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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

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

as approved by the Unidroit committee of governmental experts on 8 october 1993

and

EXPLANATORY REPORT

(prepared by the Unidroit Secretariat)

Rome, December 1994

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 [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.

Appendix

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.

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 65th 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 (1), 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 (2), which was followed by a second study dealing more particularly with the rules of private law governing the transfer of title to cultural property(3). 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 67th session held in June 1988 (4), 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

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(1) See the Report on the 65th session of the Governing Council, p. 24 (UNIDROIT 1986, C.D. 65 - Doc. 18).
(2) See UNIDROIT 1986, Study LXX - Doc. 1.
(3) See UNIDROIT 1988, Study LXX - Doc. 4.
(4) See the Report on the 67th session of the Governing Council, p. 32 (UNIDROIT 1988, C.D. 67 - Doc. 18).

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 Governing Council, Mr Roland Loewe, the essentially pragmatic approach of which was founded on the concepts of the right to payment and of restitution (5). The study group held three session 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 (6). 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 (7).

5. At its 69th 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 (8). 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 (9).

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(10). The text adopted by the committee of governmental experts was laid before the Unidroit Governing Council at its 73rd 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

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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 the APPENDIX hereto.

(10) For the text of the draft Convention, see page 1 *et seq.*

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. 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 [11]. 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 establishing 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 (ususally 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

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[11] 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 rquesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. [...]".

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 (12). 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 international 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.

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

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 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 innovatory 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 decide 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 uncontested. 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 temporally exported, for example, from 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 law 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 it 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 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 restitution 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 retroactive 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.