UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects : Explanatory Report

prepared by the UNIDROIT Secretariat *

I. – RAISON D'ÊTRE *OF THE CONVENTION AND DRAFTING HISTORY*

International protection of cultural objects

Illicit traffic in works of art is by no means a new phenomenon, nor is it confined to any particular part of the world. As a form of crime it is, however, expanding rapidly world-wide, and the emergence of new factors such as the opening-up of new outlets and the growing demand in the newly affluent States, greater ease of communication and indeed, the remarkable increase in the value of works of art as a consequence of the influx of capital into the market bodes ill for any attempt to stem the tide, still less turn it.

While the urgency of the situation is universally acknowledged, the response in terms of human and financial input and legal protection has fallen far short of what is needed. National laws in the matter differ widely and this diversity is put to good use by traffickers, as is the limited (strictly national) territorial scope of the export bans set in place by individual States: the steps taken by one State to protect its works of art not applied by other States, no more than are their fiscal, penal or administrative rules, unless inter-State agreements have been concluded to the contrary.

Most nations to-day regard the protection of their cultural heritage as the prime focus of their cultural policies – protection, that is, of their own cultural heritage but implying, also, respect for that of other States. In strictly legal terms, however, international co-operation to protect the national cultural heritage against illicit trafficking has tended to be rather a one-sided exercise, since it has in effect involved only the so-called "exporting" States. Most of the "importing" nations have held aloof from such international co-operation schemes where they

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This report is published over five years after the Convention was adopted, whereas a great many articles and monographs have in the meantime appeared analysing its single provisions, raising questions or comparing the Convention with other international instruments. This report on the contrary scrutinises the individual clauses of the Convention, their *raison d'être*, how they took shape in the drafting – where this is relevant to understanding them – and how they may be applied. In this, the report may be of assistance to those States that are considering whether to ratify the Convention or to accede to it. Where relevant, the report has been updated until 31 December 2001.

existed. The countries most at risk from theft or the illegal export of their cultural heritage have defended themselves by taking drastic legal steps such as decreeing total export bans, granting "public property" status to certain cultural objects (implying, for example, no limitation period, expropriation in the event of illegal export, etc.). Internationally, however, such national measures can only be effective if the States to whose territory the cultural object in question has been removed co-operate: in fact, however, they have been inclined in the past to put the protection of their national art markets first and co-operation second, co-operating only on certain strict conditions (*i.e.* subject to the principles of free trade and equality before the law of public and private property, and to protect the rights of the good faith purchaser) – all principles which they were prepared to sacrifice only in exceptional circumstances.

There is, however, evidence of a change of heart in this respect, notwithstanding the ever-growing threat to the cultural heritage world-wide. Theft from private homes, from museums or places of worship is on the rise and States, even the traditional "market" States, are becoming more amenable to the idea of drastic action. In part, they have been alerted by the serious problems encountered by collectors and museums stemming from the lack of a clear dividing line between legal and illicit traffic. The legal approach to illegal export is likewise changing, and the recognition and enforcement of certain foreign laws is becoming more frequent; the market States now seem more willing to enforce some, but not all, bans on certain very important categories of cultural objects.

With illicit art traffic growing increasingly international in scope, the panoply of legal instruments to combat this scourge has grown apace. A turning point was reached at the end of the 1960s when the international community agreed on the need for ethical and legal principles to protect cultural property world-wide. The last thirty years have seen the adoption of a range of international legal instruments of bilateral, regional or universal scope, most of them adopted by the United Nations Organisation for Education, Science and Culture (UNESCO), further supplemented by new rules – mostly of a non-binding nature – for use by those connected with the art trade.

From UNESCO Convention (1970) to UNIDROIT Convention (1995)

The 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (hereinafter: the 1970 Convention) [1] constituted a great step forward in that it accords privileged status to cultural objects and imposes an obligation on States to protect them, while proposing a set of concrete measures designed to implement such protection, in particular against theft and pillage. Although a public law instrument binding on Contracting States, the implementation of some of its provisions nevertheless also raises issues of private law. The main stumbling-block was Article 7 b. (ii), which provided for the restitution to the original owner of a stolen or illegally exported object by the possessor, even the good faith possessor, and the latter's right to compensation.[2]

[1] The text of this Convention is reproduced in *Conventions and Recommendations of Unesco concerning the protection of cultural heritage*, 1985, p. 57. Website: http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml. By 31 December 2001, 92 States had become Parties to this instrument.

[2] Article 7 b. ii. provides that:
"The States Parties to this Convention undertake:

The chief problems in a case of theft are transfer of title and the conflict of interests between the person (usually the owner) who has been dispossessed of an object and the purchaser in good faith of that object. Legal systems approach the problem of acquisition *a non domino* in very different ways: common law systems follow the *nemo dat quod non habet* rule (a purchaser cannot acquire valid title unless the transferor has valid title), whereas the vast majority of civil law systems accord greater protection, albeit to varying degrees, to the acquirer in good faith of stolen property ("*en fait de meubles, possession vaut titre*").

The problems of transfer of title and acquisition *a non domino* were first addressed by the International Institute for the Unification of Private Law (UNIDROIT) in a draft model law prepared in the 1960s. The draft *Uniform Law on the Acquisition in Good Faith of Corporeal Movables* (hereinafter referred to as "LUAB") [3] contemplated the acquisition for value of movables in general, and tied in closely with two other UNIDROIT instruments, the Hague Conventions on international sale adopted in 1964 (the *Convention relating to a uniform law on the international sale of goods (ULIS)* and the *Convention relating to a uniform law on the formation of contracts for the international sale of goods (ULFIS)*). In this context, and bearing in mind the aim of improving certainty in international commercial transactions, LUAB endorsed the principle of the validity of acquisition *a non domino*. This draft, which was ratified by the UNIDROIT Governing Council in 1974, never made the grade as an international instrument for lack of consensus to convene a diplomatic Conference for its adoption.

Mindful of the experience gained in connection with LUAB, UNESCO turned to UNIDROIT when the time came to prepare private law rules for the implementation of its 1970 Convention. On account however of the very special nature of the objects contemplated, which were not mere merchandise, it soon became clear that the objectives pursued by LUAB and the solution it offered were in fact quite different from those required to protect the cultural heritage.

The other problem addressed by the 1970 Convention was that of the removal of cultural objects from the territory of the State of origin in violation of its export legislation. In this connection, while the 1970 Convention does require States to adopt procedures governing the authorised export of cultural objects, it proposes no specific mechanism for the return of illegally exported objects to their country of origin.

It was clear from an early stage that only the format of an international Convention would provide an effective instrument and that, having regard to the large number of States which had already accepted the 1970 Convention, the two instruments should be fully compatible. As to the substantive content of the future instrument, the starting point was to be Article 7 b.ii. of the 1970 Convention, concentrating on the two situations it dealt with: theft and illegal export. Within this framework, the key to success consisted in finding a way of reconciling the two

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

3 The text of the draft *Uniform Law on the Acquisition in Good Faith of Corporeal Movables* ("LUAB") was reproduced in *Revue de droit uniforme / Uniform Law Review*, 1975-I, 79. See also J.-G. SAUVEPLANNE, "Explanatory Report", *Idem*, 85.

opposing positions: the advocates of the free movement of cultural objects world-wide who sought to restrict as far as possible the substantive scope of application of the Convention and to preserve the protection at present enjoyed in their countries by the purchaser in good faith; and the partisans of national protection of the cultural heritage who wished to extend as far as possible the principle of the return of stolen or illegally exported cultural objects and thereby to obtain the maximum level of international protection for their national cultural heritage.

The drafters of the UNIDROIT Convention were able at all times to count on the co-operation and assistance of UNESCO, at whose request the work had been undertaken. That organisation also took a very active part as an observer in the diplomatic Conference and continues to this day to promote the UNIDROIT Convention as an instrument supplementary to its own 1970 Convention.[4]

Reference should also be made to two initiatives undertaken at regional level which took off when the UNIDROIT Convention was still at the drafting stage. Both were to a large extent influenced by the discussions during this stage, and in return provided useful reference points in formulating appropriate compromise solutions. *EEC Regulation No. 3911/92 of the Council of the European Communities of 9 December 1992 on the export of cultural goods* [5] and *EEC Directive 93/7 of 15 March 1993 of the Council on the return of cultural objects unlawfully removed from the territory of a Member State* [6] (and their successive amendments) set out protective measures for the cultural heritage of Member States of the European Union upon completion of the Single Market and the abolition of intra-Community frontier controls. The other initiative concerns the countries of the Commonwealth and provides rules to protect cultural objects against illegal export, enshrined in a *Scheme for the Protection of the Material Cultural Heritage*, adopted in Mauritius in November 1993.[7]

The preparatory work carried out by UNIDROIT

At the request of UNESCO, in the early 1980s, the UNIDROIT Governing Council decided at its 65th session (April 1986) to include the subject of the international protection of cultural property in the UNIDROIT Work Programme for the triennial period 1987-1989.[8]

A first study on the international protection of cultural property, in the light especially of LUAB (1974) and the 1970 Convention,[9] followed by a second study dealing more particularly with the rules of private law governing the transfer of title over cultural property,[10] were entrusted to Prof. Gerte REICHELT (Austria). A comparative law survey suggested that one method

4 Special tribute must here be paid to Ms Lyndel PROTT, whose contribution to the work of UNIDROIT was decisive. See, in particular, her commentary on the UNIDROIT Convention, Lyndel V. PROTT, *Commentary on the UNIDROIT Convention*, Leicester, Institute of Art and Law, 1997, 145 p.

5 *Official Journal of the European Communities* No. L 395 of 31.12.1992, p. 1.

6 *Official Journal of the European Communities* No. L 74 of 27.3.1993, p. 74.

7 *Commonwealth Law Bulletin*, Vol. 19, No. 4, Oct. 93, p. 2015.

8 UNIDROIT 1986, C.D. 65 – Doc. 18. *Report on the 65th session of the Governing Council*, 22; UNIDROIT 1986, A.G. 39 – Doc. 10. *Report on the 39th session of the General Assembly*, 3.

9 G. REICHELT, "The international protection of cultural property", *Revue de droit uniforme / Uniform Law Review*, 1985-I, 42 (UNIDROIT 1986, Study LXX – Doc. 1).

10 G. REICHELT, "The international protection of cultural property – second study", *Revue de droit uniforme / Uniform Law Review*, 1988-I, 52 (UNIDROIT 1988, Study LXX – Doc. 4).

of providing effective protection for cultural property would be the application of mandatory rules which would translate political considerations into legal concepts. A novel approach was advocated based on the recognition of foreign laws governing the export of cultural property through the combined effect of private law, private international law (conflict of laws) and public law.

