. He feared that a provision which expressly permitted the exception of international *ordre public* would amount to a blank cheque to hobble the implementation of the Convention.

The CHAIRMAN recalled that emphasis had in previous debates been laid on the fact that the future Convention provided for the application of foreign public law. He considered erroneous the belief that the absence of an express provision would exclude the role of international public policy. As that exception was recognised in all systems of private international law, he concluded that it would be appropriate to provide expressly for it in the future Convention, while specifically restricting its application to exceptional cases.

Mr VRELLIS (Greece) agreed with the opinion expressed by the Italian delegation. He believed it to be unlikely that the court would be able to invoke the international public policy exception in the context of a Convention on substantive private law if that

instrument did not make the exception available expressly.

Mr MARQUES DOS SANTOS (Portugal) stated that he did not share the view of the Italian delegation. He recalled that private international law included not only traditional “international” public policy as referred to by the Italian and Greek delegations, but other sets of rules that were considered mandatory, for example, the “community” public policy of the member States of the European Union, or more generally “economic” public policy. He therefore emphasised the need to include an express provision in the future Convention to limit the effects of such mandatory rules of international application.

Ms PROTT (UNESCO) stated that the first reason for not mentioning public policy in the draft Convention had been to avoid encouraging courts to employ such a concept. The second reason was that the case law of some legal systems affirmed that free circulation of goods and the protection of the *bona fide* purchaser were fundamental elements of public policy. Consequently, she feared that a provision on public policy would enable States to give grounds for holding that Chapter II was manifestly against the public policy of that legal system, which would make the whole Convention ineffective.

The CHAIRMAN put the proposal in CONF. 8/C.1/W.P. 76 to the vote.

*The proposal was defeated by twenty-seven votes to seven, with six abstentions.*

#### *Article 7*

The CHAIRPERSON of the Drafting Committee stated that the reference to Article 5(1) in the *chapeau* of Article 7 had been replaced by one to Chapter III, which seemed to be more correct. Article 7(1)(a) had been left unchanged, and as the Committee of the Whole had not yet decided on the wording placed in brackets in Article 7(1)(b) and (c), these had also been left unchanged. A new paragraph (2) had been drafted with the same aim as the last sentence in Article 7 of the draft as set out in CONF. 8/3. Moreover, the new paragraph (2) had been amended to bring about conformity with the wording proposed in the suggested new Article 5(2)(d), as the two provisions were consid-

ered to reflect the same concept. The Drafting Committee had no mandate to amalgamate the *chapeau* of Article 6 with the content of Article 7, as had been suggested by some delegations, in view of the terms in which the Committee of the Whole had voted in favour of deleting Article 6. This vote had dealt with the question of whether limits should be set expressly in the Convention on the exercise by the courts of public policy considerations. If the *chapeau* to Article 6 were to be inserted in the present Article 7, this might result in a different interpretation of the content of that article. In the view of the Drafting Committee, the essential effect of Article 7 was to exclude certain claims from arising.

#### *Paragraph (1)*

Mr KHODAKOV (Russian Federation) drew attention to his delegation’s proposal in CONF. 8/C.1/W.P. 71.

Mr FRAOUA (Switzerland) requested that his delegation’s proposals in CONF. 8/C.1/W.P. 36 be put to the vote, except for paragraph (1)(a) which had appeared in the former Article 6 that had subsequently been deleted. He stressed that as there was a difference between the Swiss proposal and the text of the Drafting Committee, he was therefore requesting that a vote be taken as between the Swiss proposal and the revised draft, the real difference being found in sub-paragraph (c) of paragraph (1) of the Drafting Committee text and the retention in the latter of paragraph (2).

Mr KHODAKOV (Russian Federation) stated that the Russian proposal for sub-paragraph (b) sought to give the necessary protection to the inalienable rights of a person who had created an object to export it. As the draft currently stood, however, anyone could borrow the object from its creator, export it under a false pretext and never return it. In such a case it would be particularly difficult for the creator to prove the theft of the object. He considered it absolutely necessary that protection be accorded in such situations. The Russian proposal would, therefore, require that the person who exported the object be “duly authorised” by the creator and also include a new paragraph (3) concerning temporary exports.

The CHAIRMAN agreed that the Russian and

Swiss proposals were concurrent, and considered the wording of the Russian proposal to be perhaps more specific than that proposed by the Drafting Committee.

Mr FRAOUA (Switzerland) recalled the substance of his delegation's proposal and emphasised the importance of the draft Convention being aligned on the fifty year limitation period provided for by the Bern Convention. On the expiry of that period, the object would fall within the scope of application of the future Convention.

The CHAIRMAN emphasised that, at first sight at least, the difference between the Swiss proposal and that of the Drafting Committee on the one hand, and of the Russian proposal on the other, lay essentially in the condition that the object was exported by a person "duly authorised" by the creator.

Mr BURMAN (United States of America) considered that the main difference between the Swiss and Russian proposals was not the question of the person duly authorised, but the fact that the Swiss proposal provided for a specific period of time following the death of the creator, which would allow for the orderly disposal of the estate.

Mr KHODAKOV (Russian Federation) stated that he did not share the view of the United States delegation. Firstly, the difference between the Russian and Swiss proposals was not limited to the condition relating to the "duly authorised" person, as the Russian proposal also sought to provide the necessary protection to exports undertaken by the creator. Secondly, paragraph (3) itself was innovative, as it established an exception for temporarily exported objects.

The CHAIRMAN put to a vote the amendment to Article 7 proposed by the Russian delegation in CONF. 8/C.1/W.P. 71.

*The proposal was defeated by nineteen votes to three, with twenty-one abstentions.*

Mr FRAOUA (Switzerland) asked that only sub-paragraph (c) of his delegation's proposal be put to the vote.

The CHAIRPERSON of the Drafting Committee suggested that the Committee vote first on sub-

paragraph (c) of the Swiss proposal (CONF. 8/C.1/W.P. 36) and then between that sub-paragraph and Article 7(1)(b) of the text of the Drafting Committee (CONF. 8/D.C./Doc. 2).

Mr FRAOUA (Switzerland) agreed with the proposal of the Chairperson of the Drafting Committee.

The CHAIRMAN put to a vote the amendment proposed in sub-paragraph (c) of the Swiss proposal in CONF. 8/C.1/W.P. 36.

*The proposal was defeated by nineteen votes to fifteen, with twelve abstentions.*

Mr SAVOLAINEN (Finland) suggested the following drafting amendment to the wording in Article 7(1)(a): "the export of a cultural object is no longer illegal at the time at which the object is [ordered] to be returned"; so as to clarify cases where the export was illegal at the time of the request, but had become legal at the time of the order.

The CHAIRMAN agreed that the proposal improved the wording and suggested that the Drafting Committee give further consideration to this drafting amendment.

The CHAIRMAN put to a vote the question of the retention of the text in square brackets in Article 7(1)(b) as proposed by the Drafting Committee, beginning with the words "or within a period".

*Eighteen delegations voted in favour, four against and eighteen abstained.*

Mr BURMAN suggested applying the same period of time as in the Bern Convention.

The CHAIRMAN put to a vote the question of whether Article 7(1)(b) should contain a limitation period of fifty years, as proposed by the Swiss delegation, as opposed to the five year period proposed by the Drafting Committee.

*Seventeen delegations voted in favour of the Swiss proposal, sixteen against and fourteen abstained.*

Mr CLARK (Canada) suggested that in Article 7(1)(c) the twenty year period be replaced by one of fifty.

The CHAIRPERSON of the Drafting Committee explained that since there had been no proposal, the Drafting Committee had decided not to change the period of twenty years.

Mr FRAOUA (Switzerland) proposed that sub-paragraph (c) be deleted, as it would be very difficult to prove the length of time that had elapsed since the creation of the object if the creator's identity were unknown.

Mr YIFHAR (Israel) supported the proposal of the Swiss delegation to delete sub-paragraph (c). However, if it were to be retained, then he suggested a seventy year period.

Mr WICHIENTHAROEN (Thailand) stressed the importance of maintaining sub-paragraph (c), since in Eastern countries, religious art was often created by a deliberately unidentified author.

Ms PROTT (UNESCO) confirmed the statement by the Thai delegation in that it was indeed very difficult to identify the creators of religious art in certain States. Therefore, she supported retaining sub-paragraph (c). She further pointed out the difficulty of identifying the exact date of the creation of such an object.

The CHAIRMAN put to a vote the question of the deletion of sub-paragraph (c).

*Twenty delegations voted in favour of deletion, eighteen against and six abstained.*

*Paragraph (2)*

The CHAIRMAN put to a vote the question of retaining the square-bracketed words "tribal or" in Article 7(2).

*Thirteen delegations voted in favour, three against and twenty-three abstained.*

*It was unanimously decided to remove the square brackets around the words "traditional or ritual".*

Mr KHODAKOV (Russian Federation) called for a separate vote on the two paragraphs of Article 7.

The CHAIRMAN put the adoption of Article 7(1) as amended to the vote.

*Thirty-six delegations voted in favour, one against and six abstained.*

Mr YIFHAR (Israel) stated that, in his view, Article 7(2) was now redundant in view of the introduction of Article 5(2)(d).

Mr EVANS (Secretary-General of the Conference) noted that Article 5(2) established a rule, whilst Article 7 constituted an exception to this rule and Article 7(2) constituted an exception to that exception.

Mr YIFHAR (Israel) suggested that Article 7(2) had been drafted in order to cater for the inclusion of indigenous communities within the future Convention. However, as that aim had already been achieved in Chapter III, there was no need to retain Article 7(2).

Ms PROTT (UNESCO) explained that the exception established by Article 7(1)(b) might create problems for indigenous communities. To ensure that the cultural objects of those communities would be returned, notwithstanding that sub-paragraph, paragraph (2) was necessary.

Mr HUBBARD (Mexico) pointed out that a simple reference to Article 5 would shorten paragraph (2).

The CHAIRMAN stated that, in his view, an exception to an exception would certainly not facilitate comprehension and he therefore suggested that the paragraph be redrafted.

Mr McMANAMON (United States of America) stressed the importance of the substance of paragraph (2). However, he agreed to its being redrafted so as to avoid any confusion.

The CHAIRMAN put to the vote the question of the adoption of Article 7(2) subject to possible improvements in the drafting.

*Thirty-two delegations voted in favour, three against and fifteen abstained.*

Mr KHODAKOV (Russian Federation) explained his delegation's vote against the adoption of the provision. He emphasised that as a consequence of rejecting the Russian proposal, the draft left the creator of an object exposed to manipulation for the temporary export of that object for a supposed exhibition abroad.

If the object were not subsequently returned, then, as had already been pointed out, the creator had no protection and would have great difficulty in proving the theft.

The CHAIRMAN stated that the Explanatory Report on the Convention would clearly reflect this point and noted that Article 7 as a whole had been adopted.

#### Article 8

##### Paragraph (1)

The CHAIRPERSON of the Drafting Committee pointed out that Article 8(1) appeared in an abbreviated form as a result of the amendment of Articles 1(b) and 5. In view of the consensus in the Committee of the Whole, the Drafting Committee had decided to retain the wording “fair and reasonable” and not to include a provision which would place the proof of burden on the possessor.

The CHAIRMAN put to the vote the adoption of Article 8(1).

*The provision was adopted by forty-two votes to none, with three abstentions.*

##### Paragraph (2)

The CHAIRPERSON of the Drafting Committee recalled that CONF. 8/D.C./Doc. 2 Corr., contained two versions of Article 8(2). Variant I was a reproduction of the text of the original draft, while Variant II took into account the absence of an export certificate. Under the latter, an export certificate was important although its absence would not create a legal presumption.

Mr CREWDSON (International Bar Association) emphasised that both of the Variants contained a period of fifty years from the date of the illegal export. He pointed out that it would be most unlikely for an export certificate to be conserved for fifty years, especially given the possibility that the object might by then have passed through many hands. Furthermore, it could be extremely difficult to determine whether the original export had occurred prior to the entry into force of the Convention.

Mr MARQUES DOS SANTOS (Portugal) called for an immediate vote between the two variants.

The CHAIRMAN put to an indicative vote the adoption of Variant I in CONF. 8/C.D./Doc. 2 Corr.

*Twenty-one delegations voted in favour, nineteen against and three abstained.*

The CHAIRMAN put to an indicative vote the adoption of Variant II in CONF. 8/C.D./Doc. 2 Corr.

*Twenty-two delegations voted in favour, sixteen against and six abstained.*

Mr HUBBARD (Mexico) considered that the last vote had been unclear.

The CHAIRMAN put to a vote the question of which variant should be adopted.

*Twenty delegations voted in favour of Variant I and twenty-six in favour of Variant II, with no abstentions.*

*The meeting rose at 5.25 p.m.*

CONF. 8/C.1/S.R. 19  
23 June 1995

#### NINETEENTH MEETING

Wednesday, 21 June 1995, 3.30 p.m.

*Chairman:* Mr Lalive (Switzerland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS** (CONF. 8/3; CONF. 8/C.1/W.P. 7, 31, 39, 40, 51, 59, 65 Corr., 66, 72 Corr., 78, 79 and 81; CONF. 8/D.C./Doc. 2 and Add.)

#### REPORT OF THE DRAFTING COMMITTEE (continued)

The CHAIRMAN recalled that the President of the Conference had remarked at the outset that delegations would have to make extraordinary efforts to draw up precise rules that could fulfil the legitimate expectations of the future Convention. It was their duty to do everything in their power to secure the adoption of the Convention, as it was a sign of encouragement for all

those concerned by the problem of the theft and illegal export of cultural objects. He reported the deep concern of many delegations in relation to the fact that the work of the Conference was behind schedule, and also concerning certain tendencies that had appeared over the course of the debates which jeopardised the balance and structure of the Convention. He considered that it was important to dispel misunderstandings during this last meeting of the Committee of the Whole and emphasised the highly prejudicial consequences that the failure of the diplomatic Conference would have. He stated that the draft Unidroit Convention set up a delicate balance and that it would prove difficult to achieve its ratification by importing States if that balance were to be upset. He gave examples of the subjects of some interventions and of proposals for amendment that had been made during the discussions. He shared the concern expressed by the Zambian representative during the fourth meeting of the Committee of the Whole, that “[d]eviation from the present text and accommodation of the many amendments proposed would run the risk of the Conference closing on 24 June without the Convention being adopted”. Such a situation would be comparable to that of the 1970 UNESCO Convention which had been signed primarily by exporting States of cultural objects. He confirmed that should the draft Convention be adopted, it would hit hard the illegal traffic in and pillage of cultural objects. For this reason, he asked delegations to make the greatest efforts to adopt a text that would encourage the largest number of States to sign, and particularly those which would be obliged to take on new undertakings and to modify their domestic law.

*Article 8 (continued)*

*Paragraph (3)*

The CHAIRPERSON of the Drafting Committee explained that the Committee had made no changes to the paragraph except to insert the word “cultural” before the word “object” as it had done throughout the whole draft Convention. With respect to Article 8(3)(b), one delegation had proposed that the word “or entity” should be placed after the word “person”. The Drafting Committee had declined to do so because the term “person” was generally understood as referring to both natural persons and legal bodies. The Drafting

Committee had also declined to follow the proposal of the Japanese delegation to replace the word “possessor” in the *chapeau* with the words “the possessor who is also the owner”, having reasoned that a possessor who does not own an object has no legal right to transfer ownership of it.

Mr SHIMIZU (Japan) recalled that his delegation had proposed the deletion of Article 8(3). He considered that the requesting State and the possessor were free to agree the time and conditions of return and the paragraph was accordingly redundant.

Mr KUZMIN (Russian Federation) had no objection to Article 8(3). He proposed, however, that the term “ownership” be clarified. He suggested that the provision should specify that only the owner of a cultural object could retain or transfer ownership of it. He proposed that the words “valid title” should replace the word “ownership”, recalling that Article 7(2) of the 1970 UNESCO Convention used the same words in practically the same context.

The CHAIRPERSON of the Drafting Committee apologised to the delegation of Japan for mischaracterising their objection and pointed out that the Russian delegation had sought clarification of the term “ownership”. She noted that the Drafting Committee had carefully considered the proposal and decided that it was clear that a possessor who did not have valid title to an object could not transfer ownership of it.

The CHAIRMAN explained that the Explanatory Report could clarify the point that the Russian delegation had raised with respect to the meaning of “ownership”.

Mr KHODAKOV (Russian Federation) was surprised to hear that the Drafting Committee had already considered the proposal his delegation had just made, as it was the first proposal to replace the term “ownership” by the words “valid title”. He did not insist that a decision be taken on it in the Committee of the Whole, but hoped that the Drafting Committee would examine the proposal.

Mr FRAOUA (Switzerland) supported the retention of Article 8(3), as he considered it necessary to provide assistance to those States unable to pay fair and reasonable compensation to the good faith possessor.

He understood the concerns of the Japanese delegation, but considered that the provision would have a psychological effect and that it was, in consequence, necessary even if it was true that States could enter into agreements outside the scope of the Convention. He supported the drafting proposal made by the Russian delegation.

The CHAIRMAN put to the vote the Japanese proposal to delete Article 8(3).

*The proposal was defeated by thirty-five votes to nine, with ten abstentions.*

*Paragraph (4)*

The CHAIRPERSON of the Drafting Committee recalled that the Drafting Committee had added the word “cultural” before the word “object” in Article 8(4). The Drafting Committee had made no other changes to the provision in the absence of proposals to amend its wording.

The CHAIRMAN put Article 8(4) to the vote.

*The paragraph was adopted by forty-one votes to four, with five abstentions.*

*Paragraph (5)*

The CHAIRMAN put Article 8(5) to the vote.

*The paragraph was adopted by fifty-five votes to none, with one abstention.*

*Proposed new paragraphs (6) and (7)*

The CHAIRPERSON of the Drafting Committee stated that the Committee had considered the proposal by the delegation of Japan to add two new paragraphs to Article 8 (CONF. 8/C.1/W.P. 7). The first proposal sought to ensure that the possessor would be entitled at the time of return to compensation for restoration or preservation of the cultural object. The Drafting Committee had not considered that it had a mandate to entertain the proposal. Moreover, the representative of UNESCO had pointed out that the adoption of the proposal might encourage bad repairs. The second proposal would permit the possessor to refuse to return the object until compensation had been paid. The Drafting Committee had considered that courts would

require payment of the compensation before ordering the return of the cultural object.