After it had been informed that UNESCO did not itself envisage the preparation of any new international instrument, the UNIDROIT Governing Council decided [11] to set up a study group to consider the feasibility and desirability of drawing up uniform rules relating to the private law aspects of the international protection of cultural property. The group worked on the basis of a *preliminary draft Convention on the restitution of cultural objects*, submitted by Mr Roland LOEWE,[12] whose essentially pragmatic approach was founded on the concepts of restitution and the right to payment.[13] The study group held three sessions in Rome between 1988 and 1990,[14] under the chairmanship of Mr Riccardo MONACO (then President of UNIDROIT). At the end of its third session, it adopted the *preliminary draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.[15]

Following the Governing Council's decision to convene a Committee of governmental experts, the text of the preliminary draft was discussed and revised at four meetings, all chaired by Mr Pierre LALIVE (Switzerland) and held in Rome between 1991 and 1993.[16] At the conclusion of its fourth session, the Committee adopted the *draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*,[17] and the UNIDROIT Governing Council, at its 73rd session (May 1994), deemed the text 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 duly convened the diplomatic Conference which was held in Rome from 7 to 24 June 1995.

The Conference was attended by a large number of Governments and organisations.[18] It had before it the following texts: the *draft UNIDROIT Convention* and its *Explanatory Report*

11 UNIDROIT 1988, C.D. 67 – Doc. 18, *Report on the 67th session of the Governing Council*, 32.

12 The Austrian member of the UNIDROIT Governing Council.

13 UNIDROIT 1988, Study LXX – Doc. 3.

14 The reports on these three sessions (12-15 December 1988, 13-17 April 1989 and 22-26 January 1990) were reproduced respectively in UNIDROIT 1989, Study LXX – Doc. 10; UNIDROIT 1989, Study LXX – Doc.- 14; UNIDROIT 1990, Study LXX – Doc. 3.

15 Reproduced in *Revue de droit uniforme / Uniform Law Review* 1990-II, 16 (UNIDROIT 1990 – Study LXX – Doc. 19); see also M. SCHNEIDER, "Explanatory Report on the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects", *idem,* 26.

16 The Reports on the four sessions (6-10 May 1991, 20-29 January 1992, 22-26 February 1993 and 29 September – 8 October 1993) were reproduced 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. The meetings were attended by representatives of fifty member States of UNIDROIT, twenty-five non-member States, nine inter-governmental organisations, five non-governmental organisations and/or professional associations as well as the Sovereign Military Order of Malta.

17 Reproduced in *Revue de droit uniforme / Uniform Law Review*, 1993, 104 (UNIDROIT 1994 – Study LXX – Doc. 49); see also M. SCHNEIDER, "Explanatory Report on the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects", *idem*, 119.

18 Seventy-eight States – of which eight as observers – were represented at the diplomatic Conference; seven inter-governmental organisations, five international non-governmental organisations, one international professional association as well as the Sovereign Military Order of Malta also sent observers;

prepared by the UNIDROIT Secretariat and the *draft Final Provisions with explanatory comments* by the UNIDROIT Secretariat, as well as the proposals and comments submitted by Governments and international organisations.[19] The Conference work was carried out by the Plenum and its organs;[20] special mention should be made of an *informal Working Group* – whose membership reflected the policy positions most at variance with each other – set up ten days into the negotiations when they seemed headed for failure over several seemingly insurmountable stumbling-blocks. This group met in parallel with the Conference proper to draft a compromise text[21] which won the support of other delegations and which, together with a draft Preamble,[22] was submitted to the Conference. The *UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*[23] was opened to signature – and accession – at the close of the Conference on 24 June 1995.

The Convention remained open for signature in Rome (Italy) until 30 June 1996. By that date, 22 States had signed the Convention deposited with the Government of Italy.[24] By 31 December 2001, the Convention was in force between 13 States.[25]

for the complete list of participants, see CONF. 8/INF. 1 FINAL, in *Acts and Proceedings of the diplomatic Conference for the Adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, Presidenza del Consiglio dei Ministri – Dipartimento per l'Informazione e l'Editoria, Rome 1996, pp. 392.

19 The *Acts* (*supra* note 18) reproduce: the *draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects with explanatory Report prepared by the UNIDROIT Secretariat* (CONF. 8/3); the *draft Final Provisions Capable of Embodiment in the draft UNIDROIT Convention with explanatory comments by the UNIDROIT Secretariat* (CONF. 8/4); the *Proposals and Comments of Governments and International Organisations on the draft UNIDROIT Convention* (CONF. 8/5 and Addenda, CONF. 8/6 and Addenda, CONF. 8/W.P. 1-7 and CONF. 8/C.1/W.P. 1-82) and *(idem)* on the *draft Final Provisions Capable of Embodiment in the draft UNIDROIT Convention* (CONF. 8/C.2/W.P. 1-25).

20 The *Acts* (*supra* note 18) reproduce the *Summary records of the Conference* (CONF. 8/S.R. 1-7), the *Summary records of the Meetings of the Conference* (CONF. 8/C.1/S.R. 1-19), the *Report of the Meetings of the Conference* (CONF. 8/C.1/Doc. 1) and the *Report of the Final Clauses Committee* (CONF. 8/C.2/Doc. 1).

21 *Acts* (*supra* note 18), CONF. 8/W.P. 5, 347 – Proposal submitted by the delegations of Australia, Cambodia, Canada, France, Greece, Ireland, Italy, Mexico, Republic of Korea, Spain, Turkey, the United States of America and Zambia.

22 *Acts* (*supra* note 18), CONF. 8/W.P. 6, 351 – Proposal submitted by the delegations of Australia, Cambodia, Canada, France, Greece, Italy, Mexico, the Netherlands, Spain, Switzerland, Turkey, the United States of America and Zambia.

23 The text of the Convention is reproduced as an Annex hereafter, and may also be accessed on the UNIDROIT website: http://www.unidroit.org/english/conventions/c-cult.htm.

24 The signatory States are: Bolivia, Burkina Faso, Cambodia, Côte d'Ivoire, Croatia, Finland, France, Georgia, Guinea, Hungary, Italy, Lithuania, the Netherlands, Pakistan, Paraguay, Peru, Portugal, Romania, Russian Federation, Senegal, Switzerland and Zambia.

25 By 31 December 2001, the following States were Parties to the Convention: Bolivia, Brazil, China, Croatia, Ecuador, El Salvador, Finland, Hungary, Italy, Lithuania, Paraguay, Peru and Romania. By that time, Argentina and Norway had acceded to the Convention, with a scheduled entry into force for these States on 1 February and 1 March 2002, respectively. The state of implementation (ratifications/accessions) of the Convention is regularly updated on the UNIDROIT website at < http://www.unidroit.org/english/implement/I-95.htm> .

II. – COMMENTS ON THE PROVISIONS OF THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

The Convention is made up of 21 Articles divided into 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 5–7)

Chapter IV – General provisions (Articles 8–10)

Chapter V – Final provisions (Articles 11–21).

Title of the Convention

The *title* was repeatedly modified, right up to the diplomatic Conference. It was however accepted from the outset that it should reflect, as concisely as possible, the purpose of the Convention. Two important questions needed to be resolved: one was whether the words "restitution" and "return" should be used, the other which of the two expressions: "cultural objects" or "cultural property", should prevail.

The words "restitution" and "return" contained in the provisions of the Convention properly express the dual nature of the situation it addresses. While "restitution" applies in the case of theft, "return" refers to illegal export, so as to forestall any difficulties in connection with their international characterisation. In the end, neither was used in the title not only for the sake of brevity but also to avoid confusion in respect of their interpretation, since neither is really part of the UNESCO vocabulary (in particular that of its *Intergovernmental Committee for the Promotion of the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*). The choice of these words, and whether they should be accompanied by the adjective "international", gave rise to in-depth debate as to the kind of situation (international and/or purely national) that the Convention was intended to address. For a long time, these discussions centred on the title, since no article on the scope of application was included until the third session of the study group in 1990,[26] after which time the international character was defined within the body of the Convention itself (*cf.* Article 1).

The second question was that of choosing between the terms "cultural property" and "cultural objects", in regard to which the Committee of experts made a distinction between the French and the English language versions. In the end, they opted for the words "cultural objects" in preference to "cultural property", the latter being a relatively new concept in common law. In the French version, the words *"biens culturels"* were preferred since these had been used in the UNESCO Conventions since 1954 and in many national and international regulations thereafter, and because they had been accepted by most legal scholars. Moreover, they do not give rise any misunderstandings, being clearly defined in Article 2.

Finally, the conjunction "or" ("Convention on stolen *or* illegally exported cultural objects") makes it clear that, for the Convention's provisions to be brought into play, a cultural object as defined by the Convention need only either to have been stolen – and in that case it will be subject to the procedure set out in Chapter II –, *or* illegally exported – in which case it will be subject to the provisions of Chapter III. It may also have been both stolen *and* illegally

[26] *Cf.* UNIDROIT 1990, Study LXX – Doc. 18.

exported (this is often the case) or *vice versa* (the object may have been illegally exported by the owner seeking a higher price in a better market) and, in those cases, it will be up to the claimant to bring a claim for its return under Chapters II or III (depending in particular on the proof which the claimant is able to adduce).

Preamble

It would be a mistake to underestimate the importance of the Preamble in an international Convention. A case in point is the *1969 Vienna Convention on the Law of Treaties* which states in its Article 31 that a treaty "must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*" and that "for the purpose of the interpretation of a treaty, *the context shall comprise [...] its preamble*."

The provisions of the Preamble express common intentions and principles – albeit non-binding ones – that form an integral part of the global package that makes up the Convention. It sums up the philosophy, the objectives, the role and the content of the Convention as well as its limits, against the background of the current situation as regards trafficking and the need and will to combat it.

The Preamble starts by recalling some fundamental facts, such as the importance of protecting the cultural heritage and of cultural exchanges to promote understanding between peoples; the irreparable damage caused by illicit trade in cultural objects in general; the special place of indigenous tribal communities (*cf.* Articles 3(8), 5(3)(d) and 7(2)) and the serious problem of the pillage of archaeological sites (*cf.* Articles 3(4) and (5) and 5(3)). It then goes on to describe the objective pursued by the Convention, namely to contribute effectively to the fight against illicit trade in cultural objects and so improve the conservation and protection of the cultural heritage for the common good. To do so, it sets out to facilitate the restitution or return of cultural objects by means of a legal mechanism which it proposes to set in place.