Mr SHIMIZU (Japan) observed that the subject matter of the second proposal was not characterised as a procedural matter under Japanese law. He requested that the Explanatory Report clearly reflect the principle contained in the proposal that the right of retention was not affected by the Convention.

*Article 9*

*Paragraph (1)*

The CHAIRPERSON of the Drafting Committee explained that the Committee had removed the words “without prejudice to” from Article 9(1) because they did not adequately reflect the fact that a new ground of jurisdiction had been created in addition to existing traditional grounds.

The CHAIRMAN commended the Drafting Committee on the insertion of the words “in addition to the courts” in Article 9(1) and invited French-speaking delegations to discuss privately with the Chairperson of the Drafting Committee whether the French text achieved the same degree of precision.

Ms PROTT (UNESCO) pointed out that the Chairperson of the Drafting Committee had not mentioned the change in the title of Chapter IV.

The CHAIRPERSON of the Drafting Committee stated that the new title “Jurisdiction” more accurately reflected the substance of Article 9 than did the title “Claims and Actions”.

Mr BURMAN (United States of America) requested the Drafting Committee to consider, throughout the text of the draft Convention, whether the words “States Parties” or “Contracting States” were more appropriate bearing in mind the definition of the terms in the Vienna Convention on the Law of Treaties.

The CHAIRPERSON of the Drafting Committee stated that the Committee had not yet had the opportunity to discuss the question because it had been raised after the Drafting Committee had finished its consideration of Article 9.

The CHAIRMAN recalled that the issue had already been raised and suggested that it could be considered in the “toilette” of the Convention.

He put Article 9(1) to the vote.

*The paragraph was adopted by fifty-four votes to none, with one abstention.*

*Paragraph (2)*

The CHAIRPERSON of the Drafting Committee explained that the Committee had substituted the words “any court or other competent authority” for the words “any jurisdiction” because the word “jurisdiction” was confusing and might create the false impression that the provision related to the competence of courts rather than to the courts themselves. Moreover, the change aligned the English text on the French.

Mr SAJKO (Croatia) expressed concern at the use of the words “to any court” and suggested that Article 9(2) should clarify that while the parties had the choice of jurisdiction, they did not have a choice in relation to the type of court to submit their dispute within the jurisdiction chosen.

The CHAIRMAN considered that the provision clearly covered the point and that the Explanatory Report could clarify the matter.

Mr SIEV (Ireland) enquired whether the Drafting Committee had considered defining the word “parties”.

The CHAIRPERSON of the Drafting Committee stated that the Committee had assumed that the term would cover all parties to the action.

Mr AL NOURI (Kuwait) was not opposed to the adoption of Article 9(2) as proposed by the Drafting Committee. He considered however that the Explanatory Report should mention that States could bring their claims before courts with international jurisdiction or to arbitration.

Mr BURMAN (United States of America) noted that Article 9(1) contained the words “a claim may be brought” and stated that all agreed that this amounted to an affirmative grant of jurisdiction. In Article 9(2) however, it was his understanding that the words “may agree to submit” were not an affirmative grant of jurisdiction but were subject to the rules of whatever

court or competent authority entertained the action. He suggested that this understanding be reflected in the Explanatory Report.

The CHAIRMAN pointed out that the words “agree” and “competent” took care of the matter but agreed that the Explanatory Report could clarify the matter.

Mr YIFHAR (Israel) raised three points with respect to Article 9(2). First, he suggested that the word “parties” be amended to read “parties to the dispute”. Second, he requested that it be made clear that a court would not be obliged to accept jurisdiction over a claim simply because the parties had referred the claim to it. Third, he considered that the paragraph concerned arbitration and suggested that the words “any court or other competent authority or” be deleted so that only arbitration would remain.

The CHAIRMAN stated that the questions raised by the Israeli delegation concerned matters of both substance and drafting.

The CHAIRPERSON of the Drafting Committee stated that the Committee had been of the belief that the word “parties” obviously referred to “parties to the dispute”. With respect to the proposal of the Israeli delegation to delete the reference to any court or competent authority, she noted that the paragraph did not cover arbitration alone but was designed to give the parties the widest latitude to decide which forum should resolve their dispute. She noted that some courts such as the International Court of Justice in the Hague would not fall within the definition of an arbitral tribunal. She also noted that competent authorities were distinct from arbitral tribunals or courts of law. The term was designed to cover administrative bodies which existed in a number of States. In this regard, she pointed out that many States submitted claims under the 1970 UNESCO Convention to administrative bodies.

The CHAIRMAN put to the vote the Israeli proposal to amend Article 9(2).

*The proposal was defeated by forty-five votes to one, with nine abstentions.*

*Paragraph (3)*

The CHAIRMAN enquired of the Tunisian delegation whether it was true to say that its proposal to amend paragraph (3) (CONF. 8/C.1/W.P. 59) was superfluous, given that a court, even if it did not have jurisdiction over the substance of a case, should always take provisional and protective measures in relation to an object located on its territory. He noted that if in some States such a procedure did not exist, it was outside the ambit of the future Convention to compel them to adopt one.

The CHAIRPERSON of the Drafting Committee observed that the Committee had made no changes to the provision. It had considered the proposal of the delegation of Tunisia (CONF. 8/C.1/W.P. 59) that a Contracting State where the object was located should be required to take protective measures even where the claim for return of the object was before the courts or other competent authority of another Contracting State. The Drafting Committee considered that the Committee of the Whole had not expressed support for the proposal and that the Explanatory Report could clarify that Article 9(3) did not preclude another State from taking protective measures.

Mr GHOMRASNI (Tunisia) noted in connection with the opinion expressed by the Chairperson of the Drafting Committee that his delegation's proposal had never been subject to a vote and that it was in consequence impossible to state that the Committee of the Whole was not in favour of it. As to its substance, he suggested that if a State were to bring a claim for restitution or a request for return of a stolen or illegally exported cultural object, it would already have taken some time to locate the object and identify its possessor. The location of the object could change and it was therefore very important to provide a means of preventing the object from changing country or possessor and disappearing before an action could be brought to a conclusion. He considered it necessary for States to unify their law on the subject of provisional and protective measures.

The CHAIRMAN asked the Tunisian delegation whether it could agree to its proposal being reflected in the Explanatory Report.

Mr GHOMRASNI (Tunisia) left this question to the decision of the Committee of the Whole.

Mr BURMAN (United States of America) believed that the Tunisian proposal would make the Convention vulnerable. He noted that the inclusion of Article 9(3) was useful for States whose laws did not favour the ordering of protective measures.

The CHAIRMAN put to the vote a choice between the text of Article 9(3) as proposed by the Drafting Committee and the Tunisian proposal for amendment.

*Forty delegations voted in favour of the text of the Drafting Committee, seven for the text proposed by the delegation of Tunisia and eight delegations abstained.*

The CHAIRPERSON of the Drafting Committee stated that the Committee had considered the proposal of the delegation of Poland (CONF. 8/C.1/W.P. 31) to provide expressly for a waiver of court fees and other costs in Article 9. The Drafting Committee had seen the proposal as making a substantive change to the text of Article 9 and therefore concluded that it should be discussed by the Committee of the Whole. The Drafting Committee had also examined the proposal of the delegation of Japan (CONF. 8/C.1/W.P. 7) that Article 9 should provide that the procedural rules of the forum State would apply to an action or claim arising under the Convention. The Drafting Committee had considered an express provision to that effect to be unnecessary as a court would automatically apply its own procedural rules.

Mr PRUSZYNSKI (Poland) stated that his delegation supported the proposal contained in CONF. 8/C.1/W.P. 31 for the practical reason that the cost of the proceedings might be significant.

The CHAIRMAN put to the vote the proposal of the Polish delegation to add a new paragraph to Article 9.

*The proposal was defeated by twenty-five votes to six, with nineteen abstentions.*

Mr SHIMIZU (Japan) agreed to withdraw his delegation's proposal in CONF. 8/C.1/W.P. 7 on the understanding that the Conference agreed that the Convention did not affect the procedural law of the forum State.

### *Article 10*

The CHAIRPERSON of the Drafting Committee explained that Article 10 contained three variants (CONF. 8/D.C./Doc. 2 Add.). Variant I was the original version. That variant would allow, but not oblige, the State addressed to apply its more favourable national law to a claim for restitution or return of stolen or illegally exported cultural objects. Variant II, based on CONF. 8/C.1/W.P. 65 Corr., would enable States to apply more favourable rules provided they did not affect the application of the principles provided for in the Convention. Variant III, reflecting the proposal in CONF. 8/C.1/W.P. 66, required Contracting States to apply national laws that were more favourable to the restitution or return of stolen or illegally exported objects.

The CHAIRMAN noted in connection with Variant III that while the word “shall” in the English text clearly imposed an obligation, the words “maintient son droit” in the French text were cumbersome and should be improved by the Drafting Committee if that variant were to be adopted.

Ms BAUR (France) recalled that the French delegation had already expressed its concern in relation to Article 10, especially as it seemed open to divergent interpretations. She considered it important that the basic principles which guaranteed the balance of the draft Convention be respected, at least each time a decision was handed down under domestic legislation that was more favourable to the restitution or return of a cultural object than the future Convention. For this reason her delegation called for the basic principles to be set out in Article 10.

Mr KHODAKOV (Russian Federation) considered Variant II to be very imprecise. In Variant I it was clear that Article 10 laid down the possibility of applying a more favourable regime than that of the Convention, and that the prime objective was the best result in terms of the restitution and return of cultural objects. Variant II allowed for the application of more favourable domestic legislation on condition that it did not jeopardise the basic principles of the Convention, thereby raising the delicate question of how those principles were to be defined. His delegation was opposed to Variant II.

Mr FRAOUA (Switzerland) announced that during informal discussions with various delegations, including that of France, a solution had been found to the problem raised by that delegation. The concern had seemed to be the avoidance of discrimination against French citizens by the application of another State’s legislation which was more favourable to the return or restitution of cultural objects, but which ran counter to the basic principles of French law. Noting that this was a problem of public policy, he believed that the delegations which had participated in the informal discussions had found a satisfactory solution in the sense that it was agreed that the application of national laws more favourable to restitution or return under Article 10 would in no way imply the recognition and enforcement in France or in any other State Party to the future Convention of judgments applying such laws.

Mr HUBBARD (Mexico) stated that the informal consultations had produced a compromise between the three variants. The compromise proposed retention of the original text (Variant I) and additions to the preamble that would remove the concerns that had prompted the proposal of the other variants. He had, however, not heard whether the compromise had been formally accepted.

Mr KAYE (Turkey) noted that Variant III had been proposed to meet the concern of some delegations that lawyers in Common Law jurisdictions would persuade judges to apply the rules of the Convention as opposed to national laws that were more favourable to restitution or return. He understood that the variant posed difficulties for certain delegations and agreed that a compromise could be achieved by including language in the preamble to enable a claimant to demonstrate that the Convention did not supersede more favourable national rules. In those circumstances he withdrew Variant III.

The CHAIRMAN considered that a vote on Variant I alone would suffice.

Mr PERL (Argentina) agreed with the delegation of Turkey that the preamble could clarify the meaning of Variant I and suggested that greater confidence should be placed in national courts. Variant I simply allowed a national court to apply more favourable rules of domestic law.

Ms BAUR (France) announced that her delegation had decided to withdraw its proposal following the informal agreement that had resulted from the consultations between her delegation and others on this question.

The CHAIRMAN thanked all those delegations which had contributed to the consensus.

Mr WICHIENTHAROEN (Thailand) considered that Variant III was not without merit. He stated that he would have made a similar proposal if that variant had not been proposed and he suggested the following text: "A Contracting State shall apply its law in circumstances where it is more favourable to the restitution and return of stolen or illegally exported cultural objects than provided for in the Convention".

Mr AL NOURI (Kuwait) recalled that his delegation and the delegation of Croatia had submitted a proposal for the amendment of Article 10 (CONF. 8/C.1/W.P. 40) and requested that mention be made of it in the Explanatory Report on the future Convention. He considered, however, that Variant I of Article 10 was acceptable.

The CHAIRMAN observed that the proposal made by the Croatian and Kuwaiti delegations was very similar to the text of Variant I. He agreed that the Explanatory Report should take note of it.

The CHAIRPERSON of the Drafting Committee noted that the variant proposed by the delegation of Thailand imposed an obligation on States to apply more favourable rules. Variant I, on the other hand, allowed States to apply more favourable rules but did not oblige them to do so.

Ms PROTT (UNESCO) drew attention to the following variant of Article 10 that had been proposed by UNESCO (CONF. 8/6): "Any State Party to this Convention may accord wider protection to a person dispossessed of a cultural object in the circumstances described in Article [to be specified] or to the rights of a requesting State under Article 5 by disallowing or restricting the right to compensation of the person in possession of the object or in any other manner". Although the UNESCO text was more precise than the other proposed variants, she noted that the Drafting

Committee had not referred the proposal to the Committee of the Whole.

The CHAIRMAN put to the vote the proposal of the delegation of Thailand and Variant I that had appeared in the original text.

*Forty-nine delegations voted in favour of Variant I, four in favour of the proposal of the Thai delegation and two delegations abstained.*

Mr EL-ZEIN (INTERPOL) indicated that he would have preferred Article 10 to provide for the application of the future Convention to cultural objects subject to a wider range of offences than just theft and illegal export.

Mr HUBBARD (Mexico) recalled that certain delegations had made a proposal (CONF. 8/C.1/W.P. 78) that would enable Unidroit to convene a special commission to oversee the operation of the Convention.

The CHAIRMAN considered that the best place to include such a provision would be in the Final Clauses or in the preamble.

#### *Opting out clauses*

The CHAIRPERSON of the Drafting Committee stated that the Committee had not discussed the issue of opting out because it had not been raised formally in the Committee of the Whole. She stressed that it was also important to consider whether States that chose to opt out of one Chapter of the final Convention would be able to bring claims under that Chapter against States that had not opted out.

Ms KOUROUPAS (United States of America) referred to the United States proposal (CONF. 8/C.1/W.P. 81). The proposal advocated the addition of a provision to the Final Clauses that would allow a State, when depositing its instrument of ratification, approval or accession, not to implement Chapter III. The proposal was influenced in part by the inclusion of Article 3(2) in Chapter II. Although Chapter II commanded strong support in the United States, she anticipated possible political resistance to the implementation of Chapter III. She recalled that Chapter III contained a completely new and novel basis for legal claims and that it would

require private enforcement of public laws rendering it difficult for some States to incorporate it in their legal systems. The United States therefore needed the flexibility to opt out of Chapter III and an opting out clause would enable more States to ratify the Convention and thereby achieve greater protection for stolen cultural objects. She further observed that the adoption of part of the final Convention was preferable to not adopting it all. She stressed that whatever the fate of Chapter III in the United States, its commitment to stem the tide of international illegal export of cultural objects under existing legislation and under the 1970 UNESCO Convention would remain undiminished.

The CHAIRMAN stated that although it was preferable that States implement the Convention in its entirety, he agreed that some States needed the flexibility to opt out of certain provisions. He noted that the wording of the United States proposal was simple and concise.

Mr FRIETSCH (Germany) supported the proposal of the United States delegation.

Mr SHIMIZU (Japan) supported the United States proposal but suggested that it be amended to allow States to opt out of Chapter II or Chapter III. He stressed that Japan considered the success of the Convention to be of great importance. However, to attract adherents, the Convention should allow States to adopt only part of the final Convention. He observed that States might be precluded for constitutional or other reasons from adopting the Convention in its entirety.

Mr ALAN (Turkey) opposed the adoption of an *à la carte* Convention. In the view of his delegation, an opting out clause would destroy the delicate balance between Chapters II and III. With respect to the proposal of the delegation of Japan, he stated that the absence of Chapter II would nullify the effect of the Convention.

Mr SÁNCHEZ CORDERO (Mexico) stated that an opting out clause would upset the delicate balance that the draft Convention sought to establish.

Ms GOLAN (Israel) considered that opting out clauses were unsuitable although she recognised that the Convention raised legal problems for certain States.

She proposed that opting out clauses be omitted and that individual States be permitted to enter reservations that would be governed by the international law of treaties.

Mr BEKSTA (Lithuania) supported the proposal of the United States delegation as he considered that the Convention had not achieved a proper balance of interests.

Mr FRAOUA (Switzerland) declared that his delegation had difficulties in taking a position on this question as the content of Chapters II and III had still to be finalised. He proposed that discussion of the United States proposal be resumed at the end of the business of the Conference.

The CHAIRMAN considered that a vote on this important issue could be postponed, but not its discussion.

Mr MAROTTA RANGEL (Brazil) supported the Chairman's decision on the procedure to be followed. He added that discussion would be very useful as it would enable delegations to become more aware of the question and that it would subsequently be easier to take a decision on the matter when they had a comprehensive picture of the future Convention.

Mr KHODAKOV (Russian Federation) asked whether the Committee of the Whole would meet again before the close of the Conference.

Mr EVANS (Secretary-General of the Conference) suggested that the proposals of the United States and of Japan should go to the Plenary Conference *via* the Drafting Committee.

The CHAIRMAN suggested that there might be no need to submit the proposal to the Drafting Committee if the Committee of the Whole accepted that the Japanese proposal, which he considered to be perfectly drafted, could be put to a vote in Plenary.

Mr KHODAKOV (Russian Federation) agreed with the Secretary-General's opinion. He drew attention to the fact that the questions of retroactivity and reservations were still pending despite their having been referred back from the Drafting Committee to the Committee of the Whole.

Mr MASSA (Peru) supported the sentiments expressed by the delegations of Mexico and Turkey with respect to the addition of an opting out clause. He noted that such a clause might create a hole that would sink the entire ship.

The CHAIRMAN stated that while he was in favour of the application of the future Convention in its entirety, he had to recall that Chapters II and III had always been considered as being very different. Consequently, he thought it possible to offer an option to signatory States to make a declaration indicating that they would not apply one or the other of the Chapters. He noted that a provision of such a nature could facilitate the task of delegations in persuading their national Parliaments or authorities to adopt the Convention.

Ms DIDIGU (Nigeria) noted that the United States had an admirable implementation record under the 1970 UNESCO Convention. However, her delegation opposed the addition of an opting out clause because it would greatly reduce the effectiveness of the Convention.

The CHAIRMAN noted that a consensus existed not to put the matter to a vote at this stage.

Ms HUEBER (Netherlands) drew attention to the fact that the delegations which had made the proposal contained in CONF. 8/C.1/W.P. 78 had amended the

words "shall at regular intervals" to read "may at regular intervals".

Mr BURMAN (United States of America) considered that the Secretary-General of the Conference should propose a more appropriate term than "Special Commission".

Mr FRAOUA (Switzerland) stated that his delegation supported the proposal to include a provision in the draft Convention leaving States free to opt for either Chapter II or Chapter III. He considered that it was, however, inappropriate to take a decision on the question before the final text of the future Convention was available.

The CHAIRMAN thanked the members of the Committee for their constant support.

Mr BUCKLEY (Ireland) recalled that the Chairman and he had soldiered together through the work on the draft Convention for a number of years. He wished to thank the Chairman on behalf of all delegations for the efficient, confident and good-humoured manner in which he had presided over the proceedings of the Committee of the Whole.

The CHAIRMAN declared the work of the Committee of the Whole to be concluded.

*The meeting rose at 6 p.m.*



**PART III – FINAL CLAUSES COMMITTEE**



**COMMENTS BY GOVERNMENTS ON THE DRAFT FINAL PROVISIONS CAPABLE  
OF EMBODIMENT IN THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL  
RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

CONF. 8/5 Add. 1  
April 1995

**JAPAN**

(...)

24. There should be an explicit provision stating that the Convention will apply only to cultural objects stolen or illegally exported after the entry into force of the Convention in respect of each Contracting State.

25. It will not infrequently happen that a cultural object covered by the Convention is required to be retained by the competent authorities of a Contracting State in accordance with its domestic law in connection with the exercise of the criminal jurisdiction of that State. There will also be cases in which cultural objects are required to be transferred to another State in accordance with the relevant regulations concerning judicial assistance in criminal investigation. We are of the opinion that the Convention should not interfere with the operation of such aspects of national criminal justice systems. Accordingly, the following new article is suggested:

*(New article)*

“This Convention does not apply to

(a) cultural objects which are required to be retained by the competent authorities including administrative authorities of a Contracting State, including cultural objects which the possessor is required to retain by the order of such authorities, in accordance with the criminal justice law or any other laws of that Contracting State concerning the maintenance of public security and order and protection of private property;

(b) cultural objects which are required to be transferred from a Contracting State to another State in accordance with the domestic law of that Contracting State concerning international assistance in criminal justice and investigation;

(c) cultural objects which have been transferred from one State to another State for the purpose of international assistance in criminal justice and investigation and are required to be returned from the latter State to the former State in accordance with the terms and conditions of the initial transfer.”

CONF. 8/5 Add. 3  
May 1995

**UNITED STATES OF AMERICA**

*Article D*

This article should provide that the Unidroit Convention prevails as to future binding international agreements, except to the extent a State party declares that particular provisions of a future agreement will prevail.

*Article F*

This provision should also permit a State to declare that as a forum State it will generally apply its laws and procedures, except as it otherwise notes. Such a declaration would settle many questions of applicable law, providing guidance to parties in other States as to what implementation to expect, and reduce disputes as to applicable standards.

*Article H*

Reservations may be needed in order to render the Convention workable in various systems. This article should either be deleted, in which case general treaty law would apply, or the general treaty rule substituted, i.e. that reservations cannot contravene basic purposes of the Convention and can only be made as to specific provisions. In accordance with the Vienna Convention on the Law of Treaties, States parties would have the right to object to reservations. A provision precluding reservations would be overly restrictive.

## WORKING PAPERS SUBMITTED TO THE FINAL CLAUSES COMMITTEE

CONF. 8/C.2/W.P. 1 Corr.  
13 June 1995

*Proposal by the delegation of the Netherlands*

### *Article A*

“(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Objects at Rome on 24 June 1995 and shall remain open for signature by all States.”

- (2) (unchanged).
- (3) (deleted).
- (4) (unchanged).

### *Article B*

In paragraphs (1) and (2) the words “enters into ... deposit” should be replaced by the words: “shall enter into force on the first day of the [second] [third] month following the date of deposit ...”.

Likewise for the text of article G(3) and (4) and Article I(3).

### *Articles C and F*

These articles should be deleted since Article 10 of the Convention should cover the more favourable treatment clause. Article 10 would be the usual place in a Convention for such a provision.

### *Article D*

The term “any international instrument” in paragraph (1) is unfortunate, since international policy agreements would also be covered by it. This would be an undesirable result. A solution could be: “any international legally binding instrument”.

### *Article G(3) and (4)*

See above under Article B.

### *Article I(3)*

See above under Article B.

### *Article E*

Article E is acceptable to the Netherlands. However, due to constitutional reasons a supplementary article is needed to cover the position of those territorial units of the Kingdom of the Netherlands which are not in Europe. Such a new article should read as follows:

“A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time”.

### *Article H*

This article is considered to be extremely valuable for the Unidroit Convention as it safeguards the object and purpose of the Convention.

CONF. 8/C.2/W.P. 2  
10 June 1995

*Proposal by the delegation of the Czech Republic*

### *Preliminary application*

“1. Each signatory State agrees to preliminary application (or from the date of 1 July 1996) until entry into force for signatory States in accordance with Article ... provided that such preliminary application is not contrary to its Constitution or other internal laws.

2. Each signatory State may at the time of signature declare by notice addressed to the depositary that it does not accept preliminary application.

3. Each signatory State may terminate preliminary application by notice addressed to the depositary that it does not intend to become a Contracting State.

Such termination of preliminary application shall take effect for a signatory State 60 days after the date of receipt of this notice by the depositary.”

CONF. 8/C.2/W.P. 3 Corr.  
12 June 1995

*Proposal of the delegation of Finland*

*New article*

“(1) Each Contracting State shall at the time of signature ... declare that applications for the return of cultural objects under Chapter III may be submitted to that Contracting State by one or several of the following methods:

(a) directly to the courts or other competent authorities of that State; or

(b) through an authority or authorities designated by that State to receive such applications and to forward them to the courts or other competent authorities of that State; or

(c) through diplomatic or consular channels.

(2) Each Contracting State shall also, in a declaration made at the time of signature ... indicate the courts or other authorities of that State competent to order cultural objects to be returned under Chapter III.

(3) A declaration made under paragraphs 1 or 2 may be amended or modified at any time by a new declaration.”

CONF. 8/C.2/W.P. 4  
13 June 1995

*Proposal by the delegation of Croatia*

A new final provision should be added, to read as follows:

“When depositing its instrument of ratification, adoption, approval or accession, each State shall provide a declaration or statement on the legal regime of export of its cultural objects”.

CONF. 8/C.2/W.P. 5  
13 June 1995

*Proposal by the delegation of France in its capacity  
as Chair of the European Union*

As is recalled in the commentary on draft Article D in the Draft Final Provisions (CONF. 8/4) of 10

January 1995, it is customary for international private law Conventions to contain a provision safeguarding existing agreements, often of a regional character, dealing with the same or a similar subject-matter. The Member States of the European Union are in favour of such a clause.

In addition, they would like to avoid a situation arising whereby the Convention under negotiation might interfere with their obligations under the treaties establishing the European Communities and the European Union. They would recall in this connection that, in their relations with each other, they are already bound by Directive 93/7/EEC of the Council on the return of cultural objects unlawfully removed from the territory of a Member State.

Accordingly, the Member States of the European Union would like to include among the Final Provisions the following article:

“In their relations with each other, Parties which are Members of the European Communities shall apply the provisions of Community law and shall not therefore apply the provisions of this Convention the scope of application of which coincides with that covered by Community provisions”.

CONF. 8/C.2/W.P. 6 Corr.  
13 June 1995

*Proposal by the delegation of the United States  
of America*

The following is not a formal proposal at this time but intended to elicit the views of participating States.

*Article D*

“(1) This Convention, does not affect any international instrument to which Contracting States are [, or may become,] Parties and which contains provisions on matters governed by this Convention **or matters governed by customary international law with regard to hostilities or occupation**, unless a contrary declaration is made by the States Parties to such instrument.”

(2) (unchanged).

CONF. 8/C.2/W.P. 7  
13 June 1995

*Proposal by the delegation of the Czech Republic*

In accordance with the Vienna Convention on the Law of Treaties (Vienna, 25. 5. 1969) it is not possible to use the opening to signature of an international multilateral treaty for accession at the same time.

Accession is an international law instrument and has the same character as ratification.

States which have not signed the Convention or ratified it may become Contracting Parties only by accession.

The Convention should make no difference between States which have ratified the Convention and States which accede to it.

The Czech delegation proposes the following modification of Article A(3) of CONF. 8/4 (Draft Final Provisions):

“This Convention is open for accession by all States which are not signatory States as from the first day following termination of the opening of this Convention to signature”.

CONF. 8/C.2/W.P. 8  
13 June 1995

*Proposal by the delegation of Switzerland*

*Article I*

“1. This Convention may be denounced by any Contracting State at any time.

2. The denunciation shall be notified in writing to the depositary.

3. A denunciation takes effect on the first day of the month following the expiration of six months after the date of its notification to the depositary, unless a longer period has been provided for in the notification.”

CONF. 8/C.2/W.P. 9  
14 June 1995

*Proposal by the delegation of the  
United States of America*

*Article D*

In the light of the Committee’s discussion of the proposal made by the delegation of France in its capacity as Chair of the European Union (CONF. 8/C.2/W.P. 5), it is proposed that an additional paragraph, drafted along the following lines, be included in Article D of the draft Final Provisions. This proposed provision would, in accordance with the wishes of the Committee, parallel the provision proposed in CONF. 8/C.2/W.P. 5.

*Proposed text of a new paragraph*

“In their relations with each other, Parties which are members of other regional bodies may declare that they will apply provisions of the internal regulations of such bodies and to that extent will not therefore apply the provisions of this Convention the scope of application of which coincides with that covered by those internal regulations.”

CONF. 8/C.2/W.P. 10  
14 June 1995

*Proposal by the delegation of the  
United States of America*

*Article D(1)*

In the light of the Commission’s discussion of CONF. 8/C.2/W.P. 6 Corr., it is proposed that Article D(1) should be amended as follows:

“1. This Convention does not affect any international instrument to which Contracting States are [, or may become, ] parties and which contains provisions on matters governed by this Convention or matters relating to hostilities or occupation, unless a contrary declaration is made by the States Parties to such instrument.”

CONF. 8/C.2/W.P. 11 Corr. 2  
15 June 1995

*Proposal by the delegations of Mexico and Turkey*

It is proposed that a new Final Clause be added as follows:

“A special Commission shall be established and shall convene from time to time at the request of a Contracting State in order to review the practical operation of the Convention.”

The delegations of Mexico and Turkey further propose that a working group be formed to consider appropriate provisions concerning the creation and procedures of the Commission.

The precedent for this article is Article 42 of the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption signed on 29 May, 1993.

CONF. 8/C.2/W.P. 12  
14 June 1995

*Proposal by the delegation of China*

*Article I(4)*

“(4) The fact that a denunciation has taken effect in respect of a Contracting State shall not be a ground for that State not applying the Convention in respect of a claim brought in accordance with the Convention before a court or competent authority of that State before the date on which that State denounced the Convention.”

CONF. 8/C.2/W.P. 13  
15 June 1995

*Proposal by the delegation of the Czech Republic*

*New article*

“This Convention may be revised only by a Diplomatic Conference.”

CONF. 8/C.2/W.P. 14  
15 June 1995

*Proposals by the delegation of Switzerland*

*Article D*

“In their relations with each other, Contracting States which are Members of supranational organisations or regional bodies may declare that they will apply the regulations adopted by these organisations or bodies and will not therefore apply the provisions of this Convention the scope of application of which coincides with that of those regulations.”

*Article I(4)*

Article I(4) should be amended as follows on the basis of the proposal of the delegation of China in CONF. 8/C.2/W.P. 12:

“However, a denunciation notified by a Contracting State shall not dispense it from applying this Convention to a claim brought before a court or other competent authority of that State prior to the notification of this denunciation.”

CONF. 8/C.2/W.P. 15  
15 June 1995

*Proposal by the delegations of Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*

As is recalled in the commentary on draft Article D in the Draft Final Provisions (CONF. 8/4) of 10 January 1995, it is customary for international private law Conventions to contain a provision safeguarding existing agreements, often of a regional character, dealing with the same or a similar subject-matter. The delegations of Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, are in favour of such a clause.

In addition, the aforementioned delegations would like to avoid a situation arising whereby the

Convention under negotiation might interfere with their obligations under the treaties establishing the European Communities and the European Union. As the internal market of the European Community has been enlarged by the Agreement on the European Economic Area to Iceland, Liechtenstein and Norway, the Member States of the European Community as well as the Contracting Parties to the Agreement of the European Economic Area are already bound by Directive 93/7/EEC of the Council on the return of cultural objects unlawfully removed from the territory of a Member State of the European Community or of a Contracting Party to the Agreement on the European Economic Area

Accordingly, the aforementioned delegations propose to include among the Final Provisions the following article:

“In their mutual relations, Parties which are members of the European Community or which are parties to the Agreement on the European Economic Area shall apply European Community or European Economic Area rules and shall not therefore apply the provisions arising from this Convention whose scope coincides with that of the European Community or European Economic Area provisions”.

CONF. 8/C.2/W.P. 16  
16 June 1995

*Proposal by the delegation of the  
United States of America*

*Article D*

“In their relations with each other, Contracting States which are Members of supranational organisations or communities or regional bodies, or the supranational organisation or community or regional body acting on their behalf, may declare that they will apply the regulations adopted by these organisations, communities or bodies and will not therefore apply the provisions of this Convention the scope of application of which coincides with that of those regulations.”

CONF. 8/C.2/W.P. 17  
16 June 1995

*Proposals by the delegation of Guinea*

*Article D*

*Alternative I*

In their relations with each other, Parties which are bound by other treaties, conventions or community instruments the scope of application of which coincides with that covered by this Convention may declare that they will not apply the provisions of this Convention.

*Alternative II*

In their relations with each other, Parties which are Members of other regional bodies or communities may declare that they will not apply the provisions of this Convention the scope of application of which coincides with that covered by the law of those regional bodies or communities.

CONF. 8/C.2/W.P.18  
16 June 1995

*Proposal of the delegation of Tunisia*

*New article*

“(1) Contracting States shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests for the return of cultural objects brought by a State under Article 9 may be submitted to those States under one or more of the following procedures:

(a) directly to the courts or other competent authorities of the declaring State;

(b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;

(c) through diplomatic or consular channels.

(2) Contracting States shall also designate the courts or other authorities competent to order the restitution or return of cultural objects under the terms of Chapters II and III.

(3) Declarations made under paragraphs 1 and 4 of this Article may be amended or modified at any time by a new declaration.

(4) The provisions of paragraphs 1 to 3 of this Article do not affect those bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.”

CONF. 8/C.2/W.P. 19  
17 June 1995

*Proposal by the delegation of Switzerland*

*Article D*

“In their relations with each other, Contracting States which are Members of supranational organisations such as the European Union or regional bodies such as the European Economic Area may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply the provisions of this Convention the scope of application of which coincides with that of those regulations.”

CONF. 8/C.2/W.P. 20  
19 June 1995

*Proposal by the delegation of the  
United States of America*

Comment

In order to achieve balance, an article such as Article D should either be general in its terms, or must be considerably expanded. The later approach, suggested below, may become difficult and perhaps a general article is preferable.

*Article D*

“In their relations with each other, Contracting States which are Members of organisations such as the European Union or regional or other intergovernmental bodies such as the Organization of American States, the Organization of African Unity, the Association of South-East Asian Nations, the British Commonwealth, the European Economic Area, the Southern African Development

Community, the North American Free Trade Agreement, the Asian Pacific Economic Commission, MERCOSUR, ... (further organisations to be added by delegates) may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between their member States the provisions of this Convention the scope of application of which coincides with that of those regulations.”

CONF. 8/C.2/W.P. 21  
20 June 1995

*Text of the draft final provisions as provisionally  
adopted by the Final Clauses Committee on first  
reading and as subsequently reviewed  
by the Drafting Committee*

*Article A*

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until [30 June 1996].

(2) This Convention is subject to ratification, acceptance or approval by States which have signed it.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

*Article B*

(1) This Convention shall enter into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State on the first day of the sixth month

following the date of deposit of its instrument of ratification, acceptance, approval or accession.

#### *Article D*

(1) This Convention does not affect any international instrument by which any Contracting State is bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of this Convention.

[ (3) In their relations with each other, Contracting States which are Members of supranational organisations [, such as the European Union,] or regional bodies [, such as the European Economic Area,] may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.] (\*)

#### *Article E*

(1) If a Contracting State has two or more territorial units, whether or not possessing different systems of law applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute for its declaration another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of

the territorial units of a Contracting State, the reference to:

(a) the territory of a Contracting State in Article 1(a) shall be construed as referring to the territory of a territorial unit of that State;

(b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;

(c) the Contracting State where the cultural object is located in Article 9(1) shall be construed as referring to the territorial unit of that State where the object is located;

(d) the law of the Contracting State where the object is located in Article 9(3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and

(e) a Contracting State in Article 10 shall be construed as referring to a territorial unit of that State.

(4) If a Contracting State makes no declaration under paragraph 1, this Convention is to extend to all territorial units of that State.

[N.B. The Belgian delegation requested that the Commentary on the proposed Convention should indicate that the reference to the term “territorial” as the basis for jurisdiction under this provision should be interpreted in a broad sense: in Belgium, for instance, such jurisdiction would not be on a strictly territorial basis.]

#### *Article G*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force shall take effect on the first day of the sixth month following the date of its deposit with the depositary.

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(\*) The Committee being unable to reach agreement on the words inside square brackets, it was agreed that this question should be referred to the Conference.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal shall take effect on the first day of the sixth month following the date of the deposit of the notification.

#### *Article G bis*

(1) Each Contracting State shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests for the return of cultural objects brought by a State [under Article 9] may be submitted to it under one or more of the following procedures:

(a) directly to the courts or other competent authorities of the declaring State;

(b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;

(c) through diplomatic or consular channels.

(2) Each Contracting State may also [indicate] [designate] the courts or other authorities competent to order the restitution or return of cultural objects under the terms of Chapters II and III.

(3) Declarations made under paragraphs 1 and 2 of this Article may be [amended] [modified] at any time by a new declaration.

(4) The provisions of paragraphs 1 to 3 of this Article do not affect those bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.