However, the authors were also conscious of the need for moderation and stressed that the Convention laid no claim to solving all problems. The Preamble rightly draws attention to the limits of the text, emphasising that its aim is to establish "common, *minimal* legal rules" in as many States as possible so as to prevent traffickers from exploiting differences between legal systems. The Convention also aims at providing remedies such as compensation, failing which the mechanism for restitution or return would be unacceptable to some States, but without making them binding on those States that see no need for them. However, the new instrument in no way claims to offer an exclusive remedy for the problem of trafficking: on the contrary, stress is laid on the need for further measures such as the development and use of registers or the physical protection of archaeological sites. Finally, the Preamble calls for steps to strengthen international co-operation and to guarantee proper conditions for lawful trade in cultural objects.

It was – and is – vitally important to many States that the Convention have no retroactive effect. The experts therefore agreed that this fundamental principle should be spelled out in the Preamble ("the adoption of the provisions of [the] Convention *for the future*") and reiterated in the text proper, to enable those States that have enshrined the principle of non-retroactivity in their Constitution to become Parties to the Convention. The Committee of experts nevertheless felt that it should be clearly spelled out that it was not their intention to legitimise any illicit traffic that might have occurred prior to the Convention's entry into force and that steps should be taken to promote co-operation between States (*cf.* also Article 10(3)).

Last but not least, the States recognised the work of various existing bodies in this area and of UNESCO in particular (sub-paragraph 10), the only time that organisation is specifically

named in the text. Several States that were not Parties to the 1970 Convention would have preferred no explicit reference to be made at all, but it was felt that UNESCO's immense contribution and its unfailing support of UNIDROIT's own work could not be overlooked, no more than could the complementary nature of the two instruments (for example, they both cover exactly the same categories of objects). The authors wished there to be absolutely no doubt that the new Convention was not intended to replace the 1970 Convention nor to detract from its merits; the older Convention by 25 years remains a key resource in the fight against illicit traffic in cultural objects.

CHAPTER I – SCOPE OF APPLICATION AND DEFINITION

Article 1

The substantive scope of the Convention is defined by reference to the claims to which it applies. Initially, the study group had planned to draft a uniform law establishing common substantive rules to cover all situations – domestic as well as international – involving the theft of cultural objects, but the Committee of governmental experts in the end decided to restrict the scope of the Convention to *international* claims alone.[27]

On the other hand, the requirement in the introductory provision that claims be of an "international character" was not further specified owing to the difficulty – or near-impossibility – of agreeing on satisfactory, well-defined criteria to cover all possible scenarios. Accordingly, it will be up to national case law to work out a uniform concept of what constitutes the "international" character of claims. However, it should be borne in mind that the wording is perfectly straightforward and leaves no room for doubt when it refers to the return of illegally exported objects, which is international by definition.

As to the geographical scope, this is further defined in Articles 8 and 10 which set out the relevant connecting factors between a given international situation and the application of the Convention's rules (*cf. infra* for comments on these provisions).

Article 1 – Sub-paragraph (a)

The first category of claims to which the Convention applies covers claims for "the restitution of stolen cultural objects": theft is sufficient ground to apply the Convention.

It will be noted that the text of the draft Convention submitted to the diplomatic Conference concerned stolen cultural objects *"removed from the territory of a Contracting State"*. Objections were raised to this on the ground that the Convention appeared to treat stolen objects differently depending on whether the theft – an act condemned and punished under all national laws – had occurred on the territory of a Contracting State or of a non-Contracting State. Moreover, in cases where an object was stolen in non-Contracting State A and found in Contracting State B, the Convention would not apply but the purely fortuitous fact that it had transited through Contracting State B to Contracting State C would trigger application of the Convention, and this scarcely seemed consistent with the desire to protect cultural objects from theft in non-Contracting States or to encourage States to ratify the Convention.[28]

27 *Cf.* UNIDROIT 1992, Study LXX – Doc. 30, par. 23.

28 *Acts (supra* note 18), CONF. 8/3, *Explanatory Report on the draft Convention,* para. 23 *et seq.*

While a situation involving export is by definition an international one, the issue is less clear-cut in the case of stolen cultural objects. An attempt was made to include the words "moved across an international frontier" and although these do not appear in the final text, this is nevertheless understood to be the key criterion that must be taken into consideration. When a cultural object is found in a State other than that in which it was stolen, there can be no doubt that the claim for its return has an international character, even if it is brought before the courts of the State in which the theft took place (when, for example, the possessor is habitually resident there). The drafters clearly intended to cover the kind of situation revealed by *Winkworth V. Christie* [29] in England. There, the object had been found in the very State where it had been stolen, but it had crossed several borders in the intervening period and been traded abroad.

It should be noted that sub-paragraph (a) does not define the notion of "theft" (unlike that of "illegal export" in sub-paragraph (b)). It had been proposed at one point to assimilate "conversion, fraud, intentional misappropriation of a lost object or any other culpable act assimilated thereto" to theft, [30] but the view prevailed that the uniform law should confine itself to theft alone, an act condemned and punished in all legal systems, and exclude its application to less easily definable situations variously regulated in the different countries. In common law systems, for example, in the case of fraud or other offences, but not "theft", the good faith purchaser may acquire title. Others felt however that such extension to "other acts" should be maintained so as to cover acts that would amount to theft in civil law systems but not so in common law systems. In the end, it was decided to use only the word *theft*, on the understanding that this refers to theft in the broadest sense, but to leave States free, when a claim for restitution is brought before their courts, to extend the application of the Convention's rules concerning theft to other offences (*cf.* Article 9).

The next question, of course, is: which law will determine whether there has been theft? Whether or not a Contracting State avails itself of the option provided in Article 9 in this context, it will always be up to the court seised to give a legal characterisation of the act in order to establish whether it is covered by the Convention, and in doing so it will opt either for direct application of its own law or, where possible, for that of the law designated by the conflict of law rules.

Article 1 – Sub-paragraph (b)

The second category of claims to which the Convention applies is that of claims for the return of cultural objects "removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage." An important difference between this provision and that dealing with stolen objects is that the State whose laws regulating the export of cultural objects has been violated must be a *Contracting* State, the experts arguing that only States prepared to recognise the relevant rules of other States, within the limits imposed by the Convention, should be entitled to avail themselves of its provisions – a circumstance which may encourage other States to ratify the Convention. This limitation was readily agreed upon (*cf.* also the provisions of Article 10(2) and the comments thereto, *infra*).

From the outset, stress was laid on the need to define the notion of illegal export in view of the highly innovative character of Chapter III of the Convention which establishes the

29 *Winkworth v Christie, Manson & Woods Ltd* [1980] 1 *Ch* 496, [1980] 1 *All England Reports* 1121, [1980] 2 *Weekly Law Reports* 7.

30 *Cf.* UNIDROIT 1989, Study LXX – Doc. 11.

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 Convention undertakes to respect foreign rules concerning illegal export. The principle was agreed at the fourth session of the Committee of governmental experts that the violation must concern 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 just any provision of national law relating to the export of such objects, for example fiscal regulations or rules governing the transfer of title. This decision was re-asserted in the Convention with a view to encouraging national legislators to adopt appropriate rules to protect the national heritage, at least where objects of some importance are concerned.

Various proposals were tabled in the process of drafting the Convention before the wording "contrary to its law ..." was settled upon (for example, "contrary to its legislation" or "contrary to its laws"), but it was made perfectly clear at the diplomatic Conference that the language did indeed cover both legislative and administrative rules.

Article 2

The question of defining the categories of objects which may be the subject of a claim for restitution or return is a fundamental one in determining the scope of an international Convention on cultural objects, and one of the most delicate to resolve. The difficulties are moreover multiplied in the case of an international treaty as opposed to purely internal legislation since it is necessary to establish a general definition that will take account of the cultural context 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" 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 which reflected differences not only of drafting technique but also of substance as regards the nature and implications of the concept.

From a technical standpoint, preferences were expressed on the one hand for a general definition (to be found in many European laws and other systems influenced by the European tradition), and on the other for one that was enumerative and exhaustive. On account of the drawbacks presented by both approaches, with a general definition risking to create problems of interpretation and application, and an exhaustive definition risking to leave gaps, a combination of the two was ultimately preferred, that is to say a general definition accompanied by a reference to the various categories set out in the Annex (and which correspond to the categories listed in Article 1 of the 1970 Convention). Such a mixed system had already been opted for in other legal instruments, such as the 1970 Convention and Directive 93/7/EEC.

The draft Convention made express reference to Article 1 of the 1970 Convention but as there had been some criticism of this drafting technique referring to a free-standing text, it was decided at the diplomatic Conference to append the list of objects in Article 1 of the 1970 Convention to the UNIDROIT Convention and that it would not form an integral part of the Convention nor make express reference to its source. This solution in no way weakens the way in which the two instruments supplement each other – it was adopted to allay the fears of some delegations from non-Contracting Parties to the 1970 Convention that express reference to the latter might prevent their countries from becoming Parties to the UNIDROIT Convention. In this

connection, it is interesting to note that the number of States Parties to the 1970 Convention has risen steadily since the UNIDROIT Convention was adopted.

The draft Convention contemplated cultural objects of importance for archaeology, prehistory, ... and belonging to one of the categories listed by way of illustration ("*such as* those objects belonging to ..."). At the diplomatic Conference, however, a more restrictive definition emerged. Under the Convention, a cultural object should not only be of importance for archaeology, but it must also – that is to say, *in addition* – belong to one of the categories listed in the Annex. This brings the text even more closely in line with that of Article 1 of the 1970 Convention, and this should make it easier to apply since at the time the UNIDROIT Convention was adopted, there were already over 70 States Parties to the 1970 Convention and the definition was widely accepted.

The definition establishes the general limits of the substantive scope of application of the 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 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 implicated in illegal trade (theft and illegal export) that will accordingly be subject to the rules of the Convention.

The authors of the Convention were of the view that the combination of this broad definition with the principle of restitution of stolen objects laid down in Article 3(1) was perhaps the most important measure that could be taken against illegal traffic in cultural objects. Since, however, the Convention was certain to have significant implications for national rules of private law concerning the acquisition of movable property, there were some who doubted whether Governments would be prepared to contemplate changes to their national law for too wide a category of objects, and who would have preferred a narrower definition confined to cultural objects of "outstanding" or even "exceptional" importance – even at the risk of limiting the scope of the Convention. A substantial majority at the diplomatic Conference however opposed such a limitation, in particular because it would weaken one of the most important principles underpinning the Convention which was to require of all purchasers of cultural objects that they exercise diligence by enquiring into their provenance rather than keep up the current practice of deliberately refraining 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, which however fit the criteria laid down by the Convention and which should be covered on account of the ever greater number of thefts of such objects.

The definition is, however, subject to certain limitations where illegally exported cultural objects are concerned; thus, Article 5(3) subjects the object's return to one of the specific interests listed having been impaired as established by the requesting State, or to the object being of "significant cultural importance". Moreover, the principle of return is likewise excluded for certain categories of objects contemplated by Article 7.