#### *[Article G ter*

When depositing its instrument of ratification, acceptance, approval or accession, each State shall provide the depositary of this Convention with written information [in one of the official languages of [the Convention] [Unidroit]] concerning the law and administrative arrangements governing the export of its

cultural objects. [This information shall be updated from time to time as appropriate.]]

#### *[Article H*

No reservations are permitted except those expressly authorised in this Convention.]

#### *Article I*

(1) This Convention may be denounced by any Contracting State, at any time after the date on which it enters into force for that State, by the deposit of an instrument to that effect with the depositary.

(2) A denunciation shall take effect on the first day of the [sixth] month following the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it shall take effect upon the expiration of such longer period after its deposit with the depositary.

[(3) Notwithstanding such a denunciation, this Convention shall nevertheless apply to a claim for restitution or a request for return of a cultural object submitted prior to the date on which the denunciation takes effect.]

#### *Article J*

(1) This Convention shall be deposited with the Government of the Italian Republic.

(2) The Government of the Italian Republic shall:

(a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made under Articles E and F;

(iii) the withdrawal of any declaration made under Article G(4);

(iv) the date of entry into force of this Convention;

(v) the agreements referred to in Article D;

(vi) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).

#### **Authentic texts and witness clause**

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at Rome, this ..... day of June, one thousand nine hundred and ninety-five, in a single original, in the English and French languages, both texts being equally authentic.

CONF. 8/C.2/W.P. 22  
20 June 1995

#### *Proposal by the delegation of the Czech Republic*

##### *Reservation*

“A State may not avail itself of any reservation at the time of signature or the deposit of its instrument of ratification, approval or acceptance.”

Explanation:

It is our view that, under international treaty law and practice, declarations have no consequences. Such declarations are of a declaratory character (in the case of this Convention, to indicate the list of courts or other competent authorities). We recommend this type of declaration.

On the other hand, reservations could permit a State not to apply certain articles.

The admittance of reservations in the Convention would complicate the relations between States, especially in the practical application of the Convention.

ONF. 8/C.2/W.P. 23  
21 June 1995

#### *Proposal by the delegation of Switzerland*

##### *Article D*

“In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they apply the internal rules of these organisations or bodies and do not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.”

CONF. 8/C.2/W.P. 24  
21 June 1995

#### *Proposal by the delegation of Romania*

##### *Article G<sup>ter</sup>*

“Each Contracting State shall, no later than six months after the deposit of its instrument of ratification, acceptance, approval or accession, provide the depositary with written information in one of the official languages of the Convention concerning the legislation governing the export of its cultural objects. This information shall be updated from time to time.”

CONF. 8/C.2/W.P. 25  
21 June 1995

#### *Proposal by the delegation of Israel*

##### *Article A(3)*

Israel asks for reconsideration of Article A(3) of the Final Clauses, and proposes that the words “it is open for signature” be replaced by the words “of the entry into force of the Convention”.

**PART IV – PLENUM**



## WORKING PAPERS SUBMITTED TO THE PLENUM

CONF. 8/W.P. 1  
21 June 1995

*Proposal by the delegation of the Czech Republic*

*New article*

“This Convention may be revised only by a Diplomatic Conference.”

CONF. 8/W.P. 2  
21 June 1995

*Proposal by the delegation of Israel*

Article H of the final clauses should be deleted.

CONF. 8/W.P. 3  
22 June 1995

*Proposal by the delegation of the  
United States of America*

*Final Clauses*

*New paragraph or additional paragraph for Article H*

“When depositing its instruments of ratification, acceptance, approval or accession, a State that is a Party to the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property may make a declaration that it will not implement Chapter III of this Convention.”

CONF. 8/W.P. 4  
22 June 1995

*Proposal by the delegation of Belarus*

*Article A*

- (1) (unchanged)
- (2) (unchanged)
- (3) (unchanged)

(4) Instruments of ratification, acceptance, approval or accession shall be deposited with the Government of the Italian Republic, the depositary of this Convention.”

*Article J*

“The depositary of this Convention shall:

- (1) (unchanged)
- (2) (unchanged)”

CONF. 8/W.P. 5  
23 June 1995

*Proposal by the delegations of Australia, Cambodia,  
Canada, France, Greece, Ireland, Italy, Mexico,  
the Republic of Korea, Spain, Turkey,  
the United States of America and Zambia*

### UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

#### 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;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter “illegally exported cultural objects”).

*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 and belong to one of the categories listed in the Annex to this Convention.

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, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.

(6) A declaration referred in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.

(7) For the purposes of this Convention, a “public collection” consists of a group of inventoried or otherwise identified cultural objects owned by:

- (a) a Contracting State;
- (b) a regional or local authority of a Contracting State;
- (c) a religious institution in a Contracting State; or

(d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

(8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community’s traditional or ritual use, shall be subject to the time limitation applicable to public collections.

*Article 4*

(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment 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) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.

(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.

(4) In determining whether the possessor exercised due diligence, regard shall be had to all 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, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural 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 to order the return of a cultural object illegally exported from the territory of the requesting State.

(2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

[(3) A cultural object which has 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 shall be deemed to have been illegally exported.] **DELETED**

(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural 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 [or of a collection]; **DELETED**

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

(d) the traditional or ritual use of the object by a tribal or indigenous community,

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

(4) Any request made under paragraph 1 of this article 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 to 3 have been met.

(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

*Article 6*  
*(former Article 8)*

(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, 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 illegally exported.

(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may 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 who provides the necessary guarantees.

(4) The cost of returning the cultural 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 cultural object by inheritance or otherwise gratuitously.

*Article 7*

(1) The provisions of this Chapter shall not apply where:

(a) the export of a cultural object is no longer illegal at the time at which the return is requested; or

(b) the 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.

(2) Notwithstanding the provisions of subparagraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

CHAPTER IV – GENERAL PROVISIONS

*Article 8*  
(former Article 9)

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority 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.

*Article 9*  
(former Article 10)

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

(2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

*Article 10*  
(new article)

(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

(2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

(3) This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.

CHAPTER V – FINAL PROVISIONS

*Article 11*  
(new article)

The President of the International Institute for the Unification of Private Law (Unidroit) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of the Convention.

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc;) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments

*Proposal by the delegations of Australia, Canada,  
France, Greece, Italy, Mexico,  
the Netherlands, Spain, Switzerland, Turkey,  
the United States of America and Zambia*

**PREAMBLE**

THE STATES PARTIES TO THIS CONVENTION,

ASSEMBLED in Rome at the invitation of the Government of the Italian Republic from 7 to 24 June 1995 for a Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects,

CONVINCED of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation,

DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information,

DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all,

EMPHASISING that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States,

AFFIRMING that the adoption of the provisions of this Convention for the future in no way confers any

approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention,

CONSCIOUS that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges,

ACKNOWLEDGING that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation,

RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector,

HAVE AGREED as follows:

CONF. 8/W.P. 7  
23 June 1995

*Proposal by the delegations of Belgium, Japan, the Netherlands and Switzerland*

*Final Clauses*

Add to the new paragraph or additional paragraph for Article H as proposed by the delegation of the United States of America in CONF. 8/W.P. 3 a further provision:

“When depositing its instrument of ratification, acceptance, approval or accession, a State that is a Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property may make a declaration that it will not implement Chapter III of this Convention.

A State that is not a Party to the 1970 UNESCO Convention may make a declaration that it will not implement either Chapter II or Chapter III of this Convention.”

## REPORTS SUBMITTED TO THE PLENUM

CONF. 8/C.1/Doc. 1  
23 June 1995

### REPORT TO THE CONFERENCE OF THE COMMITTEE OF THE WHOLE

1. The Committee of the Whole held 19 sessions between 7 - 21 June 1995 at which it examined the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects which had been prepared by a Unidroit committee of governmental experts (CONF. 8/3).

2. Mr P. Lalive (Switzerland), who had been appointed Chairperson of the Committee of the Whole by the Conference under Rule 6 of its Rules of Procedure, chaired all the sessions of the Committee.

3. Acting under Rule 51 of the Rules of Procedure of the Conference, the Committee elected Ms V. Hughes (Canada) and Mr A. Beksta (Lithuania) as its first and second Vice-Chairpersons respectively.

4. At its final session the Committee of the Whole adopted, on second reading, the text of Articles 1 to 10 (Chapters I to V) of the draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects set out hereunder. These provisions were subsequently re-numbered by the Drafting Committee, the numbering under which they were adopted by the Committee of the Whole on second reading appearing, where appropriate, in between parenthesis after the new number given to them by the Drafting Committee.

#### [UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS]

##### 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,

- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter “illegally exported cultural objects”).

###### *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 one of the categories listed in the Annex to this Convention.

##### 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, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be deemed to have been stolen.

- (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

- (4) However, a claim for restitution of a cultural object forming an integral part of an archaeological or historical monument or site or belonging to a public collection shall not be subject to time limitations.

- (5) For the purposes of this Convention, a “public collection” consists of a group of inventoried or otherwise identified cultural objects owned by:

- (a) a Contracting State,
- (b) a regional or local authority of a Contracting State,
- (c) a religious institution in a Contracting State, or
- (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

(6) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a member or members of an indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

#### *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 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 cultural 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 to order the return of a cultural object illegally exported from the territory of the requesting State.

(2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

(3) A cultural object which has 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 shall be deemed to have been illegally exported.

(4) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural 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 or of a collection,
- (c) the preservation of information of, for example, a scientific or historical character,
- (d) the traditional or ritual use of the object by a tribal or indigenous community,

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

(5) 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 to 4 have been met.

(6) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned.

*Article 6*  
*(former Article 8)*

(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, 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 illegally exported.

(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may 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 who provides the necessary guarantees.

(4) The cost of returning the cultural 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 cultural object by inheritance or otherwise gratuitously.

*Article 7*

(1) The provisions of Chapter III shall not apply where:

(a) the export of a cultural object is no longer illegal at the time at which the return is requested; or

(b) the 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.

(2) Notwithstanding the provisions of subparagraph (b) of the preceding paragraph, the provisions of Chapter III shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

CHAPTER IV – GENERAL PROVISIONS

*Article 8*  
*(former Article 9)*

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority 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.

*Article 9*  
*(former Article 10)*

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

CHAPTER V – FINAL PROVISIONS

*Article 10*

(...)

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc;) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

### **REPORT TO THE CONFERENCE OF THE FINAL CLAUSES COMMITTEE**

1. The Final Clauses Committee held five sessions on 14, 16, 17 and 21 June 1995 at which it considered the draft Final Provisions (with the exceptions of Articles C and F) capable of embodiment in the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, drawn up by the Unidroit Secretariat (CONF. 8/4) as well as a number of other proposals for the amendment and completion of these draft Final Provisions (CONF. 8/C.2/W.P. 1-25). The Final Clauses Committee was open to all delegations attending the diplomatic Conference and virtually all delegations took part in its work.

2. On a proposal by the representative of Portugal, the Committee, acting in conformity with Rule 51 of the Rules of Procedure of the Conference, elected Mr Vicente MAROTTA RANGEL (Brazil) as Chairperson of the Committee and Mr Isaiah ZIMBA CHABALA (Zambia) as Vice-Chairperson. All sessions of the Committee were chaired by Mr Marotta Rangel.

3. In relation to Article E of the draft Final Provisions, the Belgian delegation requested that the Commentary on the proposed Convention should indicate that the reference to the term "territorial" as the basis for jurisdiction under this provision should be interpreted in a broad sense: in Belgium, for instance, such jurisdiction would not be on a strictly territorial basis.

4. Article J (former Article H) of the draft Final Provisions was considered by the Final Clauses Committee to raise issues that could only be decided upon by the Plenum at such time as it had the substantive provisions prepared by the Committee of the Whole before it. It was therefore referred to the Plenum in square brackets.

5. The Final Clauses Committee decided that the

question of the establishment of an international cultural commission proposed in CONF. 8/C.2/W.P. 11 Corr. (joint proposal of Mexico and Turkey) should be dealt with by the Conference, involving as it did questions of substance.

6. The Final Clauses Committee agreed that a Resolution might usefully be adopted by the Conference calling upon Unidroit to provide for the preparation of translations of the proposed Convention in as many additional languages as possible.

7. At its fifth session, the Final Clauses Committee adopted, on second reading, the text of the draft Final Provisions (with the exceptions of Articles C and F) of the draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects set out hereunder. These provisions were subsequently renumbered by the Drafting Committee, the numbering by which they were adopted by the Final Clauses Committee on second reading appearing in parentheses after the new number given to them by the Drafting Committee.

*Text of the Draft Final Provisions as adopted by the Final Clauses Committee on second reading and as subsequently reviewed by the Drafting Committee*

#### *Article A*

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until 30 June 1996.

(2) This Convention is subject to ratification, acceptance or approval by States which have signed it.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Ratification, acceptance, approval or accession shall be subject to the deposit of a formal instrument to that effect with the depositary.

#### *Article B*

(1) This Convention shall enter into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State on the first day of the sixth month following the date of deposit of its instrument of ratification, acceptance, approval or accession.

#### *Article C*

(Referred by the Plenum to the Committee of the Whole).

#### *Article D*

(1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary.

(3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.

#### *Article E*

(1) If a Contracting State has two or more territorial units, whether or not possessing different

systems of law applicable in relation to the matters dealt with in this Convention, it may, at the time of signature or of the deposit of its instrument of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute for its declaration another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:

(a) the territory of a Contracting State in Article 1 (a) shall be construed as referring to the territory of a territorial unit of that State;

(b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;

(c) the Contracting State where the cultural object is located in Article 8 (1) shall be construed as referring to the territorial unit of that State where the object is located;

(d) the law of the Contracting State where the object is located in Article 8 (3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and

(e) a Contracting State in Article 9 shall be construed as referring to a territorial unit of that State.

(4) If a Contracting State makes no declaration under paragraph 1 of this article, this Convention is to extend to all territorial units of that State.

#### *Article F*

(Referred by the Plenum to the Committee of the Whole).

#### *Article G*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force shall take effect on the first day of the sixth month following the date of its deposit with the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal shall take effect on the first day of the sixth month following the date of the deposit of the notification.

#### *Article H (former Article G bis)*

(1) Each Contracting State shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests for the return of cultural objects brought by a State under Article 8 may be submitted to it under one or more of the following procedures:

(a) directly to the courts or other competent authorities of the declaring State;

(b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;

(c) through diplomatic or consular channels.

(2) Each Contracting State may also designate the courts or other authorities competent to order the restitution or return of cultural objects under the provisions of Chapters II and III.

(3) Declarations made under paragraphs 1 and 2 of this article may be modified at any time by a new declaration.

(4) The provisions of paragraphs 1 to 3 of this article do not affect bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.

*Article I (former Article G<sup>ter</sup>)*

Each Contracting State shall, no later than six months following the date of deposit of its instrument of ratification, acceptance, approval or accession, provide the depositary with written information in one of the official languages of the Convention concerning the legislation regulating the export of its cultural objects. This information shall be updated from time to time as appropriate.

*[Article J (former Article H)*

No reservations are permitted except those expressly authorised in this Convention.]

*Article K (former Article I)*

(1) This Convention may be denounced by any State Party, at any time after the date on which it enters into force for that State, by the deposit of an instrument to that effect with the depositary.

(2) A denunciation shall take effect on the first day of the sixth month following the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it shall take effect upon the expiration of such longer period after its deposit with the depositary.

(3) Notwithstanding such a denunciation, this Convention shall nevertheless apply to a claim for restitution or a request for return of a cultural object submitted prior to the date on which the denunciation takes effect.

*Article L (former Article J)*

(1) This Convention shall be deposited with the Government of the Italian Republic.

(2) The Government of the Italian Republic shall:

(a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made in accordance with this Convention;

(iii) the withdrawal of any declaration;

(iv) the date of entry into force of this Convention;

(v) the agreements referred to in Article D;

(vi) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit);

(c) perform such other functions customary for depositaries.

*Authentic texts and witness clause*

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Convention.

DONE at Rome, this ..... day of June, one thousand nine hundred and ninety-five, in a single original, in the English and French languages, both texts being equally authentic.

CONF. 8/7  
19 June 1995

## REPORT OF THE CREDENTIALS COMMITTEE TO THE CONFERENCE

In accordance with Rule 4 of the Rules of Procedure of the Conference, following consultations between the Heads of Delegations, the Conference appointed a Credentials Committee on 12 June 1995, comprising representatives of the following States:

Argentina; the Czech Republic; France; Guinea and Pakistan.

The Committee met thrice, once on 13 June and twice on 19 June, its meetings being attended by the following representatives:

Mr N. PERL (Argentina);  
Mr O. SRBA (Czech Republic);  
Ms D. DELGA (France),  
*substituted on 19 June by Ms S. MOUSSETTE;*  
Mr F.L. FALL (Guinea);  
Ms F. NASREEN (Pakistan).

In accordance with Rule 51 of the Rules of Procedure of the Conference, it fell to the Committee to elect its own Chairperson. On a proposal by the representative of France, the representative of Argentina was elected to the chair.

The credentials of the delegations of the following States, transmitted to the Secretary-General of the Conference in accordance with Rule 3 of the Rules of Procedure, were examined and found to be in due and proper form:

the Republic of Albania; the Republic of Angola; the Argentine Republic; Australia; the Republic of Austria; the Republic of Belarus; the Republic of Bolivia; the Federative Republic of Brazil; Burkina Faso; the Kingdom of Cambodia; the Republic of Cameroon; Canada; the People's Republic of China; the Republic of Colombia; the Republic of Croatia; the Republic of Cyprus; the Czech Republic; the Kingdom of Denmark; the Republic of Ecuador; the Arab Republic of Egypt; the Republic of Finland; the French

Republic; the Republic of Georgia; the Federal Republic of Germany; the Republic of Guinea; the Hellenic Republic; the Holy See; the Republic of Hungary; the Islamic Republic of Iran; Ireland; the State of Israel; the Italian Republic; Japan; the State of Kuwait; the Socialist People's Libyan Arab Jamahiriya; the Republic of Lithuania; the Grand Duchy of Luxembourg; the Republic of Malta; the United Mexican States; the Kingdom of Morocco; the Union of Myanmar; the Kingdom of the Netherlands; the Federal Republic of Nigeria; the Kingdom of Norway; the Islamic Republic of Pakistan; the Republic of Paraguay; the Republic of Peru; the Republic of Poland; the Portuguese Republic; the Republic of Korea; Romania; the Russian Federation; the Republic of Slovenia; the Republic of South Africa; the Kingdom of Spain; the Kingdom of Sweden; the Swiss Confederation; the Kingdom of Thailand; the Republic of Tunisia; the Republic of Turkey; Ukraine; the United Kingdom of Great Britain and Northern Ireland; the United States of America; the Republic of Yemen; the Republic of Zambia.

The Committee noted that the following States were represented at the Conference by observers:

the Republic of Bosnia-Herzegovina; the Republic of Venezuela.

The Committee noted that, whilst it had on this occasion been able to find the credentials of all the aforementioned delegations to be in due and proper form, this had in some cases only been possible on the basis of a broad interpretation of their compliance with the formal requirements of the Rules of Procedure. While the Committee had on this occasion taken the view that all the aforementioned credentials, notwithstanding imperfections in certain cases on a strict reading of all the formal requirements laid down in the Rules of Procedure, had nevertheless been submitted in good faith, it invited States attending Unidroit diplomatic Conferences to ensure henceforth that the credentials of their delegations were made out in the form required by the Rules of Procedure of such Conferences.

CONF. 8/7 Add.  
21 June 1995

**ADDENDUM TO THE REPORT OF THE  
CREDENTIALS COMMITTEE  
TO THE CONFERENCE**

Subsequent to the submission of its report to the Conference (CONF. 8/7) in accordance with Rule 4 of the Rules of Procedure of the Conference, the Credentials Committee met on 21 June to examine the credentials of the delegations of certain States which had not been transmitted to the Secretary-General of the Conference in time for examination by the Credentials Committee at its first three meetings.

The meeting was attended by the following representatives:

Mr N. PERL (Argentina);  
Mr O. SRBA (Czech Republic);  
Ms S. MOUSSETTE (France);  
Mr F.L. FALL (Guinea);  
Ms F. NASREEN (Pakistan).

The credentials of the following States were examined and found to be in due and proper form:

the Kingdom of Belgium; the Republic of Bulgaria;  
the Republic of Côte d'Ivoire.

CONF. 8/7 Add. 2  
23 June 1995

**SECOND ADDENDUM TO THE REPORT  
OF THE CREDENTIALS  
COMMITTEE TO THE CONFERENCE**

Subsequent to the submission of its report to the Conference (CONF. 8/7) and the Addendum thereto (CONF. 8/7 Add.) in accordance with Rule 4 of the Rules of Procedure of the Conference, the Credentials Committee met on 23 June 1995 to examine the credentials of certain delegations which had not been transmitted to the Secretary-General of the Conference in time for examination by the Credentials Committee at its first four meetings. On this occasion the Credentials Committee also examined, in accordance with Rule 63 (3) of the Rules of Procedure, the

credentials of the representatives with Full Powers to sign the proposed Unidroit Convention on Stolen or Illegally Exported Cultural Objects at the closing ceremony of the diplomatic Conference.

The meeting was attended by the following representatives:

Mr N. PERL (Argentina);  
Mr O. SRBA (Czech Republic);  
Ms S. MOUSSETTE (France);  
Mr F.L. FALL (Guinea);  
Ms F. NASREEN (Pakistan).

The credentials of the following States were examined and found to be in due and proper form:

the People's Democratic Republic of Algeria; the  
Republic of India.

The Committee noted that the following States therefore had the right to participate in the votes of the Plenum and to sign the Final Act of the diplomatic Conference:

the Republic of Albania; the People's Democratic Republic of Algeria; the Republic of Angola; the Argentine Republic; Australia; the Republic of Austria; the Republic of Belarus; the Kingdom of Belgium; the Republic of Bolivia; the Federative Republic of Brazil; the Republic of Bulgaria; Burkina Faso; the Kingdom of Cambodia; the Republic of Cameroon; Canada; the People's Republic of China; the Republic of Colombia; the Republic of Côte d'Ivoire; the Republic of Croatia; the Republic of Cyprus; the Czech Republic; the Kingdom of Denmark; the Republic of Ecuador; the Arab Republic of Egypt; the Republic of Finland; the French Republic; the Republic of Georgia; the Federal Republic of Germany; the Republic of Guinea; the Hellenic Republic; the Holy See; the Republic of Hungary; the Republic of India; the Islamic Republic of Iran; Ireland; the State of Israel; the Italian Republic; Japan; the State of Kuwait; the Socialist People's Libyan Arab Jamahiriya; the Republic of Lithuania; the Grand Duchy of Luxembourg; the Republic of Malta; the United Mexican States; the Kingdom of Morocco; the Union of Myanmar; the Kingdom of the Netherlands; the Federal Republic of Nigeria; the Kingdom of Norway; the Islamic Republic

of Pakistan; the Republic of Paraguay; the Republic of Peru; the Republic of Poland; the Portuguese Republic; the Republic of Korea; Romania; the Russian Federation; the Republic of Slovenia; the Republic of South Africa; the Kingdom of Spain; the Kingdom of Sweden; the Swiss Confederation; the Kingdom of Thailand; the Republic of Tunisia; the Republic of Turkey; Ukraine; the United Kingdom of Great Britain and Northern Ireland; the United States of America; the Republic of Yemen; the Republic of Zambia.

The Committee noted that the following States were represented at the Conference by observers:

the Republic of Bosnia-Herzegovina; the Republic of Ghana; the Republic of Guatemala; the Republic of Honduras; the Hashemite Kingdom of Jordan; the Kingdom of Saudi Arabia; the Syrian Arab Republic; the Republic of Venezuela.

The representatives of the following States were found, in accordance with Rule 63 (2) of the Rules of Procedure, to have Full Powers to sign the proposed Convention:

Burkina Faso; the Kingdom of Cambodia; the Republic of Côte d'Ivoire; the Republic of Croatia; the Republic of Ecuador; the Republic of Guinea; the Hellenic Republic; the Holy See; the Republic of Hungary; the State of Kuwait; the Republic of Lithuania; the Grand Duchy of Luxembourg; the Republic of Malta; the Kingdom of Morocco; the Republic of Slovenia; the Kingdom of Spain; the Republic of Yemen.

CONF. 8/8  
23 June 1995

**DRAFT FINAL ACT OF THE DIPLOMATIC  
CONFERENCE FOR THE ADOPTION OF THE  
DRAFT UNIDROIT CONVENTION ON THE  
INTERNATIONAL RETURN OF STOLEN OR  
ILLEGALLY EXPORTED CULTURAL  
OBJECTS**

1. The Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects was held in Rome, Italy from 7 to 24 June 1995.

2. Representatives of 70 States participated in the Conference, namely representatives of:

the Republic of Albania; the People's Democratic Republic of Algeria; the Republic of Angola; the Argentine Republic; Australia; the Republic of Austria; the Republic of Belarus; the Kingdom of Belgium; the Republic of Bolivia; the Federative Republic of Brazil; the Republic of Bulgaria; Burkina Faso; the Kingdom of Cambodia; the Republic of Cameroon; Canada; the People's Republic of China; the Republic of Colombia; the Republic of Côte d'Ivoire; the Republic of Croatia; the Republic of Cyprus; the Czech Republic; the Kingdom of Denmark; the Republic of Ecuador; the Arab Republic of Egypt; the Republic of Finland; the French Republic; the Republic of Georgia; the Federal Republic of Germany; the Republic of Guinea; the Hellenic Republic; the Holy See; the Republic of Hungary; the Republic of India; the Islamic Republic of Iran; Ireland; the State of Israel; the Italian Republic; Japan; the State of Kuwait; the Socialist People's Libyan Arab Jamahiriya; the Republic of Lithuania; the Grand Duchy of Luxembourg; the Republic of Malta; the United Mexican States; the Kingdom of Morocco; the Union of Myanmar; the Kingdom of the Netherlands; the Federal Republic of Nigeria; the Kingdom of Norway; the Islamic Republic of Pakistan; the Republic of Paraguay; the Republic of Peru; the Republic of Poland; the Portuguese Republic; the Republic of Korea; Romania; the Russian Federation; the Republic of Slovenia; the Republic of South Africa; the Kingdom of Spain; the Kingdom of Sweden; the Swiss Confederation; the Kingdom of Thailand; the Republic of Tunisia; the Republic of Turkey; Ukraine; the United Kingdom of Great Britain and Northern Ireland; the United States of America; the Republic of Yemen; the Republic of Zambia.

3. Eight States sent observers to the Conference, namely:

the Republic of Bosnia-Herzegovina; the Republic of Ghana; the Republic of Guatemala; the Republic of Honduras; the Hashemite Kingdom of Jordan; the Kingdom of Saudi Arabia; the Syrian Arab Republic; the Republic of Venezuela.

4. The following intergovernmental Organisations were represented by observers at the Conference:

the Commission of the European Communities  
the Council of Europe  
the Council of the European Union  
the Hague Conference on Private International Law  
the International Centre for the Study of the Preservation and the Restoration of Cultural Property  
the International Criminal Police Organisation  
the United Nations Educational, Scientific and Cultural Organization.

5. The following international non-governmental Organisations were represented by observers at the Conference:

the International Bar Association  
the International Council on Archives  
the International Law Association  
the International Union of Latin Notariat.

6. The following international professional association was represented by an observer at the Conference:

the International Association of Dealers in Ancient Art.

7. The Sovereign Military Order of Malta was represented by an observer at the Conference.

8. The Conference elected Mr Walter Gardini (Italy) as President.

9. The Conference elected as Vice-Presidents the following representatives:

Mr M. Ghomrasni (Tunisia)  
Mr A.G. Khodakov (Russian Federation)  
Mr M. Kima Tabong (Cameroon)  
Mr J. Sánchez Cordero Dávila (Mexico)  
Mr A. Wichiencharoen (Thailand).

10. The following committees were set up by the Conference:

#### **Steering Committee**

**Chair:** The President of the Conference

**Members:** The President and the Vice-Presidents of the Conference and the Chair of the Committee of the Whole.

In addition the Secretary-General of the Conference participated in the work of the Steering Committee, at the invitation of the Chair.

#### **Committee of the Whole**

**Chair:** Mr P. Lalive (Switzerland)  
**First Vice-Chair:** Ms V. Hughes (Canada)  
**Second Vice-Chair:** Mr A. Beksta (Lithuania)

#### **Final Clauses Committee**

**Chair:** Mr V. Marotta Rangel (Brazil)  
**Vice-Chair:** Mr I. Zimba Chabala (Zambia)

#### **Drafting Committee**

**Chair:** Ms R. Balkin (Australia)  
**Members:** Australia; China; Egypt; Finland; France; Nigeria; Portugal; Turkey; United States of America.

#### **Credentials Committee**

**Chair:** Mr N. Perl (Argentina)  
**Members:** Argentina; Czech Republic; France; Guinea; Pakistan.

11. The Secretary-General of the Conference was Mr M. Evans, Secretary-General of Unidroit.

12. The basic working materials used by the Conference and its organs were the draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects as adopted by a Unidroit committee of governmental experts on 8 October 1993 with an explanatory report prepared by the Unidroit Secretariat (CONF. 8/3) and the draft final provisions capable of embodiment in the draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects with explanatory notes drawn up by the Unidroit Secretariat (CONF. 8/4). The Conference and its organs also considered proposals and comments by Governments and international Organisations on the

draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/5 and Addenda, CONF. 8/6 and Addenda, CONF. 8/W.P. 1 - ... and CONF. 8/C.1/W.P. 1 - 82) and on the draft final provisions capable of embodiment in the draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/C.2/W.P. 1 - 25).

13. The Conference assigned to the Committee of the Whole the first and second readings of the draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Articles C and F of the draft final provisions capable of embodiment in the aforementioned draft Convention and the title of said draft Convention. The Conference assigned to the Final Clauses Committee the first and second readings of all but Articles C and F of the draft final provisions capable of embodiment in the aforementioned draft Convention.

14. On the basis of the deliberations recorded in the summary records of the Conference (CONF. 8/S.R. 1 - ...), the summary records of the Committee of the Whole (CONF. 8/C.1/S.R. 1 - 19) and its report (CONF. 8/C.1/Doc. 1) and the report of the Final Clauses Committee (CONF. 8/C.2/Doc. 1), the Conference drew up **THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**.

15. The Unidroit Convention on Stolen or Illegally Exported Cultural Objects, the text of which is set out in an appendix to this Final Act, was adopted by the Conference on 23 June 1995 and opened for signature at the closing session of the Conference on 24 June 1995. The Convention will remain open for signature in Rome, Italy until 30 June 1996. It was also opened for accession on 24 June 1995.

16. The Convention is deposited with the Government of Italy.

**IN WITNESS WHEREOF** the representatives,

**GRATEFUL** to the Government of Italy for having invited the Conference to Italy and for its generous hospitality,

**HAVE SIGNED** this Final Act.

**DONE** at Rome, this twenty-fourth day of June, one thousand nine hundred and ninety-five, in a single copy in the English and French languages, each text being equally authentic.

## SUMMARY RECORDS OF THE MEETINGS OF THE CONFERENCE (PLENUM)

CONF. 8/S.R. 1  
10 June 1995

### FIRST MEETING

Wednesday, 7 June 1995, at 11.10 a.m.

*Temporary President:* Mr Paolucci (Italy)  
(Minister of Culture of the Italian Republic)

*President:* Mr Gardini (Italy)

### OPENING OF THE CONFERENCE

The TEMPORARY PRESIDENT gave the following address of welcome:

“Thank you all for having responded to the invitation of the Italian Government in such numbers. Your presence bears witness to the growing common interest in updating the mechanisms necessary for the protection of the cultural heritage of the world. It is therefore necessary to make every effort that this concern be translated into strict and fair rules on the international trade in cultural objects.

The illegal traffic in such objects is on the increase. It is estimated that sixty thousand objects are stolen annually in Europe alone. This is due to many different causes: to the extremely permeable nature of borders; the growing facility in communications; the rapid accumulation of large financial surpluses in one country or another and lastly to the use of the art market to launder capital of illicit origin. Unfortunately, it must be added that frequently more attention is paid to the commercial value of cultural objects than to their historical or anthropological worth. This is an attitude which will have to change if we are to ensure the effective and lasting protection of the world's cultural heritage.

The international community has long been working to counteract these trends. At national level, each State has adopted specific rules concerning cultural objects. For example in Italy, a country particularly rich in culture where the problem is felt acutely and the fight against illegal trafficking is one of the pillars of

our cultural policy, action is taken at civil, administrative and criminal levels. Firstly, transactions concerning works of art follow stricter rules than those relating to other property; secondly, the inventory of cultural property has begun on national scale and, finally, a Carabinieri brigade responsible solely for the recovery of cultural goods has been set up.

At international level, since the end of the nineteen-sixties the number of agreements of broader or narrower scope in relation to their purpose has multiplied. Even at supranational level, namely under the auspices of UNESCO, a Convention against the illegal export of cultural property has been adopted and there exists an Intergovernmental Committee for the restitution of stolen cultural objects.

However, with the art market turnover reaching some seven billion dollars annually, it must be admitted that there is little coordination between these efforts. In particular, on the one hand the Conventions in force impose strict domestic rules on Contracting States in relation to cultural objects, and on the other hand, once adopted, the other Contracting States do not recognise them. It resembles, dare I say, a “legislative Babel”.

During the mid nineteen-eighties, in order to tidy up the situation, the Director-General of UNESCO requested Unidroit to consider the possibility of strengthening legislation on the matter. Consequently in the course of ten years' hard work Unidroit prepared the draft Convention which will be considered during the days to come and for which we are in its debt. Here at last are rules where the national, international and supranational aspects come together to protect the world's cultural heritage.

To a degree, the details of which must effectively be decided, this draft makes necessary the mutual recognition of domestic legislation. Consequently it will no longer be possible to say that simply by crossing a border a theft can become a purchase.

However, legislative co-ordination was not the only preoccupation of the experts gathered together by Unidroit. As well as stating the overriding principle of the return of stolen objects, the draft also protects the *bona fide* possessor who is obliged to return an object,

as one cannot right one injustice by committing another.

The list of advantages offered by this draft could be continued, but I will leave this privilege to the experts.

I take this opportunity on behalf of the Italian Government to wish every success to the Conference and would like to share a personal dream with you, one which this thousands of years old city inspires: that of a cultural heritage accessible to all and protected by all, which should never be either a restricted domain or *terra nullius*.”

Mr. FERRARI BRAVO (President of Unidroit) made the following reply to the opening address of the Temporary President:

“Excellencies,  
Ladies and Gentlemen:

The Italian Minister of Culture, the Honourable Antonio Paolucci, has in his opening address very clearly indicated the nature and the urgency of the problems to which more than two hundred representatives from over seventy States will, over the next two and a half weeks, seek to offer practical and just solutions.

In endorsing all that has been said by our Temporary President, I would, in my capacity as President of Unidroit, extend my warmest thanks to the Italian Government for having taken the step of convening this diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects.

Indeed, I am convinced that no more appropriate venue could have been found for this Conference than Rome. In the first instance it is well known that Italy is the country with by far the largest cultural heritage on its territory and which is therefore particularly exposed to the risk of deprecation through theft and illegal export, sometimes more insidious attacks on a country's national identity and the common cultural heritage of mankind than the threats posed by armed conflict.

Likewise, it was Italy, ever conscious of its inheritance of the traditions of Roman Law, that in 1926 established Unidroit as the first, and indeed to this day the only, organisation with a mandate to promote the unification of private law in all its aspects. It is moreover testimony to the role played by Unidroit

in the protection of cultural property that as long ago as 1951 it completed work on the draft International Convention for the Protection of Cultural Property in Case of War that was ultimately to lead to the adoption in 1954 of the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict.

It is therefore scarcely surprising in these circumstances that it was to Unidroit that UNESCO turned for advice in the field of private law when considering, during the mid nineteen-eighties, the possibility of revising or supplementing the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

The reasons for this request were various: in the first place the 1970 Convention raises, without fully solving, the important private law question of the degree of protection to be accorded to a good faith purchaser who may be called upon to return to its country of origin an item of cultural property that has been illegally exported. At the same time, the Convention requires the return only of those cultural objects that have been stolen from museums or similar institutions, subject to the additional condition that they have been inventoried, as well as that of cultural objects of archaeological interest. Further, suggestions have been made in some quarters that the scope of application of the 1970 Convention is not perhaps sufficiently clear and that a broad interpretation could interfere with the conduct of the legal trade in cultural property.