The distinction drawn between stolen and illegally exported cultural objects in terms of the scope of application of the Convention is justified by the fact that whereas theft is a universally reprehensible act, this is not true of illegal export. It was suggested to have two separate definitions, one for stolen objects, the other for illegally exported objects, but this was rejected as too complex, as were other proposals seeking to restrict the definition of cultural objects on the basis of their age or of their economic value. The chief objections to these various proposals were, on the one hand, the differences in the estimated value of a given object from one jurisdiction to another, coupled with the fact that in some cases, to attach a

market value would be inappropriate – and might indeed be offensive to the communities concerned – and, on the other hand, the fact that the purpose of the Convention is 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.

Article 2 makes no reference to the national law of Contracting States with a view to determining which cultural objects will be protected by the Convention, unlike the 1970 Convention which gives each State leave to "designate" a cultural object as being of importance. There was, however, one proposal to the effect that each Contracting State should be free to identify those cultural objects to which the Convention should apply, the reasoning being that it was more appropriate for States themselves to determine which items of their cultural heritage were of such significance as to justify their restitution or return in the event of theft or illegal export than to leave it to the courts of another State to decide. While the experts believed it to be self-evident that each Contracting Party to the Convention was free to establish in its national legislation rules for the protection of its cultural heritage, a majority considered that it would be unacceptable for their Governments to give effect to such legislation without having some form of control, even though the courts or other competent authorities were to pay due regard to the law of the State from which an object had been removed. Such a "national" system of designating objects would deprive the Convention of some of its uniform legal character, while it was also noted that it might have the effect of excluding from the protection of the Convention objects (in particular those owned by local bodies or private persons) not designated by the State.

It may be noted, in conclusion, that proposals were tabled at various stages to include, for the sake of uniformity, other definitions in Chapter I, in particular of the words "claimant", "possessor", "theft" and "illegal export". The view prevailed, however, that this would be too arduous an undertaking and that the experience of uniform law conventions, especially in recent years, indicated that national courts sought to harmonise the way in which they interpreted key concepts in accordance with the aims and purposes of the international treaty in question (as provided in Article 31(1) of the *1969 Vienna Convention on the Law of Treaties*).

CHAPTER II – RESTITUTION OF STOLEN CULTURAL OBJECTS

From the outset, it had been realised that the goal should be to reconcile two equally legitimate interests: that of the person (usually the owner) dispossessed of a cultural object by theft and that of the good faith purchaser of such an object. The second preliminary study [31] indicated the widely differing approaches to this problem in the various legal systems, while UNIDROIT's own experience in connection with LUAB amply demonstrated the obstacles to any rapprochement between the common law jurisdictions and most civil law systems which latter have (albeit to varying degrees) accorded much wider protection than the former to the good faith purchaser of stolen property – and this, while it no doubt means greater legal security for the art trade, also promotes trafficking. Indeed, the combination of the *lex rei sitae* rule and the lack of uniform substantive rules plays into the hands of traffickers who have but to choose the place in which to ply their trade, and makes it extremely difficult to press a claim on the cultural object in question against a good faith purchaser. Whatever the difficulties in drafting uniform law rules and getting them accepted by States, such rules were seen as the only reliable way of guaranteeing the return of an object: The UNIDROIT Convention opts for this solution.

31 *Cf. supra*, note 10.

Work on the Convention accordingly took as its starting-points the inability of existing legal instruments to ensure an acceptable level of protection of cultural objects and the need to depart from the common regimen on account of the special nature of the objects in question. The prime objective was to curb illicit trafficking, not by favouring the solution offered by one legal system over another, but by formulating minimal rules that would leave room for the application of more favourable treatment.

Article 3 – Paragraph 1

This provision asserts the general principle of the restitution of stolen cultural objects. It does not distinguish between public or private property or between good or bad faith purchasers, the latter being decisive only in relation to the purchaser's right to compensation (*cf.* Article 4). Likewise, it does not require any specific connection between the object's location, the place where the theft occurred or the owner's place of residence, on the one hand, and the State concerned being a Contracting Party, on the other hand – connecting factors being dealt with in Article 10 (see the relevant comments *infra*, and Article 1, sub-paragraph (a) *supra*).

The principle of automatic restitution met with broad consensus fairly early on: in the face of escalating art theft it was deemed vital to improve the protection of the dispossessed owner against that of the purchaser as the only realistic solution which would also have a deterrent effect on illegal traffic in cultural objects. From a comparative law standpoint, the principle of restitution represents an important innovation for those countries which traditionally protect a good faith purchaser for value.

The possessor must return the stolen object on the sole condition that the claimant adduce proof that it has been stolen and in this connection much will be left to the discretion of the courts. Moreover, it should be pointed out that unlike the mechanism set in place for the return of illegally exported cultural objects (*cf.* Article 5(4)), the Convention does not require the claimant to supply factual or legal information in support of its claim for restitution to enable the courts or the competent authorities seised to ascertain whether the requirements have been met.

Although there was general agreement on the principle of the automatic restitution of stolen cultural objects, two difficulties nevertheless arose. The first of these related to the term "possessor", to which some would have preferred another word such as "holder", or which they would have liked to see further defined. Indeed, 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). This was however rejected in favour of a broad understanding of the term "possession" and hence, of "possessor", in accordance with the aim of the Convention which is to facilitate the return of cultural objects. The second point concerned the person to whom the stolen cultural object is to be returned, the final version of the text being silent on this point. This would generally be the dispossessed owner (an earlier draft referred to the "owner") but it might equally be a third party: thus, an object held as security for a bank guarantee will be returned to the creditor; likewise, an object lent to a museum or art gallery will be returned to the latter. The Convention is silent on the question of competing claims relating to title, and it will be for the courts seised to decide to whom the object is to be returned in accordance with the applicable rules of law.

Although a proposal to include the words "in accordance with the provisions of this Convention" – so as to prevent its being interpreted as incorporating procedures falling outside the scope of the Convention – was ultimately rejected, the diplomatic Conference made it clear

that the obligation to return an object flowed exclusively from the mechanism established by the Convention.

Article 3 – Paragraph 2

The seriousness of the phenomenon of pillage of archaeological sites was repeatedly referred to during the deliberations, not least because unlawfully excavated cultural objects are not covered by the 1970 Convention which only provides for the restitution of inventoried cultural objects stolen from a museum or similar institution [32] – and of course, an unlawfully excavated cultural object cannot, by definition, be inventoried. The interpretation given by some States to Articles 3 ("The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted … by the States Parties …, shall be illicit") and 9 (which contemplates "pillage of archaeological or ethnological materials") of the 1970 Convention might, it is true, allow this type of object to be covered, provided its origins and the date on which it was excavated can be proved.

The UNIDROIT Convention accordingly seeks to fill this gap: in the Preamble (sub-paragraph 4, "… deeply concerned … in particular [by] the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information"), in the definition given in Article 2 ("objects which are of importance for archaeology") and in the Annex (sub-paragraph (c), "products of archaeological excavations (including regular and clandestine) or of archaeological discoveries"). To clarify what constitutes a "protected cultural object", Article 3(2) uses the words "cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained", which covers – as in sub-paragraph (c) of the Annex – not only objects that have been unlawfully excavated but also those that were lawfully excavated but have subsequently been unlawfully retained.

In order to ensure that the substantive provisions of the Convention offered protection to unlawfully excavated objects, the question was debated of whether such objects should be treated as stolen or as illegally exported objects (in that they are assimilated to objects removed from a site contrary to the requesting State's rules in respect of excavations and removed from the territory), or both. It was agreed in the end to insert a special provision as part of the rules governing claims for restitution (Article 3(2)), whereas it was felt that the general conditions laid down for the bringing of claims for return (Article 5(3)(a) to (c) – see the comments to these provisions, *infra*) were so formulated as to include excavated objects. Claimants may bring an action either for the restitution or the return of excavated objects depending on the type of evidence they are able to adduce. It will probably be more difficult to prove that an object was unlawfully excavated than that it was illegally exported: for example, the absence of an export licence might suffice to establish illegal export.

Thus, excavated objects are regarded as having been stolen "when consistent with the law of the State where the excavation took place": this will usually be so since in most cases, the domestic law of those States hardest hit by this scourge regard the products of excavations as belonging to the State, and to retain such objects would therefore in any case be tantamount to

32 Article 7 b. i. of the 1970 Convention provides:
"The States Parties to this Convention undertake:
b. i. to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution."

theft. In order to prevent States from applying more liberal rules for purposes of characterisation, the Convention includes a conflicts rule designating the law of the place where the excavation took place to determine whether theft was involved or not. It must be understood however that this approach, while consistent with the broad interpretation given to the word "theft", should not leave the door open to claims in respect of archaeological objects of little interest that are not in any special need of protection, and which would anyway not justify the financial outlay involved (cost of court proceedings, expertise) for the requesting State; moreover, it will be up to the claimant to prove the actual provenance of the object and, perhaps, the date of its discovery (many countries only regard as State property objects discovered from a certain date onward).

Article 3 – Paragraph 3

The principle of automatic restitution as a penalty for theft was agreed upon without much difficulty, and the subsequent discussions centred rather on how to implement it. The debate focused, first on the limitation periods for the bringing of actions and second, on compensation of the possessor. A full six of the eight paragraphs that make up Article 3 deal with the compromise mechanism in respect of limitation.

Paragraph 3 sets out the general rule: "Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft."

The provision does not specify who may bring the claim; as a rule, claims for restitution before the courts or other competent authorities contemplated by Articles 8 and 16 may be brought either by a private person dispossessed of a cultural object as a consequence of theft or by a State in similar circumstances (claims for the return of an illegally exported object on the other hand can only be brought by the State whose rules have been infringed – *cf.* Chapter III *infra*); in another scenario, it may be possible for the State to act in the place of a private person who cannot or does not wish to bring a claim.

Views differed widely as to the question of whether a time limit should be imposed for the bringing of claims and if so, what that time limit should be: on the one hand, the mostly "exporting" nations were anxious to safeguard their right to claim restitution or return and held out for the longest possible limitation period, if any – so as not to legitimise an illegal situation; the predominantly "importing" nations on the other hand sought secure trading conditions on the art market and accordingly favoured short limitation periods. In essence, this is a classic conundrum: limitation periods are intended to encourage the claimant to act swiftly on the premise that the law does not set out to protect the negligent, but they also serve to avoid the disturbance that might be caused to a long-standing possession; yet to have no limitation period at all might rebound on the very party that expected to benefit by it, since an "importing" country might at any time find itself in the position of an "exporting" country and *vice versa*, and the rules cut both ways.