It is against this background that close co-operation was established between the UNESCO and Unidroit Secretariats with a view to determining whether these and other aspects of the illegal trade in cultural objects could be addressed through the agency of a private law Convention and that a study group composed of experts chosen by both organisations and chaired by the former, and now honorary, President of Unidroit, Professor Riccardo Monaco, worked out a preliminary draft Convention. That text was subsequently considered at four sessions of a Unidroit committee of governmental experts, chaired by Professor Pierre Lalive, and it is the fruits of their labour which are laid before the diplomatic Conference today.

And in this connection may I make clear one point so as to avoid possible misunderstandings, namely that

it is in no way intended that the adoption of the new Convention should interfere with the operation of the 1970 UNESCO Convention. The obligations assumed by the Contracting Parties under that treaty will subsist in their entirety although they may, in some respects, be supplemented or possibly clarified by the Unidroit Convention.

The Conference may therefore wish to bear in mind during the course of its deliberations the relevant provisions of the UNESCO Convention as well as those of EEC Directive 93/3/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. While it is true that the EEC instrument was to a large extent inspired by the approach adopted in earlier versions of the Unidroit draft, due allowance should however be made for the fact that the Directive is of regional rather than universal application and that, unlike the Unidroit draft, it does not expressly address the question of stolen cultural objects.

Important as those instruments are, the basic text before the Conference is the outcome of the final session of the Unidroit committee of governmental experts in October 1993. From that text it is apparent that much common ground has been achieved, although a number of significant matters have yet to be settled. This is the task that lies before the Conference and while not underestimating the difficulties which still have to be overcome, I am confident that solutions can be reached capable of attracting wide acceptance from the international community as a whole.

On 24 June therefore I look forward to the opening to signature of the Rome Convention as a major step towards the regularisation of the international exchange of cultural objects to the mutual advantage of all those with a legitimate interest in such exchanges between peoples, to the conservation of those objects for future generations and to the total isolation of those who traffic in such objects either illegally or, as is often the case, at the limits of the law for purely personal gain.

In conclusion, I wish the Conference all success and can assure the delegations present that they will be able to count on the total commitment of the Unidroit Secretariat throughout its duration to achieving the positive outcome that every one of us so earnestly desires."

Ms PROT (UNESCO) gave the following address on behalf of the Director-General, Mr Mayor:

"It is with great pleasure that I send a message of encouragement to all those States participating in this Conference, which is a fitting conclusion to ten years' work by the International Institute for the Unification of Private Law (Unidroit).

Following a meeting of experts on illicit traffic in cultural objects held in 1983, Unidroit, at UNESCO's request, agreed to take up some of the questions of private law not resolved by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. UNESCO has continued to support the work of Unidroit on this topic ever since.

I know how difficult and demanding negotiations for the present draft Convention have been, and how much dedication and hard work have gone into the drafting of the present text. I know that further dedication and hard work will be required in the course of this Conference and that difficult decisions will have to be made.

All of you, I know, are convinced of the terrible toll illicit traffic exacts on the cultural heritage through the failure of the international community to act most decisively on this question. UNESCO is informed daily of ransacked museums, destroyed archaeological sites, looted temples and churches. Recent studies show a direct correlation between figures for theft and figures for the licit trade of objects – it can no longer be denied that much of what is illicitly acquired is funnelled into the legal trade and ends up in the hands of those who are, usually unwittingly, supplying the looters and thieves with rewards for their crimes.

I believe that the Unidroit draft Convention aims to achieve that middle point between maximising the exchange of cultural objects and assuming the necessary protection of the cultural heritage. Doubtless there are points to debate and improve. But I sincerely hope that it will be possible for the delegates here present to agree in adopting a text which, even if it cannot satisfy the diversity of views of all, will nonetheless be widely accepted in the international community. This will enable all of us, at last, to have the legal means to contain the illegal trade organised by criminal groups which are at present so deeply

engaged in the exploitation of the cultural heritage for their own ends, to the great detriment of humanity.”

The TEMPORARY PRESIDENT expressed his appreciation for the UNESCO statement which was a valuable one showing both a thorough understanding of the matter and the commitment of that Organisation to the fight against the illegal traffic in cultural objects.

#### **ELECTION OF THE PRESIDENT OF THE CONFERENCE**

Mr MAROTTA RANGEL (Brazil) underlined the particular importance of the fact that the Conference was taking place in Rome, a setting so rich in history and culture and he accordingly proposed Mr Walter Gardini, Head of the Italian Delegation, as President of the Conference.

Ms HUGHES (Canada), Mr CUNY (France) and Mr PERL (Argentina) seconded the proposal.

*Mr. Walter Gardini was elected President of the Conference by acclamation.*

The TEMPORARY PRESIDENT congratulated the President on his election and asked him to take the chair.

The PRESIDENT of the Conference thanked the Temporary President and expressed his gratitude for the confidence and support of the delegations present. He joined in paying tribute to the work carried out by Unidroit and in particular thanked its Honorary President, Mr Monaco, its President, Mr Ferrari Bravo and its Secretary-General, Mr Evans. He pointed out that the aim of the Conference was ambitious and innovative in itself and that substantial effort would be needed to reach a precise definition of the rules at issue and to fulfil the legitimate expectations placed in the Conference.

#### **AGENDA ITEM 1: ADOPTION OF THE AGENDA (CONF. 8/1)**

*The provisional agenda was adopted unanimously.*

#### **AGENDA ITEM 2: ADOPTION OF THE RULES OF PROCEDURE FOR THE CONFERENCE (CONF. 8/2 Corr.)**

*The Rules of Procedure were adopted without comment.*

#### **AGENDA ITEM 3: ELECTION OF THE VICE-PRESIDENTS AND OTHER OFFICERS OF THE CONFERENCE (CONF. 8/2 Corr.)**

The PRESIDENT suggested that this item be deferred pending consultations, except with regard to the election of the Chairperson of the Committee of the Whole.

*It was so agreed.*

#### **ELECTION OF THE CHAIRPERSON OF THE COMMITTEE OF THE WHOLE**

Mr LEANZA (Italy) proposed Mr. Pierre Lalive of the Swiss delegation on account of his excellent work as President of the committee of governmental experts during the preparation of the draft Convention.

Ms GARCIA VILLEGAS (Mexico), Mr CUNY (France), Mr MARQUES DOS SANTOS (Portugal) and Mr HACHED (Tunisia) warmly seconded the proposal.

*Mr Pierre Lalive was unanimously elected Chairperson of the Committee of the Whole.*

#### **AGENDA ITEM 4: APPOINTMENT OF THE CREDENTIALS COMMITTEE (CONF. 8/2 Corr.)**

Mr PERL (Argentina) suggested that each of the five members of the Committee should be selected from different continents.

The PRESIDENT proposed that the item be deferred pending consultations.

*It was so decided.*

#### **AGENDA ITEM 5: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF A FINAL CLAUSES COMMITTEE AND OTHER COMMITTEES AS NECESSARY (CONF. 8/2 Corr.)**

The PRESIDENT proposed that this item be deferred pending consultations, except with regard to

the establishment of the Committee of the Whole under Rule 46 and the Final Clauses Committee under Rule 48, both of which were open to all States represented at the Conference.

With regard to the constitution of the Drafting Committee, the nine members would be elected at the next meeting of the Conference following the necessary consultations.

*The Conference agreed to the proposals of the President.*

Mr RADICATI (Italy) provided information concerning the different social events scheduled to take place during the Conference and stated that further information would follow.

*The meeting rose at 12.20 p.m.*

CONF. 8/S.R. 2  
14 June 1995

## **SECOND MEETING**

Friday, 9 June 1995, at 3.10 p.m.

*President:* Mr Gardini (Italy)

### **AGENDA ITEM 3: ELECTION OF THE VICE-PRESIDENTS AND OTHER OFFICERS OF THE CONFERENCE (CONF. 8/2 Corr.)**

#### **ELECTION OF THE VICE-PRESIDENTS OF THE CONFERENCE**

The PRESIDENT, in accordance with Rule 6 of the Rules of Procedure, invited nominations for the offices of Vice-Presidents.

Mr ALAN (Turkey) proposed as Vice-Presidents of the Conference Mr Mustapha Ghomrasni (Tunisia), Mr Alexander Khodakov (Russian Federation), Mr Michael Kima Tabong (Cameroon), Mr Jorge Sánchez Cordero Dávila (Mexico) and Mr Adul Wichiencharoen (Thailand).

Mr RADICATI (Italy), Mr EMARA (Egypt) and Mr ZIMBA CHABALA (Zambia) seconded those nominations.

*The representatives in question were elected unanimously.*

#### **ELECTION OF THE CHAIRPERSON OF THE DRAFTING COMMITTEE**

The PRESIDENT invited nominations for the office of Chairperson of the Drafting Committee in accordance with Rule 6 of the Rules of Procedure.

Mr BURMAN (United States of America) proposed Ms Rosalie BALKIN of the Australian delegation as Chairperson of the Drafting Committee.

Mr HUBBARD (Mexico) and Mr LE BRETON (France) seconded the proposal.

*Ms BALKIN was unanimously elected.*

### **AGENDA ITEM 4: APPOINTMENT OF THE CREDENTIALS COMMITTEE (CONF. 8/2 Corr.)**

The PRESIDENT proposed that the appointment of the five members of the Credentials Committee under Rule 6 of the Rules of Procedure be deferred pending further consultations until the next meeting of the Conference on Monday, 12 June.

*It was so agreed.*

### **AGENDA ITEM 5: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF A FINAL CLAUSES COMMITTEE AND OTHER COMMITTEES, AS NECESSARY (CONF. 8/2 Corr.)**

#### **APPOINTMENT OF THE DRAFTING COMMITTEE**

The PRESIDENT said that in accordance with Rule 47 of the Rules of Procedure he had been invited to propose the following composition of the Drafting Committee: Australia, China, Egypt, Finland, France, Nigeria, Portugal, Turkey and the United States of America.

Mr ABRAHAMSEN (Norway) expressed his satisfaction that Finland was to be amongst the members of the Drafting Committee. He nevertheless suggested that it might have been wiser for Switzerland to have been appointed as a member of the Committee rather than for three member States of the European Union to sit upon it.

Mr EVANS (Secretary-General of the Conference) recalled that extensive consultations had been held and that he had been informed by the Swiss delegation that it could accept the proposed composition of the Drafting Committee.

*The PRESIDENT declared the Drafting Committee to be constituted.*

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS (CONF. 8/3; CONF. 8/4)**

The CHAIRMAN of the Committee of the Whole proposed that since Article C of the Draft Final Provisions corresponded to Article 10 of the draft Convention and that Article F was also closely related, both Articles C and F should be examined by the Committee of the Whole.

Mr BURMAN (United States of America) supported the proposal but asked for further clarification. He stated that the delegation of the United States of America as well as other delegations expected the issue of the retroactive applicability of the Convention also to be discussed by the Committee of the Whole.

Mr EVANS (Secretary-General of the Conference) stated it to be his understanding that the question of retroactivity and any other matters of substance that might arise under Article F would be considered by the Committee of the Whole rather than by the Final Clauses Committee.

*It was so agreed.*

*The meeting rose at 3.30 p.m.*

CONF. 8/S.R. 3  
16 June 1995

**THIRD MEETING**

Monday, 12 June 1995, at 3.15 p.m.

*President: Mr Gardini (Italy)*

**AGENDA ITEM 4: APPOINTMENT OF THE MEMBERS OF THE CREDENTIALS COMMITTEE (CONF. 8/2 Corr.)**

The PRESIDENT announced that in accordance with Article 4 of the Rules of Procedure, and after consultations, the representatives of the following States had been proposed to serve on the Credentials Committee: Argentina, the Czech Republic, France, Guinea and Pakistan. In the absence of objections he would take it that it was the wish of the Conference to appoint them.

*It was so agreed.*

*The meeting rose at 3.20 p.m.*

CONF. 8/S.R. 4  
20 June 1995

**FOURTH MEETING**

Tuesday, 20 June 1995, at 3.05 p.m.

*President: Mr Ghomrasni (Tunisia)*

**AGENDA ITEM 7(c): EXAMINATION OF THE REPORT OF THE CREDENTIALS COMMITTEE (CONF. 8/7)**

*The Conference adopted the interim report of the Credentials Committee (CONF. 8/7) as submitted by its Chairman.*

*The meeting rose at 3.15 p.m.*

CONF. 8/S.R. 5  
24 June 1995

### FIFTH MEETING

Friday, 23 June 1995, at 11.30 a.m.

*President:* Mr W. Gardini (Italy)

#### **AGENDA ITEM 7(c): EXAMINATION OF THE REPORT OF THE CREDENTIALS COMMITTEE (CONF. 8/7 Add. and Add. 2)**

The CHAIRMAN of the Credentials Committee presented the two addenda to the Report of the Credentials Committee to the Conference (CONF. 8/7 Add.; CONF. 8/7 Add. 2).

*The second report of the Credentials Committee was unanimously adopted.*

The PRESIDENT gave the following address:

“Ladies and Gentlemen,

Despite the fact that this session of the Plenum is taking place two days later than anticipated, it is with great pleasure that I open it, as the existence of a Convention is now guaranteed.

For my part, it has been with great pleasure that I have discharged the task with which I was honoured. Due however to prior engagements arranged for this afternoon, I shall not be able to be present until the close of the Conference. Consequently, in application of Article 9 of the Rules of Procedure of the Conference, I appoint Vice-President Mr Alexander Khodakov to chair the next session of the Conference.

Tomorrow morning, delegations are expected at the Room of the Orazi and Curiazi at 10 a.m., for the signing ceremony. For this ceremony, the last session of the Plenum, I would ask Vice-President Mr Adul Wichiencharoen to assume the functions of President.

After eighteen days of work, the moment has now come for assessment. Our discussions have led us to explore all the possibilities that would allow us to draft a Convention acceptable to all here present, and which would complete the legal position established by the UNESCO Convention on the Means of Prohibiting and

Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970. The twenty-five years that were necessary in order to arrive at the present negotiations bear witness to the obstacles that we had to overcome and to the need to reach an agreement on the recovery of stolen or illegally exported cultural objects.

Italy launched this initiative, convinced of the interest that all the participating States had in reaching agreement on this issue, and after eighteen days of intensive work we persist in that initiative. A lack of rules is even worse than imperfect rules; a legal vacuum actually encourages flagrant illegal activity.

Furthermore, none can fail to be aware of the current situation and the increase of theft and illegal activity on the art market; every year, Italy loses twenty thousand cultural objects on account of theft, and Europe loses sixty thousand. There is a risk that the magnitude of this phenomenon will increase in tandem with the increase of purchasing power in industrialised nations which do not have available the protective measures they need.

Consequently, action must be taken, and fast. The civilised world can no longer tolerate this despoilment; the civilised world cannot remain indifferent to these offences; the civilised world cannot allow important artistic and cultural testimony to our roots, the roots of humanity, of the whole world, steadily to be destroyed and fragmented.

This universal and global conception of culture should lead us to make choices untainted by individual interests.

Can we tolerate, and even protect, the interests of a tiny part of humanity which is enriched by the illegal traffic of cultural objects, even if it is simply for the pleasure of privately owning them? In my view the answer can only be negative.

Ladies and Gentlemen, this is why we must continue our task and successfully arrive at the adoption of a Convention which will represent the triumph of our planet's civilisation, the victory of human genius over outdated parochialism and the predominance of justice over the violation of rights.

I do not hesitate in qualifying this Conference as historic, although I would not wish to be over-confident as to its success. Perhaps it will be the last of its nature before the end of the century and the new

millennium. Let us make it fruitful so that in the future it will be recalled as a fundamental step towards the affirmation of certain universal values. There will be neither winners nor losers, only the victory of civilisation as we know it. Once again, the international community will have given a signal of hope and solidarity to all those who cherish sentiments of peace and mutual co-operation, in a world which every day becomes smaller and more diverse and which consequently cries out for ever for greater solidarity.

On behalf of the Italian Government, I would like to thank you for having come to Rome, bringing your invaluable contribution and bearing witness to the great interest generated by this Italian initiative.

I thank you all and wish you every success in the final work ahead.”

*The meeting rose at 12.00 p.m.*

CONF. 8/S.R. 6  
24 June 1996

## SIXTH MEETING

Friday, 23 June 1995, at 4.20 p.m.

*President:* Mr Khodakov (Russian Federation)

**AGENDA ITEM 8: ADOPTION OF THE FINAL ACT OF THE CONFERENCE AND OF ANY INSTRUMENTS, RESOLUTIONS AND RECOMMENDATIONS RESULTING FROM ITS WORK** (CONF. 8/C.1/Doc. 1; CONF. 8/C.2/Doc. 1; CONF. 8/C.2/W.P. 25; CONF. 8/W.P. 1, 2, 3, 4, 5 and 6)

The PRESIDENT expressed his gratitude for the trust the Conference had placed in him by giving him this prestigious task at such a delicate stage of the negotiations, although at the same time he recognised the weight of responsibility he had assumed. He requested delegations to concentrate their efforts towards the only possible outcome of the Conference; the adoption of the draft Convention. He wholeheartedly agreed therefore with the opinions expressed by the Chairman of the Committee of the Whole, Mr Lalive, and the President of the Conference, Mr Gardini.

The CHAIRPERSON of the Drafting Committee introduced documents CONF. 8/C.1/Doc.1 and CONF. 8/C.2/Doc.1. She explained that the former was simply a redraft by the Drafting Committee of the text adopted by the Committee of the Whole on second reading, and that the latter was the appropriate redrafting of the Report of the Final Clauses Committee to the Conference. She stressed that the changes which had been made to both documents were simply of drafting technique, and that they did not affect the substance.

The PRESIDENT, on behalf of the entire Conference, thanked the Chairperson and the members of the Drafting Committee for the excellent quality of the work accomplished. He drew attention to the documents making up the preamble (CONF. 8/W.P. 6), the body of the Convention (CONF. 8/W.P. 5), hereinafter “the Compromise Text”, and the Report of the Final Clauses Committee (CONF. 8/C.2/Doc. 1), which had been broadly modified in the final consultations, both formal and informal. Concerning the Israeli delegation’s proposal (CONF. 8/W.P. 2), he suggested that Article H of the Final Clauses be put immediately to the vote.

Ms GOLAN (Israel) pointed out that it would be preferable first to debate proposals relating to the former Article H, notably those submitted by Israel and the United States of America.

The PRESIDENT explained that the United States proposal did not relate to reservations but to a completely different question, known as “opting out”. As to the Israeli proposal, it was agreed with that delegation that the vote be taken directly on Article J (former Article H).

Mr SOKOLOVSKY (Belarus) stated that, given the long road ahead before the desired result of the adoption of the draft Convention could be achieved, his delegation was prepared to withdraw its proposal (CONF. 8/W.P. 4).

The PRESIDENT, with a view to resolving the question of reservations, drew attention to the Report of the Final Clauses Committee (CONF. 8/C.2/Doc.1), and put to the vote the question of whether Article J (former Article H) as worded therein should be retained.

*Eighteen delegations voted in favour, six against and twenty-three abstained.*

Concerning Article C of the Report of the Final Clauses Committee, he drew attention to the proposal of the delegation of the United States of America (CONF. 8/W.P. 3), which sought to allow States already party to the 1970 UNESCO Convention to opt out of Chapter III if they so wished. He recalled that this question had been discussed in depth both informally and in the Final Clauses Committee and he proposed that it be voted on.

Mr FRAOUA (Switzerland), in agreement with other delegations, proposed an amendment to the United States proposal in the sense of the introduction of a provision that would also give States not party to the 1970 UNESCO Convention the possibility of opting out of either Chapter II or Chapter III of the Convention.

Mr MARQUES DOS SANTOS (Portugal), concerning the amendment proposed by the Swiss delegation, pointed out that it would be strange for a State that was not prepared to apply Chapter II on stolen cultural objects to be willing to apply Chapter III on those which had been illegally exported. Generally, and logically, a State that did not wish to apply Chapter II would *a fortiori* not wish to apply Chapter III. While theft was a crime sanctioned by every legal system, it was far less certain that universal concern existed in connection with the recognition of foreign export regulations. He was therefore opposed to the amendment proposed by Switzerland and would vote against it.

Mr FRAOUA (Switzerland) emphasised that whether it was logical to permit an opting out of Chapters II or III was a matter that should be left for each State to decide.

The PRESIDENT, in the absence of the time required for the Swiss proposal to be submitted in writing, decided in accordance with Article 28 of the Rules of Procedure to consider the amendment as having been presented orally, and to put it to the vote before the United States proposal which it amended. He therefore put the Swiss amendment to the vote.

*The Swiss amendment was defeated by thirty-nine votes to eleven with six abstentions.*

The PRESIDENT then put the United States proposal (CONF. 8/W.P. 3) to a vote.

*The United States proposal was defeated by thirty-seven votes to four with eighteen abstentions.*

Following the rejection of the United States proposal and in the absence of any other proposals, he declared that there would be no provision in the Convention corresponding to the present Article C in the Report of the Final Clauses Committee. Concerning the texts presently in question, the preamble (CONF. 8/W.P. 6), the Compromise Text on the substantive provisions of the Convention (CONF. 8/W.P. 5) and the Final Clauses (CONF. 8/C.2/Doc. 1), he suggested that they should not be submitted to separate votes.

Mr AL NOURI (Kuwait), while giving his delegation's approval to the proposed preamble, emphasised that it should contain an express reference to the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The PRESIDENT explained that it would be very difficult at this stage to introduce new elements into the preamble, which represented the result of long consultations, both formal and informal. A simple reference in the Explanatory Report on the future Convention to the proposal of the Kuwaiti delegation ought to suffice.

Mr BOMBOGO (Cameroon) suggested certain stylistic improvements to the French text of the preamble.

The PRESIDENT agreed that the French text of the preamble could benefit from improvement.

Mr MAROTTA RANGEL (Brazil) accepted the preamble as it stood, and enquired whether a decision had been made concerning the possible option between "Contracting State" and "State Party".

The CHAIRPERSON of the Drafting Committee stressed that the Committee was of the view that the term "State Party" should be referred to only in the

final clauses. Due to the very busy schedule of the last working days, the use of this term in the preamble had not been given a great deal of attention.

The PRESIDENT confirmed that this was essentially a question of pure legal technique which the Drafting Committee could solve in an appropriate manner.

Mr IDIL (Turkey) suggested that the preamble be adopted by simple consensus.

Mr MOLYVANN (Cambodia) wished to associate his delegation with the many delegations that had proposed the preamble and the Compromise Text on the substantive provisions.

Ms GOLAN (Israel) reminded the Conference that her delegation's proposal in CONF. 8/C.2/W.P. 25 had not yet been debated.

The PRESIDENT in turn recalled that a proposal of the same nature as that made by the Israeli delegation had been discussed by the Final Clauses Committee where it had not been retained. In consequence, the question could not be put back on the agenda unless two thirds of the delegations so wished.

At the request of the Israeli delegation, he put the question of reopening the debate on Article A(3) of the Final Clauses as presented in CONF. 8/C.2/W.P. 25 to the vote. Only one delegation having voted in favour, the President noted that it was impossible to obtain the two-thirds majority required for the debate to be reopened.

The PRESIDENT then drew the attention of delegations to the fact that the so-called Compromise Text (CONF. 8/W.P. 5) on the substantive provisions of the Convention constituted a valuable attempt to achieve a compromise which had been supported by a certain number of delegations. He emphasised that since the Compromise Text dealt with the substantive provisions of the future Convention, it could not be considered separately from the texts of the preamble and Final Clauses which had just been adopted. These three texts were very closely linked, and he considered it necessary to vote on them as a whole. Consequently he suggested a block vote.

Mr YIFHAR (Israel) strongly suggested a separate vote on each article, as provided for by the Rules of Procedure.

The PRESIDENT recalled that the Rules of Procedure could be modified by the Conference when necessary.

Mr FOROUTAN (Islamic Republic of Iran) pointed out that document CONF. 8/C.1/Doc.1 was based on a substantial compromise, adopted in a democratic manner through extensive and detailed discussions. He stressed that if the aim of the new proposal was simply to attract more ratifying States, which was certainly laudable in itself, there should be no sacrifice of the real aim of the future Convention, namely the adoption of an instrument based on a broad consensus that had been the subject of lengthy debate. He therefore suggested that a vote be taken first on the text presented by the Drafting Committee.

The PRESIDENT reminded delegations that informal consultations were no less democratic than formal ones.

Mr FRIETSCH (Germany) inquired whether the President would allow delegations to explain their vote after voting procedure had been completed.

The PRESIDENT confirmed that this was his intention.

Mr EL NASHAR (Egypt) supported the suggestion by the Iranian delegation to vote first on the draft proposed by the Drafting Committee.

The PRESIDENT pointed out that there was no provision which obliged each article to be the subject of a separate vote. Rule 39 of the Rules of Procedure allowed the President to choose the order of voting. As the proposal set out in CONF. 8/W.P. 5 constituted a new Compromise Text amending the draft proposed by the Drafting Committee, he decided first that a vote be taken on CONF. 8/W.P. 5. An appeal against his ruling could be carried by a two-thirds majority.

Mr RADICATI (Italy) expressed complete agreement with the President and emphasised that the Compromise Text was the very important outcome of lengthy negotiations, both formal and informal.

Mr SOKOLOVSKY (Belarus) supported the decision by the President to vote on CONF. 8/W.P. 5 as a “package”, which meant including the preamble as set out in CONF. 8/W.P. 6 and the Final Clauses as set out in CONF. 8/C.2/Doc. 1.

Mr BURMAN (United States of America), while supporting the suggestion to vote on CONF. 8/W.P. 5 as a separate package from CONF. 8/C.1/Doc. 1, suggested voting separately on the preamble and on the Final Clauses.

The PRESIDENT noted that no matter which proposal on the substantive text was adopted, the preamble and the Final Clauses would in any case remain the same as they had already been adopted.

Mr GRINE (Algeria) raised a point of order opposing a block vote, and strongly advocated that separate votes be taken.

The PRESIDENT reminded delegations that his ruling would stand unless two-thirds of the delegations voted in favour of an appeal against it.

Mr YIFHAR (Israel) appealed against the President’s ruling and asked for a roll-call vote.

Mr WICHIENTHAROEN (Thailand) raised a point of order, suggesting that a formal roll-call vote be excluded, and that the vote on the appeal against the President’s ruling be taken by a show of hands.

The PRESIDENT stressed it was then necessary to decide between the Israeli and the Thai proposals on the voting procedure. As the second proposal could be regarded as an amendment to the Israeli proposal, he suggested that a vote be taken first on the Thai suggestion.

Mr YIFHAR (Israel) raised a point of order stressing that once a delegation had formally asked for a roll-call vote under Rule 36 of the Rules of Procedure, no other delegation could prevent this vote taking place.

The PRESIDENT recalled that the Conference was a sovereign body perfectly able to adapt its Rules of Procedure when appropriate, even by modifying those already existing.

Mr FALL (Guinea) requested that a vote first be taken on the President’s decision.

The PRESIDENT explained that the object of the vote was indeed his decision, and that the question currently at issue related to the method of voting to be followed.

Mr SAVOLAINEN (Finland) fully supported the proposal of the Thai delegation.

Mr HE (China) pointed out that according to Rule 20 of the Rules of Procedure, a point of order should immediately be decided upon by the President, without any interruption by another speaker.

The PRESIDENT clarified that every delegation had the right to raise a point of order. Consequently the representative of Thailand had the right to propose an amendment to the Rules of Procedure.

Mr FRAOUA (Switzerland) called on all delegations to put an end to any disagreements on procedure and to take a position on the real issue, the substantive solutions to be adopted.

The PRESIDENT put to the vote the question of whether the vote should be by a show of hands, as suggested by the Thai delegation.

*Forty-six delegations voted in favour, three against and eight abstained.*

The PRESIDENT then put to the vote by a show of hands the question of whether his ruling should stand.

*Thirty-nine delegations voted in favour, twelve against, and nine abstained.*

The PRESIDENT, in underlining the crucial importance of the vote that was now to be taken, requested delegations to bear in mind the fact that the proposed text of the Convention was the result desired and drawn up by the majority of the delegations, despite the fact that certain provisions were perhaps not satisfactory to everyone. He requested those delegations not convinced by the Compromise Text to abstain rather than to vote against it. The obvious reason for this request was to enable States that were ready to be bound by this, the first private law Convention on the

subject, to take a step which was of great importance in the battle against the illegal traffic in cultural objects.

The PRESIDENT put the question of the adoption of the package of the three texts, preamble, Compromise Text on the substantive provisions and the Final Provisions, to the vote.

*Thirty-seven delegations voted in favour, five against and seventeen abstained.*

*The Unidroit Convention on Stolen or Illegally Exported Cultural Objects was accordingly adopted.*

*(Applause)*

Mr CLARK (Canada), on behalf of the Conference, underlined the central part played by the Mexican delegation in bringing the long and delicate negotiations to a successful conclusion.

Mr FRIETSCH (Germany), speaking to some extent also on behalf of other delegations which had abstained on the final vote, stressed that Germany respected and supported the aims of the Convention. However, he explained that Germany regretted that it had been unable to vote in favour of the text of the Convention for reasons already extensively discussed.

Mr BOMBOGO (Cameroon) emphasised that his delegation's abstention was simply due to certain solutions in the Convention which were not completely satisfactory, especially in relation to the limitation periods. His delegation would attempt to persuade its Government of the well founded nature of the Convention.

Mr IDIL (Turkey) wished primarily to thank all the staff of Unidroit and the different Presidents of the Conference. In substance, his country would continue its policy of co-operation in this field.

Mr MASSA MURRAZZI (Peru) stressed that the Convention was satisfactory as the first international step against the unlawful traffic in cultural objects. He thanked all the Officers of the Conference, Unidroit, and in particular the Mexican delegation for its valuable contribution.

Mr ZIMBA CHABALA (Zambia) stressed that, as a compromise, the Convention was satisfactory to his delegation. This outcome was a very valuable first step against the unlawful traffic in cultural objects. He expressed his sincere gratitude to all the Officers of the Conference, to Unidroit and to the Italian Government.

Mr RADICATI (Italy) recalled that the initiative for the Conference had been taken because of the need to establish an international treaty framework which would ensure the greatest possible protection of cultural objects. Due to Italy's involvement in this matter, with some twenty thousand objects stolen each year, Italian support for the Compromise Text should be considered as the guarantee of its quality. He was certain that the delegations which had voted against the final text had done so in good faith, as the Conference's success had been desired by all. He thanked especially Mr Lalive, Unidroit and all the Presidents of the Conference. Furthermore he pointed out that the choice of the Hall of the Orazi and Curiazi for the signature of the Convention was auspicious, as it was in those magnificent surroundings that in 1957 the six founding States of the European Economic Communities had signed the Treaty of Rome. He drew attention to the fact that Italy had launched the initiative of setting up a Fund under the auspices of UNESCO, or a similar body, which would enable States that could not themselves pay any compensation due to benefit from the return of cultural objects.

The PRESIDENT, on behalf of the Conference, warmly thanked the Italian Government for the organisation of this long and rich Conference. He addressed particular thanks to Ms Balkin, Chairperson of the Drafting Committee, to Mr Lalive, Chairman of the Committee of the Whole, to Mr Marotta Rangel, Chairman of the Final Clauses Committee and to Unidroit.

Mr LE BRETON (France) wished to pay his respects to the President of the present session, to whom much was owed for the successful outcome. He particularly thanked the Italian Government, Unidroit and the Officers of the Conference, as well as the Mexican delegation for its role as intermediary in the negotiations of the past few days.

Ms KOUROUPAS (United States of America) thanked all those who had made the Conference a success, and particularly the Unidroit Secretariat. The United States would continue co-operation on both bilateral and multilateral fronts aimed at combatting the unlawful traffic in cultural objects.

Mr HAWAS (Egypt) particularly thanked Unidroit, Mr Lalive and the Italian Government. He underlined that the Convention was very important to Egypt, and explained that his delegation had voted against the final text not because of its goal but simply because of the lack of clarity with which the negotiations had been conducted over the last two days.

Mr GNAPI (Côte d'Ivoire) expressed satisfaction at the result, which for his country marked an important step forward. He explained that his delegation had abstained from the vote as it had simply not had the time to analyse in detail the last version of the text. His delegation would do its best to encourage its Government to ratify the Convention.

Mr PERL (Argentina) stressed the importance of the Convention, and thanked all delegations as well as the Officers of the Conference for their efforts to reach a successful conclusion.

The CHAIRPERSON of the Drafting Committee stated that she was particularly grateful for the confidence expressed in the Drafting Committee, and emphasised the very valuable role of the UNESCO representative, Ms Prott, in the elaboration of the Convention.

*The meeting rose at 6.30 p.m.*

CONF. 8/S.R. 7  
24 June 1995

#### **SEVENTH MEETING**

Saturday, 24 June 1995, at 10.30 a.m.

*President:* Mr Wichiencharoen (Thailand)

#### **AGENDA ITEM 8: ADOPTION OF THE FINAL ACT OF THE CONFERENCE AND OF ANY**

#### **INSTRUMENTS, RESOLUTIONS AND RECOMMENDATIONS RESULTING FROM ITS WORK (CONF. 8/9)**

The President enquired whether there were any objections to the Final Act of the Conference prepared by the Drafting Committee and found there to be none.

*The Final Act was adopted by acclamation.*

#### **AGENDA ITEM 9: SIGNATURE OF THE FINAL ACT AND OF ANY OTHER INSTRUMENTS ADOPTED BY THE CONFERENCE (CONF. 8/9)**

Mr LA ROCCA (Director of Museums, Galleries, Monuments and Excavations of the City of Rome) welcomed the participants in the name of the Mayor of Rome, Mr Francesco Rutelli, who had been prevented from attending the session due to unforeseen circumstances. He recalled the words of the Mayor at the reception held on 13 June concerning the importance with which the municipality considered the work of the diplomatic Conference and stated that the success achieved at the end of nearly three weeks of intensive work was a most encouraging signal in the fight against the illicit traffic in cultural objects. He indicated the necessity of conserving cultural objects in their context and the paramount interest in reaching agreements which would preserve both. The Convention which was about to be signed was an extremely satisfactory first example of such an agreement, not only for the countries directly concerned but for all humanity.

Mr FERRARI BRAVO (President of Unidroit) stressed the importance of the step taken to hinder the illicit traffic in cultural objects and paid tribute to his predecessor, Mr Riccardo Monaco, who had initiated the work on this subject. He thanked all delegations for the spirit of co-operation shown during the Conference, the Italian Government for its organisation and the Secretary-General and the Executive Secretary of the Conference and all the staff of Unidroit who had worked so hard during the last three weeks.

Mr LE BRETON (France) read the following declaration:

“In conformity with Article 13 of this Convention and on behalf of the acting Presidency of the Council of the European Union in accordance with its decision of 17 May 1995, the French delegation has the honour to make the following declaration: In their relations with each other, the Parties which are members of the European Community will apply the rules of community law and will not therefore apply those provisions of the Convention the scope of application of which coincides with that covered by community provisions”.

Mr EVANS (Secretary-General of the Conference) invited representatives to sign the Final Act and, where appropriate, the Unidroit Convention on Stolen or Illegally Exported Cultural Objects.

*The Final Act was signed by representatives of the following Governments:*

Albania, Algeria, Angola, Argentina, Australia, Austria, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, China, Colombia, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Ecuador, Egypt, Finland, France, Georgia, Germany, Greece, Guinea, Holy See, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Kuwait, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Malta, Morocco, Myanmar, Netherlands, Nigeria, Norway, Pakistan, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovenia, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United States of America, Yemen and Zambia.

*Representatives of the following Governments signed the Convention:*

Burkina Faso, Cambodia, Côte d’Ivoire, Croatia, France (*ad referendum*), Guinea, Hungary, Italy, Lithuania and Zambia.

*The President and the Secretary-General of the Conference signed the Final Act.*

#### **CLOSURE OF THE CONFERENCE**

Mr WICHENCHAROEN (Thailand) delivered the following address:

“His Excellency Mr Paolucci, the Italian Minister of Culture,

Mr La Rocca representing the Honourable Francesco Rutelli, the Mayor of Rome,  
Mr Ferrari Bravo, President of Unidroit,  
Distinguished Delegates,  
Ladies and Gentlemen,

It is a great honour and privilege for me, as Vice-President, and for my country, Thailand, to be given the opportunity to preside over the final session of this Conference for the adoption of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects, in witness whereof all of us representing the participating States have just signed the Final Act. It is, indeed, gratifying that a number of States have also signed the Convention itself.