It was agreed quite early on to propose two periods, reflecting the rules that obtain in the different legal systems: one relative (running from the time when the claimant has actual knowledge of the object's location and of the possessor's identity), the other absolute (running from the time of the theft). The length of the two periods was however left open – this being an issue regarded as central to the package constituted by the Convention as a whole that should be settled by the diplomatic Conference in relation to the other parameters of the text. The draft accordingly confined itself to proposing the upper and lower limits contemplated in the preparatory stages, namely one to five years for the relative limitation period, and 30 to 50 years for the absolute period.

The relative limitation period refers to the situation in which the claimant has sufficient information to bring an action, that is to say, it has actual knowledge of the location of the object and of the identity of the possessor. In such cases, the claimant has three years within which to bring its claim for restitution, this being regarded as the minimum needed to collect all the evidence on account of the object's being located abroad – but also long enough since the period does not actually start to run until the claimant has knowledge of these two key elements. A one-year limit was deemed too short for use in an international instrument, and while three years is shorter than the period required by some legal systems, the time when the limitation period starts to run should be borne in mind as should be the fact that Contracting States are free, in accordance with Article 9, to continue to apply their own limitation periods or to introduce longer periods.

The information required of the claimant to enable the period to start running – knowledge of the object's location and the possessor's identity – is cumulative. This was seen as being in the claimant's best interest: mere knowledge of the possessor's identity would be insufficient since the latter, were it to become aware of having been discovered, could then remove the object and make it disappear. The dispossessed claimant, it was argued, should be given an opportunity to wait until the possessor put the object up for sale or lent it to an exhibition. As to what exactly constitutes such "knowledge", the draft Convention contained the words "the claimant knew *or ought reasonably to have known* the location ... ," some holding that this language would prompt claimants to greater diligence in looking for their stolen property, while others objected that it was too vague and apt to be variously interpreted. This constructive knowledge requirement was eventually abandoned; also, it will make little difference in practice since the courts will probably apply their own general rules of law to determine whether the claimant has been diligent in discovering the whereabouts of the stolen object or the identity of its possessor. Moreover, a person who has been robbed of a cultural object may be expected to do all it can to recover it.

The absolute period starts to run from the time of the theft, and at its expiry the claimant's action is extinguished once and for all – thus safeguarding the rights of the last possessor. Article 3(3) of the Convention sets out the general principle of a fifty-year period – coupled (see Article 3(4) *infra*) with an exceptional regime to protect certain categories of objects.

It should be noted that the limitation periods for theft and illegal export are identical in length (albeit dealt with in separate provisions) – this is so as to ensure that the (different) length of the limitation period does not become the deciding factor in determining the grounds on which a claim will be brought, for example where unlawfully excavated objects are concerned.

Finally, it should be recalled that there are other options open to a claimant whose action is time-barred under the UNIDROIT Convention, for example in respect of cultural objects appropriated in the course of an armed conflict (a situation which does, however, also fall within the scope of the Convention), namely that of resorting to the *Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the case of Armed Conflict* or, in general, to the *UNESCO Intergovernmental Committee for the Promotion of the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*.

Article 3 – Paragraph 4

To accommodate those countries which favoured long limitation periods or no limitation periods at all for the bringing of actions for the return or restitution of particularly significant cultural objects, the idea took shape that an exceptional regime might be contemplated for those objects that lie at the very heart of each State's cultural heritage and are closely linked to

its national identity: in some States, objects in public ownership, in particular public collections, in others, archaeological objects, a category which often enjoys special legal status in the national framework (inalienability, no limitation period). Such objects, it was agreed, should be protected to protect the cohesion of the whole.

Special treatment is likewise given to certain categories of objects by the 1970 Convention (Article 7 – cultural objects stolen "from a museum or a religious or secular monument or a similar institution"), and by Directive 93/7/EEC (Article 7(1) – "public collections and ecclesiastical objects").

The diplomatic Conference decided to dispense with the absolute limitation period in respect of claims for restitution of such objects and retain only to the three-year relative period that runs from the time when the claimant knows the location of the object and the identity of its possessor. The categories of objects governed by this exceptional regime are, however, strictly defined: on the one hand, objects that belong to a public collection – as defined in Article 4(7) of the Convention (cf. infra); on the other hand, objects that form an integral part of an identified monument or archaeological site. The word "identified" – the experts purposely avoided the word "inventoried" to allow for the fact that some States have difficulty in establishing proper inventories – was included to promote the identification of sites and so improve their protection (cf. Preamble (sub-paragraph 9)), which calls for the Convention to be implemented in combination with other effective measures such as the physical protection of archaeological sites). This identification requirement applies to the site as a whole, not to single objects in it, which are often unknown. A non-identified site and the objects that form an integral part of it are subject to the general limitation system provided in Article 3(3).

Article 3 – Paragraph 5

Several States (belonging to the group of so-called "importing" countries) having declared that they could not, on constitutional grounds, accept a rule – even though confined to a category of objects in need of special protection – that waived the limitation period for claims spelled out in the preceding paragraph, an exception was inserted under which Contracting States may declare that a claim for the restitution of a cultural object contemplated under paragraph 4 is subject to an absolute time bar of 75 years or such longer period as is provided in its law. The relative limitation period contemplated under Article 3(3) and (4) still applies, however.

The second sentence of paragraph 5 lays down the principle of reciprocity, specifying that a State that makes such a declaration and thus imposes a time limit on claims for restitution brought in its territory is not entitled to a longer limitation period in respect of claims for the return of its own cultural objects from another State, even if that State imposes no limitation period or a longer period than the requesting State.

Article 3 – Paragraph 6

This is a technical provision specifying when the Contracting State must make the declaration contemplated in the preceding paragraph, namely at the time of signature, ratification, acceptance, approval or accession.

By 31 December 2001, two States had made such a declaration and introduced a limitation period of 75 years: the Netherlands (at the time of signature) and the People's Republic of China (at the time of accession).

Article 3 – Paragraph 7

Since public collections are subject to an exceptional limitation regime under the Convention (*cf.* Article 3(4)) and in addition enjoy special legal status in many legal systems, the authors of the Convention agreed that, in view of the very great differences in the way national laws contemplated this issue, the words "public collection" would need to be defined for the purposes of the Convention.

The precise wording was the subject of lengthy debate in drafting the Convention. After rejecting the idea of referring to the definitions adopted by other international instruments, it was decided to include it as free-standing definition for the purposes of the Convention alone. The purpose of such a provision was not, it was stressed, to make up for the absence or shortcomings of any definitions in domestic law, while too broad a definition would turn the exception into the rule and render the Convention unacceptable to a large number of States. Since the draft under consideration revealed a lack of consensus on this point, the diplomatic Conference set up a special working group which eventually produced the definition contained in Article 3(7).

The prime criterion in defining what constitutes a "public collection" is the identification of the objects it contains; the definition in fact refers to any "group of inventoried or otherwise identified cultural objects": any system that allows the object to be identified, an inventory, or any other document (this was included so as not to exclude the collections of States that lack the resources for a proper inventory) is acceptable, the aim being to encourage museums in their practice of keeping records of their collections that will enable them to notify any thefts to the appropriate international registers of stolen cultural objects. This provision, like the one dealing with *identified* monuments and sites contemplated in Article 3(4)), clearly ties in with the Preamble's provisions in respect of other measures to protect cultural objects (sub-paragraph 9); moreover, inventories are also useful in strengthening international cultural co-operation (Preamble, sub-paragraph 8).[33] On the other hand, the Convention does not provide (as did the draft Convention) that the object must be "accessible to the public on a [substantial and] regular basis", which although important was not considered indispensable, particularly as regards objects belonging to religious institutions, or indeed archives and library registers, which are rarely on public display.

The second criterion in defining the words "public collection" refers to the status of the owner. The owner may be a Contracting State (*sub-paragraph (a)*) or a local or regional authority of a Contracting State (*sub-paragraph (b)*). This latter specification was added to accommodate States with a federal system or de-centralised government, where public collections may be administered by local or provincial authorities. The collection may also belong to a religious institution (*sub-paragraph (c))*; the word "religious" was adopted as representing all faiths, although some countries took the view that the exceptional limitation regime should apply only to objects belonging to "established" religions and opposed its extension to less "approved" beliefs. Finally, the definition also covers objects belonging to private institutions recognised as serving the public interest by the – Contracting – State in which they are established. The text does not specify what form such recognition should take or

33 For example, the work of the International Council of Museums (ICOM), and in particular that of its International Committee for Documentation (CIDOC): see, among others, ICOM publication: *Handbook of Standards – Documenting African Collections,* 1996.

what its scope should be: this may be inferred from any act implying legal recognition: for instance, the draft Convention explicitly mentioned tax exemption as an acceptable form of recognition.

Article 3 – Paragraph 8

During the discussions on the exceptional limitation regime for objects that form part of a monument, an archaeological site or a public collection (*cf.* Article 3 (4) to (7)), several delegations made it clear that they would not be able to agree to such a regime unless it also covered objects regarded as extremely important for the cultural survival of an indigenous or tribal community. In fact, the importance of this category of objects had already been underscored in the Preamble (*cf.* sub-paragraph 4 contemplating "national, tribal, indigenous or other communities"), and the rules applicable to illegally exported objects under the Convention also take the special nature of this type of object into account (*cf.* Articles 5(3) and 7(2)).

Thus, "a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections." Unless the claimant knows where the object is located and is aware of the identity of the possessor, in which case the claim must be brought within three years – the relative limitation period under the general regime –, no time limit applies to the claim unless Contracting States make the declaration contemplated in Article 3(5).

This provision applies to a small number of objects known to and used by the members of an indigenous community: "sacred" cultural objects are objects required for traditional or ritual use, whereas "communally important" cultural objects are objects of historical, traditional or cultural significance for a particular indigenous community. However, it was decided in the end not to specify the language "indigenous or tribal community" (as had been done for "public collections") – by referring, for example, to Article 1 of the *1989 Convention (No. 169) of the International Labour Organisation (ILO) concerning Indigenous and Tribal Peoples in Independent Countries*.

Article 4

The principle of restitution (*cf.* Article 3) is counterbalanced in the Convention by the good faith possessor's right to compensation for the loss of its cultural object. This provision protects the diligent possessor and is a key element of the compromise package to reconcile two diametrically opposed trends in domestic law.

From the point of view of those legal systems that see the person that acquires a stolen object in good faith as the rightful owner – with all the protection that such title implies – restitution of the object constitutes a fundamental departure from one of the pillars of their law that only the political and philosophical need to protect the cultural heritage can render acceptable, and only on condition that the acquirer/possessor receives compensation – failing which it would amount to spoliation. From the point of view of the original owner dispossessed of its property, on the other hand, whose rights are protected by law in those systems that do not make provision for good faith acquisition of a stolen object, the principle of restitution is regarded as just, but not if it involves paying compensation to the possessor, which might moreover prove too great a burden on the person called upon to pay. As to those legal systems that do make provision for the restitution of stolen cultural objects without paying compensation, they are free (as indeed is clear from sub-paragraph 6 of the Preamble) to choose

not to pay compensation to the good faith possessor, in accordance with Article 9 (*cf.* comments to that Article, *infra*).

Article 4 – Paragraph 1

The payment of compensation is, however, subject to a twofold condition: "that [the possessor] neither knew nor ought reasonably to have known that the object was stolen" and "[that it] can prove that it exercised due diligence when acquiring the object." In other words, the possessor must prove that it did not know that the object had been stolen and that its ignorance was not due to any negligence on its part. The language "or ought reasonably to have known" was included so as to prompt purchasers to greater vigilance, since Article 4 is intended above all as a sanction against those who acquire cultural objects without making serious inquiries into their provenance. Knowing that they were at risk of having to return the object without receiving any compensation, prospective purchasers might hesitate to go ahead with the purchase if they lacked adequate information. This would discourage theft and at the same time modify the present practice of dealers and auction houses that do not disclose sellers' names and that of purchasers that do not question the sellers' statements. It should be recalled that this provision contemplates possessors who have obtained an object for value, whereas the case of possessors who have obtained the object gratuitously is covered in Article 4(5).

The text appears to require greater diligence of the possessor at the time of acquiring the object ("or ought reasonably to have known", Article 4(1)) than it does of the dispossessed owner in its efforts to locate its property ("knew the location of the cultural object, Article 3(3)). Indeed, the drafters of the Convention sought to draw attention to the fact that the possessor's conduct prior to acquisition – the precautions it must take to establish the origins of the object – is the most effective weapon with which to combat illicit traffic (this line of thinking is also increasingly taken up in case law), whereas lack of due diligence on the part of the claimant is detrimental only to the claimant itself in that it may lead to loss of the right to sue. This distinction is similar to that between the respective obligations of the requesting State and the possessor contemplated in Chapter III (Articles 5(5) and 6(1).

The principle that places on the possessor the burden of proving that it exercised due diligence (a concept explained in paragraph 4) is a key element in the legal response to illicit traffic in cultural objects. It constitutes a departure from the rule in force in several legal systems that rely on a presumption of good faith, even though some civil law systems already at times shift the burden of proof (thus, when the claimant's position makes it difficult for it to prove its claim, the good faith defendant is required to lend assistance or even to adduce the evidence itself).[34]

From the very earliest drafts, the text carefully refrained from defining or otherwise referring to the term "good faith", which has different meanings in different legal systems, settling instead for the term "*due* diligence" ("*diligence requise*" in the French version) which implies a greater degree of diligence than would usually be expected in a normal commercial transaction. The concept of due diligence, which has a precise meaning in some jurisdictions, should here be interpreted autonomously within the meaning of the Convention rather than by reference to any given legal system. "Due diligence" is defined in Article 4(4) (see comments *infra*).

34 See, for example, Article 3.2 of the Swiss Civil Code: "no person can plead *bona fides* in any cases where he has failed to exercise the degree of care required by the circumstances."

Once these requirements have been met and the principle has been accepted that the possessor is entitled to compensation, the question arises: how much? Compensation must be "fair and reasonable": the Convention adds nothing further in this respect (nor, indeed, does the 1970 Convention (Article 7 b. (ii)). Since the concepts of "fair" and "reasonable" are well established in domestic case law, it was felt to be preferable to rely on the discretion of the courts rather than refer to any specific criterion such as the price paid or the commercial value, as had been advocated by some. In particular, several delegations argued that the claimant's ability to pay should be explicitly referred to. It was decided in the end not actually to settle this issue in the Convention (although Article 4(2) and (3) do hint at an answer – *cf. infra*).

What does compensation cover? Compensation is intended to indemnify the possessor for the loss of its cultural object and, unlike the return of an illegally exported object, no specific provision is made for the cost of arranging for restitution (transport costs, insurance, etc.). The cost of the legal proceedings instituted to further the claim for restitution, on the other hand, is fixed in accordance with the procedural rules of the State in which the claim is brought. As to the cost of preserving or restoring the object, it was felt that while such expenditure might be taken into account by the courts in fixing the amount of compensation, it had best not be specifically addressed by the Convention since such automatic reimbursement might prompt restorations which, if badly done, might impair the object's cultural value.

It was understood from the outset that the possessor is entitled to payment of compensation "*at the time of*" its restitution, that is to say, payment and restitution should be made simultaneously. One delegation suggested at the Conference that the possessor be allowed to retain the object pending payment of the compensation, but this was rejected as constituting a point of procedure to be decided by the courts or authority seised. It was agreed that the details should be filled in by the court or competent authority or, failing these, by the parties themselves (time of restitution and of payment, place, etc.).

Article 4 – Paragraphs 2 and 3

The question of who should pay compensation to the possessor was much discussed in drafting the Convention. Although the draft submitted to the Conference specified that it was up to the claimant, *i.e.* the person dispossessed of the object, to pay, this was criticised on the grounds that here were two persons, one the good faith purchaser, the other the dispossessed owner, both required to pay the price of an illegal act committed by a third person – and that it would recompense the transferor (possibly the thief).

Accordingly, although the Committee of governmental experts was not able, at the time, to agree on the wording of a provision in this connection, a clear consensus nevertheless emerged to the effect that the Convention should not require the claimant to pay compensation from its personal funds and that nothing prevented sponsorship or other means of ensuring payment. The underlying idea here was to assist claimants with limited financial resources, and this idea surfaced powerfully at the diplomatic Conference, in particular among those delegations opposed to the idea of taking the claimant's ability to pay into account in fixing the amount of compensation.

The Conference examined a proposal to incorporate the principle of "subsidiarity" so as to enable the possessor to bring a claim against the person that transferred the object and made the transaction appear legal and whose identity only the possessor knows. However, such a claim would not be justified if the possessor were denied the compensation contemplated in Article 4(1) pursuant to Article 9. The text adopted by the Conference therefore returns to the

concept of subsidiarity using more neutral language tending towards harmonisation, although not in any systematic way: ... "*reasonable efforts* shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought"; the latter requirement was included to satisfy those States whose law expressly provides that the transferor has an obligation to guarantee title to the possessor.

This provision is in keeping with current efforts to ensure greater transparency and morality in trade in cultural objects: knowing that if an object must be returned, compensation may be claimed from any person in the chain of transactions between the time of the theft of the object and its acquisition, prospective purchasers will probably be more cautious and buy from reputable sellers who are not likely to disappear overnight, while greater care will also be required of dealers (whether buying or selling). This could prove very useful if the claimant were unable to pay the amount of the compensation.

If the possessor were unable to obtain compensation from the transferor or any previous transferor, the claimant would be required to pay. In such circumstances, the Convention specifically entitles the latter to bring a claim against a third party (paragraph 3). This rule was included expressly to safeguard in the claimant's own interest the solution applied in most national jurisdictions.

Article 4 – Paragraph 4

Since compensation depends on proof of due diligence at the time of acquiring the object (Article 4(1)), it was felt that the concept of due diligence should be explained for the benefit of the courts – the notion of "good faith" being interpreted variously in different legal systems – and to ensure some degree of uniformity in applying the Convention. The court or competent authority seised of the case will be required to have regard to "all the circumstances of the acquisition", and to pay particular attention to certain criteria that were defined largely by reference to Article 7(2) and (3) LUAB,[35] although allowance was made for the special nature of cultural objects. These criteria were inserted for the guidance of the courts. As is demonstrated by the use of the word "including", they are neither exhaustive nor decisive in themselves.

In addition to the character of the parties and the purchase price paid, the additional requirement that prospective purchasers consult "any reasonably accessible register of stolen cultural objects" – a precaution which they would do well to heed – is likely to be particularly significant. The number of such registers has multiplied in recent years, including registers in the form of electronic databases managed by public or private bodies. In particular, the database on stolen works of art operated by the International Criminal Police Organization (ICPO-Interpol) expressly provides that: "it is used to help to seek proof of the legality of art

[35] Article 7 LUAB provides:

"2. – The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case.

3. – In determining whether the transferee acted in good faith, account shall, *inter alia*, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor's acquisition of the movables known to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded."

transactions, in accordance with the UNIDROIT art agreement, Art. 4§4". It is also true, however, that there is as yet no database that offers world-wide coverage and the specialised databases are not always accessible to the public, although initiatives have been taken, in particular by UNESCO, to facilitate the interface between the different networks. The prospective purchaser's conduct in this respect (for example, the number and relevance of databases consulted) will be examined to establish the degree of diligence exercised, bearing in mind also the person's status since an antique dealer, for example, might be expected to have knowledge of and consult the most authoritative sources. The simple fact of consulting a register and failing to find the object there is not sufficient to establish due diligence.

Other factors which the possessor may advance to prove its diligence include: "any other relevant information and documentation which [the possessor] could reasonably have obtained": this will refer in particular to any scientific publications (dealing with this type of object or with objects originating in a specific geographical region or excavation which attract the attention of the public or of art lovers), as well as the consultation of "accessible agencies" or "any other step that a reasonable person would have taken in the circumstances" – a open-ended formulation that to some degree reflects the concept of *"bon père de famille"* which entitles the possessor to adduce any circumstances that are likely to prove its diligence.

Clearly, the courts will assess these criteria and any other relevant circumstances in combination: an object removed from a clandestine excavation, for example, is unlikely to be listed in any register, but its nature and origin (for example, a country notoriously victim of illicit traffic) [36] may dictate greater diligence on the part of the purchaser at the time of acquisition, when factors such as the status of the parties (an antique dealer or an inexperienced private collector), the place where the transaction took place (a dealer's gallery or a backroom emporium, an art fair or a flea market), the purchase price (which might differ substantially according to the legitimacy of the object's provenance) take on particular significance.

The concept of due diligence under the Convention in fact reflects the practice of the case law in most countries in establishing what is reasonable in the circumstances. The criteria used to assess the possessor's conduct also closely resemble those in general use by most museums for purposes of acquisition, in accordance with their codes of ethics (ICOM's, for example). Several new initiatives have been developed in this respect since the adoption of the UNIDROIT Convention, in particular the new "International Code of Ethics for Dealers in Cultural Property" launched by UNESCO in November 2000 which makes express reference to Article 4 of the UNIDROIT Convention, or the "codes of due diligence" for auction houses and dealers adopted in the United Kingdom in 1999 under the auspices of the *Council for the Prevention of Art Theft* (CoPAT). This should help prospective buyers to identify dealers that apply certain standards of transparency and who may be expected to have ascertained the provenance of the objects they put up for sale. The Preamble of the Convention (sub-paragraph 8) in fact makes it clear that it seeks to "maintain a proper role for legal trading" and pays tribute to the achievements, in particular, of UNESCO in drafting codes of conduct (sub-paragraph 10).