On behalf of the delegations assembled here, I should like to ask Mr La Rocca to convey to Mr Francesco Rutelli, the Mayor of Rome, our appreciation and gratitude for the reception offered to us on Tuesday, 13 June, at Villa Caffarelli on this Capitol Hill, and again today for making available to us this historical Room of the Orazi e Curiazi of the Capitoline Palace as the seat to hold our final session for the signing of the Final Act and of the Convention. We would also have been honoured by his presence on this significant occasion, had he not been deterred by the urgent call of duty.

May we, the delegates assembled here, request you, Sir, Your Excellency the Minister of Culture, to convey our deep gratitude and appreciation to His Excellency Mr Oscar Luigi Scalfaro, President of the Italian Republic, for the audience accorded to us at the Quirinale Palace on Friday, 9 June. We all shall long remember his address, which clearly displayed his expertise in jurisprudence and his deep conviction of the importance of safeguarding the cultural heritage for the future of mankind, as well as his wisdom and the advice given to us.

It is certainly most befitting that this diplomatic Conference for the adoption of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects has taken place here in this great city of Rome – Rome for its historic context in the continuum of world civilisation – Rome for its glorious wealth of cultural heritage – and Rome for its fundamental contribution to the

development of jurisprudence. Therefore, the delegations representing the various States from all parts of the world assembled here are deeply grateful to the Government of the Italian Republic for having invited the Conference to Italy and for its generous hospitality. We owe, in particular, our gratitude to the Italian Ministry of Foreign Affairs and the Italian Ministry of Culture, together with their officials concerned. Of course, we are indebted to His Excellency Mr Paolucci, the Minister of Culture, and to Ms Suzanna Agnelli, the Secretary of State for Foreign Affairs. Especially, His Excellency Mr Paolucci inaugurated our Conference on Wednesday, 7 June, with the address of welcome, urging us to seek practical and just solutions to the serious, worldwide problems confronting us, and is with us again today officially to close our successful meeting.

There is one regret, though, that Ambassador Walter Gardini, President of our Conference, bound by important duty, is unable to be with us today. As our Conference President and also in his capacity as the Under-Secretary of State for Foreign Affairs of the Italian Republic, he earns our high esteem and gratitude.

We are grateful to Unidroit and Mr Ferrari Bravo, President of Unidroit. Our heartfelt thanks go to Mr Evans, Secretary-General of Unidroit, who is also the Secretary-General of the Conference, and his assistants and staff for the efficiency and hard work prior to and during the Conference. Undoubtedly, we all are appreciative of the contribution of UNESCO in the person of Ms Lyndel Prott as the representative of the UNESCO Secretariat, who has played a significant role in the efforts that have now resulted in the Convention and the Final Act adopted by this Conference.

Our thanks also go to the interpreters for their indispensable service and the personnel seen and unseen by us for their valuable support services throughout the long hours of our arduous work.

Distinguished delegates, all of us bid farewell with parting good wishes to one another. Last but not least, having worked together for eighteen strenuous days, could or should we say to one another that we will try our best to help bringing this Convention of *ours* into effect in order to protect the integrity of our cherished cultural heritage and the good of mankind.

With all my best wishes, I thank you all.”

Mr PAOLUCCI (Minister of Culture of Italy) delivered the following address:

“I would like to express my great satisfaction at the agreement that has been reached over the course of this diplomatic Conference, an agreement which has resulted in the adoption of the text of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects which, in my opinion, is acceptable to the great majority of the countries which contributed to its elaboration.

Italy convened this diplomatic Conference in the knowledge that it was a difficult undertaking, requiring the accommodation of widely divergent legal and cultural positions. Some countries were requested to take on new obligations, others to abandon some of their expectations and all to undertake to defend not only their cultural heritage, but also that of other nations.

Consequently the result of the Conference could not be foreseen. As host nation we took a gamble on the important common aim of sending a strong message to counter the illegal traffic in cultural objects. This goal has been achieved, and the two fundamental principles underlying the draft Unidroit Convention have been affirmed: stolen or illegally exported cultural objects must be returned, and the good faith purchaser has a right to fair and reasonable compensation. On the one hand, the concerns of countries which could have difficulties in paying compensation were taken into account, and on the other an attempt was made clearly to define the scope of application of the Convention so as to clarify the obligations undertaken by all the parties. All in all, various options have been left open to States, in the knowledge that this Convention is in many aspects revolutionary, and that for many States accession will imply legal adjustments of no small consequence.

Furthermore, I would like to emphasise that aside from the legal considerations, a great step forward for culture has been taken. We are, effectively, aware that by definition cultural objects are of universal significance, but also that maintaining them in their country of origin as evidence of a people’s artistic and intellectual achievements is essential as it preserves the cultural identity of that nation.

This Convention enables States with a particularly flourishing art market more easily to ensure that the rules relating to the transparency of transactions are respected, which is to the advantage of dealers who operate seriously and legitimately. As for those nations which are considered to be producers of cultural objects, the Convention provides an efficient instrument to protect their heritage.

As of today, Italy is the depositary of this Convention. It is both an honour and a burden that we take on before you all, assuring you that we will not confine our efforts to the obligations conferred by this task but take all steps possible to ensure the greatest number of

accessions. In this undertaking we know that we can count on the assistance of Unidroit, which has worked unstintingly towards this goal and to which I would like to extend my warmest thanks. I would also like to express my gratitude to all the delegations which, right up until the very last moment and with unusual dedication, sought a compromise solution.

Finally, permit me to conclude by quoting the motto of the diplomatic Conference: *Ars grata legi*.

I hereby declare the Rome diplomatic Conference closed.”

**PART V – TEXTS / INSTRUMENTS ADOPTED BY THE CONFERENCE**



**FINAL ACT OF THE DIPLOMATIC CONFERENCE FOR THE ADOPTION  
OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN  
OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

1. – The Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects was held in Rome, Italy from 7 to 24 June 1995.

2. – Representatives of 70 States participated in the Conference, namely representatives of:

the Republic of Albania; the People's Democratic Republic of Algeria; the Republic of Angola; the Argentine Republic; Australia; the Republic of Austria; the Republic of Belarus; the Kingdom of Belgium; the Republic of Bolivia; the Federative Republic of Brazil; the Republic of Bulgaria; Burkina Faso; the Kingdom of Cambodia; the Republic of Cameroon; Canada; the People's Republic of China; the Republic of Colombia; the Republic of Côte d'Ivoire; the Republic of Croatia; the Republic of Cyprus; the Czech Republic; the Kingdom of Denmark; the Republic of Ecuador; the Arab Republic of Egypt; the Republic of Finland; the French Republic; the Republic of Georgia; the Federal Republic of Germany; the Republic of Guinea; the Hellenic Republic; the Holy See; the Republic of Hungary; the Republic of India; the Islamic Republic of Iran; Ireland; the State of Israel; the Italian Republic; Japan; the State of Kuwait; the Socialist People's Libyan Arab Jamahiriya; the Republic of Lithuania; the Grand Duchy of Luxembourg; the Republic of Malta; the United Mexican States; the Kingdom of Morocco; the Union of Myanmar; the Kingdom of the Netherlands; the Federal Republic of Nigeria; the Kingdom of Norway; the Islamic Republic of Pakistan; the Republic of Paraguay; the Republic of Peru; the Republic of Poland; the Portuguese Republic; the Republic of Korea; Romania; the Russian Federation; the Republic of Slovenia; the Republic of

South Africa; the Kingdom of Spain; the Kingdom of Sweden; the Swiss Confederation; the Kingdom of Thailand; the Republic of Tunisia; the Republic of Turkey; Ukraine; the United Kingdom of Great Britain and Northern Ireland; the United States of America; the Republic of Yemen; the Republic of Zambia.

3. – Eight States sent observers to the Conference, namely:

the Republic of Bosnia-Herzegovina; the Republic of Ghana; the Republic of Guatemala; the Republic of Honduras; the Hashemite Kingdom of Jordan; the Kingdom of Saudi Arabia; the Syrian Arab Republic; the Republic of Venezuela.

4. – The following intergovernmental Organisations were represented by observers at the Conference:

the Commission of the European Communities  
the Council of Europe  
the Council of the European Union  
the Hague Conference on Private International Law  
the International Centre for the Study of the Preservation and the Restoration of Cultural Property  
the International Criminal Police Organization  
the United Nations Educational, Scientific and Cultural Organization.

5. – The following international non-governmental Organisations were represented by observers at the Conference:

the International Association of Lawyers  
the International Bar Association  
the International Council on Archives  
the International Law Association  
the International Union of Latin Notariat.

6. – The following international professional association was represented by observers at the Conference:

the International Association of Dealers in Ancient Art.

7. – The Sovereign Military Order of Malta was represented by an observer at the Conference.

8. – The Conference elected Mr Walter Gardini (Italy) as President.

9. – The Conference elected as Vice-Presidents the following representatives:

Mr M. Ghomrasni (Tunisia)  
Mr A.G. Khodakov (Russian Federation)  
Mr M. Kima Tabong (Cameroon)  
Mr J. Sánchez Cordero Dávila (Mexico)  
Mr A. Wichiencharoen (Thailand).

10. – The following committees were set up by the Conference:

#### **Steering Committee**

**Chair:** The President of the Conference

**Members:** The President and the Vice-Presidents of the Conference and the Chair of the Committee of the Whole

In addition the Secretary-General of the Conference participated in the work of the Steering Committee, at the invitation of the Chair

#### **Committee of the Whole**

**Chair:** Mr P. Lalive (Switzerland)

**First Vice-Chair:** Ms V. Hughes (Canada)

**Second Vice-Chair:** Mr A. Beksta (Lithuania)

#### **Final Clauses Committee**

**Chair:** Mr V. Marotta Rangel (Brazil)

**Vice-Chair:** Mr I. Zimba Chabala (Zambia)

#### **Drafting Committee**

**Chair:** Ms R. Balkin (Australia)

**Members:** Australia; China; Egypt; Finland; France; Nigeria; Portugal; Turkey; United States of America.

#### **Credentials Committee**

**Chair:** Mr N. Perl (Argentina)

**Members:** Argentina; Czech Republic; France; Guinea; Pakistan.

11. – The Secretary-General of the Conference was Mr M. Evans, Secretary-General of Unidroit.

12. – The basic working materials used by the Conference and its organs were the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects as adopted by a Unidroit committee of governmental experts on 8 October 1993 with an Explanatory Report prepared by the Unidroit Secretariat (CONF. 8/3) and the draft final provisions capable of embodiment in the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects with explanatory notes drawn up by the Unidroit Secretariat (CONF. 8/4). The Conference and its organs also considered proposals and comments by Governments and international Organisations on the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/5 and Addenda, CONF. 8/6 and Addenda, CONF. 8/W.P. 1 – 7 and CONF. 8/C.1/W.P. 1 – 82) and on the draft final provisions capable of embodiment in the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects (CONF. 8/C.2/W.P. 1 – 25).

13. – The Conference assigned to the Committee of the Whole the first and second readings of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Articles C and F of the draft final provisions capable of embodiment in the aforementioned draft Convention and the title of said draft Convention. The Conference assigned to the Final Clauses Committee the first and second readings of all but Articles C and F of the draft final provisions capable of embodiment in the aforementioned draft Convention.

14. – On the basis of the deliberations recorded in the summary records of the Conference (CONF. 8/S.R. 1 - 7), the summary records of the Committee of the Whole (CONF. 8/C.1/S.R. 1 - 19) and its report (CONF. 8/C.1/Doc. 1) and the report of the Final Clauses Committee (CONF. 8/C.2/Doc. 1), the Conference drew up **THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**.

15. – The Unidroit Convention on Stolen or Illegally Exported Cultural Objects, the text of which is set out in an appendix to this Final Act, was adopted by the Conference on 23 June 1995 and opened for signature at the closing session of the Conference on 24 June 1995. The Convention will remain open for signature in Rome, Italy until 30 June 1996. It was also opened for accession on 24 June 1995.

16. – The Convention is deposited with the Government of Italy.

**IN WITNESS WHEREOF** the representatives,

**GRATEFUL** to the Government of Italy for having invited the Conference to Italy and for its generous hospitality,

**HAVE SIGNED** this Final Act.

**DONE** at Rome, this twenty-fourth day of June, one thousand nine hundred and ninety-five, in a single copy in the English and French languages, each text being equally authentic.

The Vice-President

The Secretary-General

## APPENDIX

### UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

THE STATES PARTIES TO THIS CONVENTION,

ASSEMBLED in Rome at the invitation of the Government of the Italian Republic from 7 to 24 June 1995 for a Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects,

CONVINCED of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation,

DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information,

DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all,

EMPHASISING that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States,

AFFIRMING that the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of

whatever kind which may have taken place before the entry into force of the Convention,

CONSCIOUS that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges,

ACKNOWLEDGING that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation,

RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector,

HAVE AGREED as follows:

#### 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;
- (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects").

##### *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 and belong to one of the categories listed in the Annex to this Convention.

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, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.

(6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.

(7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by:

(a) a Contracting State

(b) a regional or local authority of a Contracting State;

(c) a religious institution in a Contracting State; or

(d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

(8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

*Article 4*

(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment 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) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.

(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.

(4) In determining whether the possessor exercised due diligence, regard shall be had to all 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, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural 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 to order the return of a cultural object illegally exported from the territory of the requesting State.

(2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural 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 traditional or ritual use of the object by a tribal or indigenous community,

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

(4) Any request made under paragraph 1 of this article 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 to 3 have been met.

(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

#### *Article 6*

(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, 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 illegally exported.

(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may 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 who provides the necessary guarantees.

(4) The cost of returning the cultural 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 cultural object by inheritance or otherwise gratuitously.

#### *Article 7*

(1) The provisions of this Chapter shall not apply where:

- (a) the export of a cultural object is no

longer illegal at the time at which the return is requested; or

(b) the 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.

(2) Notwithstanding the provisions of subparagraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

#### CHAPTER IV - GENERAL PROVISIONS

##### *Article 8*

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority 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.

##### *Article 9*

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

(2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

##### *Article 10*

(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

(2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

(3) This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.

#### CHAPTER V - FINAL PROVISIONS

##### *Article 11*

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects and will remain open for signature by all States at Rome until 30 June 1996.

(2) This Convention is subject to ratification, acceptance or approval by States which have signed it.

(3) This Convention is open for accession by all

States which are not signatory States as from the date it is open for signature.

(4) Ratification, acceptance, approval or accession is subject to the deposit of a formal instrument to that effect with the depositary.

#### *Article 12*

(1) This Convention shall enter into force on the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State that ratifies, accepts, approves or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State on the first day of the sixth month following the date of deposit of its instrument of ratification, acceptance, approval or accession.

#### *Article 13*

(1) This Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States bound by such instrument.

(2) Any Contracting State may enter into agreements with one or more Contracting States, with a view to improving the application of this Convention in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary.

(3) In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules.

#### *Article 14*

(1) If a Contracting State has two or more territorial units, whether or not possessing different systems of law applicable in relation to the matters dealt with in this Convention, it may, at the time of signature or of the deposit of its instrument of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute for its declaration another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the reference to:

(a) the territory of a Contracting State in Article 1 shall be construed as referring to the territory of a territorial unit of that State;

(b) a court or other competent authority of the Contracting State or of the State addressed shall be construed as referring to the court or other competent authority of a territorial unit of that State;

(c) the Contracting State where the cultural object is located in Article 8 (1) shall be construed as referring to the territorial unit of that State where the object is located;

(d) the law of the Contracting State where the object is located in Article 8 (3) shall be construed as referring to the law of the territorial unit of that State where the object is located; and

(e) a Contracting State in Article 9 shall be construed as referring to a territorial unit of that State.

(4) If a Contracting State makes no declaration under paragraph 1 of this article, this Convention is to extend to all territorial units of that State.

#### *Article 15*

(1) Declarations made under this Convention at

the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration shall take effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force shall take effect on the first day of the sixth month following the date of its deposit with the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal shall take effect on the first day of the sixth month following the date of the deposit of the notification.

#### *Article 16*

(1) Each Contracting State shall at the time of signature, ratification, acceptance, approval or accession, declare that claims for the restitution, or requests for the return, of cultural objects brought by a State under Article 8 may be submitted to it under one or more of the following procedures:

(a) directly to the courts or other competent authorities of the declaring State;

(b) through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State;

(c) through diplomatic or consular channels.

(2) Each Contracting State may also designate the courts or other authorities competent to order the restitution or return of cultural objects under the provisions of Chapters II and III.

(3) Declarations made under paragraphs 1 and 2 of this article may be modified at any time by a new declaration.

(4) The provisions of paragraphs 1 to 3 of this article do not affect bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.

#### *Article 17*

Each Contracting State shall, no later than six months following the date of deposit of its instrument of ratification, acceptance, approval or accession, provide the depositary with written information in one of the official languages of the Convention concerning the legislation regulating the export of its cultural objects. This information shall be updated from time to time as appropriate.

#### *Article 18*

No reservations are permitted except those expressly authorised in this Convention.

#### *Article 19*

(1) This Convention may be denounced by any State Party, at any time after the date on which it enters into force for that State, by the deposit of an instrument to that effect with the depositary.

(2) A denunciation shall take effect on the first day of the sixth month following the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it shall take effect upon the expiration of such longer period after its deposit with the depositary.

(3) Notwithstanding such a denunciation, this Convention shall nevertheless apply to a claim for restitution or a request for return of a cultural object submitted prior to the date on which the denunciation takes effect.

#### *Article 20*

The President of the International Institute for the Unification of Private Law (Unidroit) may at regular intervals, or at any time at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention.

*Article 21*

a n n e x

(1) This Convention shall be deposited with the Government of the Italian Republic.

(2) The Government of the Italian Republic shall:

(a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) each declaration made in accordance with this Convention;

(iii) the withdrawal of any declaration;

(iv) the date of entry into force of this Convention;

(v) the agreements referred to in Article 13;

(vi) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;

(b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit);

(c) perform such other functions customary for depositaries.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised, have signed this Convention.

DONE at Rome, this twenty-fourth day of June, one thousand nine hundred and ninety-five, in a single original, in the English and French languages, both texts being equally authentic.

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