[36] Here it is worth mentioning the widely-distributed series of leaflets published by the International Council of Museums (ICOM), entitled "One hundred missing objects" which highlights conditions particularly in Africa, at Angkor (Cambodia) and in Latin America.

Article 4 – Paragraph 5

When a cultural object is acquired by inheritance or otherwise gratuitously, the possessor may have no means of knowing the circumstances in which its predecessor acquired it, and may be quite in the dark as to its unlawful origins which may however have been known to the transferor. The Convention provides that a person who acquires an object in this way is not entitled to more favourable treatment than that granted to the transferor, so that if the latter acted in bad faith, its successor cannot rely on evidence of good faith with a view to obtaining compensation for the object's restitution. Although the wording of paragraph 5 could conceivably benefit a person that acquired an object in bad faith from an "innocent" transferor, this eventuality was considered to be sufficiently rare to render superfluous a special provision to address it.

This provision also seeks to clean up the practice of some museums whose acquisition policy includes approaching private individuals with suggestions that they donate – in return for sizeable tax cuts – objects possibly of doubtful provenance which their codes of practice would prevent them from buying outright.

CHAPTER III – RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Whereas Chapter II deals with the theft of cultural objects, a phenomenon universally condemned on both moral and legal grounds, Chapter III contemplates the delicate issue of national export restrictions in respect of certain types of object, which are variously enforced by other nations. A point to remember is that the international community still does not regard the courts of the forum as in any way obliged to heed the public law rules of another State (this would include its export regulations). In private international law, the conflict rules of the forum only refer, in principle, to the application of the foreign State's *private law* rules. In the absence of specific international commitments, the removal of a cultural object from the territory of a State in breach of the latter's rules is not regarded by many of the countries to whose territory the object is transferred as an unlawful act, and does not in itself constitute a legal obstacle to the acquisition of such an object.

However, this situation was condemned in a resolution adopted by the *International Law Institute* in Wiesbaden (Germany) in 1975,[37] which was the first to query the traditional principle of the inapplicability of foreign public law on the grounds that it had no valid foundation and was "inconsistent with contemporary needs for international co-operation". This shift in legal thinking found expression in such provisions as the *1980 Convention of the European Communities on the Law Applicable to Contractual Obligations* (Article 7) and the 1989 Swiss Law on Private International Law (Article 19), and was instrumental in "softening" the case law of some countries which have indicated a willingness in certain circumstances to pay more attention to foreign mandatory rules of law as a gesture of international solidarity where cultural objects are concerned. This principle was subsequently taken up in European Union law (EEC Regulation No. 3911/92 and Directive 93/7/EEC), but it is most spectacularly endorsed in the UNIDROIT Convention in that it is universal in scope. The implementing conditions are, however, highly restrictive, and Chapter III is so constructed as to reconcile the interests of the place of origin, on the one hand, and the liberal views of the international art trade, on the other hand, with a view to securing widespread acceptance of the Convention.

[37] *Annuaire de l'Institut de droit international*, 1975, Session de Wiesbaden 1975, pp. 551, 553.

That is why, unlike theft, which is sufficient ground in itself to claim restitution, illegal export alone is not sufficient to obtain a court order for an object's return.

Article 5 – Paragraph 1

This paragraph states that a Contracting State may request a foreign court or any other competent authority (the bodies in question are specified in Article 16 – see comments *infra*) of another Contracting State to order the return of a cultural object illegally removed from its territory (subject to the conditions laid down in the provisions that follow). Since such a claim is brought on the ground of breach of public law rules to protect the cultural heritage, it is the State that has an interest in starting proceedings and indeed under the Convention only States are entitled to bring such claims, irrespective of whether the object in question is public or private property. The State may act on its own initiative or at the request of a private owner, if the object was first stolen and then unlawfully removed to another State: in that case, a claim for restitution may also be brought by the dispossessed owner.

Both the requesting State and the State addressed must be *Contracting* States: a court seised of a claim for return will only be bound by the rules of the Convention if the forum State has accepted them; however, only claims brought by States that have likewise accepted these rules are admissible (this rule also features in Article 1(b) on the scope of the Convention), since the Convention only extends its special protection – which departs from the common rules – to those States that have accepted the regimen it sets out.

The words "illegally exported" were defined in Article 1(b) (*cf. supra*) as referring to an object which has "been removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage." Clearly, then, a State that does not protect its cultural objects by means of specific regulations cannot request their return under the Convention; this makes sense since the purpose of the Convention is not to grant more protection to objects from another State than they enjoy in their country of origin. Finally, the Convention is silent in the matter of evidence of breach of export regulations, but the requirement that States (Article 17, *cf. infra*) must supply the depositary with information in relation to the relevant legislation may be of assistance to the courts in assessing the circumstances.

As in the case of stolen objects, this provision does not specify to whom the illegally exported cultural object must be returned, its drafters having determined that the Convention should steer clear of questions of ownership.

Article 5 – Paragraph 2

A cultural object removed from the territory of a State under a temporary export permit for purposes such as exhibition, research or restoration and not returned in accordance with the terms of that permit is deemed to have been illegally exported and eligible for protection in accordance with the rules of the Convention. What is decisive in triggering application of the Convention is failure to comply with the terms of the temporary export permit issued "according to [the] law [of the requesting State] regulating its export for the purpose of protecting its cultural heritage," language chosen to correspond to Article 1(b) where the same wording is used to define illegal export. Directive 93/7/EEC (Article 1(2)), for example, makes a similar comparison in respect of "unlawful removal".

While this provision may be invoked in any Contracting State in respect of objects remaining on its territory after the expiry of the period stated in the permit, it is not intended for situations in which the object is removed to a third State *before* the export permit expires; it was suggested that this contingency was covered by Article 8(3) on provisional and precautionary measures in the Contracting State where the object is located.

The drafters of the Convention were at all times mindful of the importance of international exhibitions and were at pains not to place any obstacles in their way. Moreover, the ICOM Code of Ethics (whose Article 3(6) requires museums to verify the terms of export) is already applied by a large number of museums that refrain from exhibiting objects which have been illegally exported or are of doubtful provenance; also, more and more dealers call on the services of specialised firms to check the provenance of objects before putting them on display at fairs or exhibitions; at some of these events, such checks are actually compulsory for prospective exhibitors.

Article 5 – Paragraph 3

Although consensus on the principle of return of illegally exported cultural objects was fairly straightforward, views differed widely as to how such return should be brought about. The need for a balanced formula that would do justice to the various interests at stake resulted in a set of minimum criteria on international co-operation to protect the cultural heritage, as well as maximum criteria to allow departures from the principle of recognition of foreign law in certain circumstances. The general protection afforded by the Convention accordingly applies only to certain categories of objects characterised by the interests impaired, and to objects of "significant cultural importance" for the requesting State.

The court of the State addressed must establish that there has been illegal export (*cf.* Article 5(1)) and examine the claim on its merits, on the basis of the grounds put forward by the requesting State and in the light of the cultural purpose of the Convention. The requesting State must "establish" that special interests have been impaired or that the object is of "significant cultural importance". The use of the word "establish" was the outcome of a compromise between those who advocated automatic return and for whom a simple claim that the State's cultural heritage had been damaged was sufficient (and who favoured the verb "to declare"), and those who required proper proof of the damage, thus underscoring the responsibilities of the requesting State. The latter must provide the court with all the factual and legal information at its disposal to assist it in assessing the damage caused by the export, and the court or competent authority of the requested State must examine each case according to its specific circumstances. Article 5(4) specifically refers to the information which the requesting State must submit to enable the courts to determine whether all requirements have been met.

The interests specified in paragraph 3 define the types of object that are protected by Chapter III – always on the proviso that their export must have caused "significant" damage. The interests listed are:

- "*the physical preservation of the object or of its context*" (sub-paragraph (a)) which covers physical damage to monuments and archaeological sites (including that caused by illegal excavations and pillage) as well as to objects as a result of their careless handling by looters, smugglers, dealers and possessors etc. implicated in their illegal export;
- "*the integrity of a complex object*" (sub-paragraph (b)) which refers in particular to the dismemberment of large monuments such as the decapitation of statues, the

dispersion of frescoes, the division of triptychs and the dismantling of the contents of historic buildings;

- "*the preservation of information, of, for example, a scientific or historical character*" (sub-paragraph (c)) refers to damage to the object's original context without which it no longer fulfils its function as a source of a scientific or historical information – examples given include disturbance of the stratigraphy, the breaking up of collections or the destruction of documentation, but there is no doubt that the main objective here is the problem of clandestine excavations (*cf.* the special mention in the Preamble, sub-paragraph 4), so that objects removed from such excavations will *ipso facto* be considered as belonging to this category;
- "*the traditional or ritual use of the object by a tribal or indigenous community*" (sub-paragraph (d)) refers to the culture of traditional communities that use these objects (*e.g.* sculptures or masks) for ritual purposes whether or not they are physically located within the community. It is sufficient that the community has control of them. The words "tribal or indigenous community" were first used in Article 3(8) and this whole sub-paragraph again reflects States' concern to protect the heritage of such communities.

Finally, since some cultural objects, however rare and unique or significant, might not be covered by the language of sub-paragraphs (a) to (d) (for example the Taranaki sculptures in the case of *Attorney General of New Zealand v. Ortiz*), [38] it was felt that a general provision should be included for objects of "*significant* cultural importance." Although no further details are given, the question of the close link between Articles 5(3) and Article 2, which defines the words "cultural object" for the purpose of the Convention, was repeatedly referred to in the course of drafting, and certainly "significant cultural importance" is more restrictive than plain "importance" when it comes to establishing whether an object is a cultural object within the meaning of Article 2 of the Convention.

The courts must assess the information submitted by the requesting State in the light of the purpose of the Convention. However, unlike the impairments listed under sub-paragraphs (a) to (d) *supra*, which lay down objective criteria to qualify the damage, what is required of the courts here is that they measure the object's cultural importance from the point of view of the requesting State against the extent and wealth of that State's heritage, be it in public or private hands, and assess its aesthetic value, its importance for historical, artistic or scientific research, and its rarity. For example, an object that is the last surviving example of a given style or period on the territory of a State would fall within this category, even though it might not be exceptional in itself. At any rate, the very fact that a State is prepared to embark on what will probably be long and costly proceedings before the courts of another State to secure the return of an object is a fairly reliable barometer of the importance which it attaches to the object in question.

Finally, it should be stressed that the criteria listed under paragraph 3 are alternative: each single one of these is sufficient in itself to warrant a claim for return. Here again, Article 9 gives each State leave to apply rules more favourable to the return of illegally exported cultural objects than those provided by the Convention.

[38] [1983] 2 *Weekly Law Reports* 809 ; [1984] *Appeal Cases (Law Reports)* 1 (HL) – United Kingdom.

Article 5 – Paragraph 4

A claim for the return of an object by a requesting State must *be accompanied by any relevant information of a factual or legal nature* that will assist the court in determining whether the requirements of paragraphs 1 to 3 have been met. The production of evidence is a normal requirement to be found in many Conventions on mutual assistance so as to facilitate their implementation and to provide more legal security. The requesting State supplies all relevant information of a legal (in particular any export regulations that have been infringed) or cultural nature, such as expert evidence to determine the extent of the damage to one or the other of the interests listed in paragraph 3. This includes evidence by experts from third countries or even experts from the State addressed. If it is in the claimant's interest that all available evidence be produced, the court may call for additional details or further proof. The information required of the claimant is intended to increase the likelihood of the objet's return and to strengthen claimant's case and should not be seen as intended to complicate matters.

This is essentially a technical provision: it has no bearing on the admissibility of the claim, as had been envisaged in an earlier draft. In this way, no undue burden is placed on the requesting State as regards the provisions in the following paragraph on limitation of actions; certainly, too short a limitation period would make it difficult or even impossible for States to collect the necessary information if such information were to be a precondition for bringing a claim for return. *A fortiori*, the requesting State need supply no information other than that required to comply with paragraphs 1 to 3 – thus, a suggestion by the study group that the claim 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 rejected by the governmental experts for fear that this might be used as a pretext for systematically refusing to order the return of cultural objects.

This provision is in effect instrumental in encouraging States to promote their own cultural heritage. The existence of inventories and catalogues, and publicity for sites and collections could prove decisive in securing the return of objects by providing documentary evidence in support of the claim and by highlighting the significance of the objects in question. The initiatives developed by organisations such as UNESCO, UNIDROIT, Interpol or ICOM to assist – each in its own field – the developing countries, in particular, in their attempts to improve the national legal environment, protect important sites, develop museums, inventor cultural objects and train officials are to be seen in this light.

Article 5 – Paragraph 5

This provision contemplates the *limitation of actions* for the return of illegally exported cultural objects. Although there were some who expressed a preference during the preparatory stage for shorter periods than those decided for theft (illegal export being regarded as in some way less reprehensible), the principle prevailed that the limitation periods should be the same for both, so that in situations where an action might be brought either for restitution or for return (typically in the case of objects that are first stolen and then illegally exported, as is frequent in connection with unlawfully excavated objects), the decision as to procedure is taken solely on the basis of proof adduced and not on that of the length of the limitation period. See under

Article 3(3) *supra* for comments (which apply also to the deletion of the language *"or ought reasonably to have known"*).

In view of the connection established earlier in paragraph 2 between the infringement of the terms of a temporary export permit and illegal export, it was specified that the absolute limitation period starts to run on the date by which the object should have been returned under the terms of the temporary export permit.

Unlike the rules relating to theft, which stipulate an exceptional limitation system for claims for the restitution of certain categories of objects (those that form an integral part of an identified monument or archaeological site or belong to a public collection – *cf.* Article 3(4) and (5)), or that belong to or are used by a tribal or indigenous community – *cf.* Article 3(8)), Chapter III makes no such provision, on the grounds that the objects in question are by definition always stolen before they are illegally exported.

Article 6

Once the requesting State – a Contracting Party to the Convention – has satisfied the court or competent authority of the State addressed (1) that a cultural object (*cf.* Article 2) has been illegally exported (*cf.* Articles 1(b) and 5(1)), (2) that the export significantly impaired at least one of the interests contemplated in Article 5(3) or (3) that the object is of significant cultural importance to it, and provided the claim was brought within the periods laid down in Article 5(5), the court or competent authority of the State addressed shall order the physical return of the object to the territory of the requesting State, the procedure for which is set out in Article 6.

Article 6 – Paragraph 1

This provision asserts the principle that a possessor required to return an object is entitled to payment of fair and reasonable compensation if it did not know that the object had been illegally exported. As regards the legal function of compensation to indemnify a possessor regarded as the rightful owner – subject, here again, to the provisions of Article 9),ì – reference should be made to the comments to Article 4(1) on stolen objects. Article 6(3) also refers to other ways of remedying illegal export which – provided the requesting State agrees – safeguard the possessor's title (*cf. infra*).

The words "*fair and reasonable* compensation" (see comments under Article 4(1)) are not further defined; in particular, the idea that the difference between theft and illegal export would justify the payment, in the latter case, of compensation equivalent to the price paid was not taken up, largely because of the extremely high prices commanded by works of art, the limited financial resources of many States and the need to discourage speculation. However, all these factors, the commercial value of the object both in the State of origin and in the requested State, and any other relevant circumstances will assist the court in determining the amount of compensation. The possessor is entitled to compensation for the object *"at the time of its return"*, language that is the twin of the words "at the time of restitution" in Article 4(1) on theft.

The text also specifies that it is up to the *requesting State* to pay the compensation to the possessor – this departs from the rules applicable to stolen objects which do not name the claimant as the party primarily responsible for paying the compensation. The same suggestion was made in this connection as that made in relation to Chapter II, namely that a third party (a private or public entity) should be permitted to pay the compensation in lieu of the requesting State. In the end it was decided to remain silent with regard to such special arrangements

(referring for example to future possession, access, insurance or preservation of the object), these having no place in the Convention which anyway did not exclude them.

A possessor who bought the object *"after it was illegally exported"* is entitled to compensation provided it *"neither knew nor ought reasonably to have known"* that the object had been illegally exported. This concept, which matches the provision in Article 4(2) (*cf.* the commentary) is further defined in the following paragraph (*cf. infra*). While corresponding to the provisions in Article 4(1) on stolen objects (the purchaser's diligence is assessed at "the time of acquisition", *i.e.* when it could still have avoided the purchase, with the consequence that a possessor who discovered the object's unlawful provenance after it bought it cannot be denied compensation), Article 6(1) nevertheless differs from these on two counts: in the first place, the possessor need not prove that it exercised *"due diligence"*, a large number of delegations arguing that the specific nature of theft should not be made to bear on the illegal export of cultural objects; in this sense, less diligence appears to be required of the possessor than in the case of theft. Second, Article 6(1) does not name the party that must establish whether the possessor knew or ought to have known of the illegal export: is it up to the requesting State to prove that the possessor knew, or up to the possessor to prove that it did not? This question will be left to be decided under the applicable domestic law.

Article 6 – Paragraph 2

As in Chapter II on stolen objects (*cf.* Article 4(4)), the drafters of the Convention did indicate some ways of establishing whether the possessor "knew or ought reasonably to have known" that the object had been illegally exported. Here again, the court must consider – and enjoys broad discretion in assessing – all the circumstances of acquisition, in particular whether the prospective buyer inquired into any export restrictions applicable to major works of art, information concerning which is readily accessible in many countries.

Special mention is however made of the situation in which the export certificate required by the law of the requesting State is missing. The draft Convention contained a provision (in square brackets to indicate lack of consensus) aimed at debarring the possessor from invoking its good faith – and by extension, denying its right to compensation – in the absence of the export certificate required by the law of the Contracting State from which the object was removed. This proposal was ultimately rejected but, in recognition of the important role played by such certificates in preventing the illegal export of cultural objects, the Conference did agree to name this (one) criterion as one of the circumstances to be taken into account by the courts in determining whether the possessor exercised due diligence.

While this provision does not affect the optional nature (for States) of the permit system, it is nevertheless intended as an incentive. It should be recalled in this connection that Article 6 of the 1970 Convention does require States to introduce export certificates, to prohibit the removal of objects not accompanied by such certificates and to bring this prohibition to the notice of the general public. EEC Regulation No. 3911/92 on the export of cultural objects for its part requires an export licence for cultural objects that are exported outside the European Union (*cf.* Article 2), also defining the scope of application of these measures and indicating how they ought to be implemented.

Article 6 – Paragraph 3

The possessor required to return an illegally exported cultural object to the territory of the requesting State may opt for alternatives to compensation, provided the requesting State agrees:

it may retain ownership of the object or dispose of it in other ways. This provision is intended both to safeguard the rights of the good faith possessor – which should render it acceptable to those legal systems which set great store by such protection – and to provide a less financially onerous alternative to the payment of compensation by the requesting State with a view to securing the object's return.

Sub-paragraph (a) allows the possessor to retain ownership. The word "ownership" here makes its first appearance in the Convention, but this does be taken as implying that the courts may rule on legal title over the object by virtue of this provision, the question of ownership being one that must be settled between the requesting State and the good faith possessor under the applicable law.

Sub-paragraph (b) allows the possessor to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides "the necessary guarantees". That person must be recognised by the requesting State as a trustworthy guardian unlikely to connive in another illegal export (*cf.* "in agreement with the requesting State" in the introductory paragraph). With reference to these guarantees, earlier versions of the text specified ways in which the object should be protected, preserved and kept safe but no consensus proved possible on these so that the provision will have to be interpreted in the light of the purpose of the Convention, which indubitably covers such aspects. The word "person" here refers to physical or legal persons and so might very well refer to a public or private institution (a museum or an art gallery) that was able to give the proper guarantees.

Article 6 – Paragraph 4

This provision stipulates that the requesting State is to bear *"the cost of returning"* the cultural object, "cost" being understood as referring to the administrative and material cost of physically transferring the object to the requesting State, such as the cost of transport and insurance. Expenses associated with the legal proceedings arising out of the claim before the court or competent authority will, on the other hand, be determined in accordance with the procedural law or relevant regulations of the State addressed. The expenses contemplated under this provision have no bearing on those covered by paragraph 1 on the payment of compensation to the possessor.

This solution was adopted so as to cover all contingencies, irrespective of how the return is effected, for example if the possessor were to transfer the object against payment to a person of its choice in the requesting State. However, the Convention explicitly provides that the State is entitled to recover costs of returning the object from "any other person": this may be the purchaser, or whoever was responsible for the illegal export (the thief, any accomplices, a receiver or those running an illegal traffic ring), or any other person with whom the State might have concluded an agreement to that effect.

Mention may be made in this context of the *International Fund for the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* set up by the UNESCO General Conference (and funded by voluntary contributions) at its 30th session in 1999, to assist States that lack the resources to recover their lost heritage by financing the transportation of objects, suitable exhibition facilities and proper training of museum professionals.

Article 6 – Paragraph 5

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 is comparable to that of the transferor. This provision echoes that on theft in Chapter II (*cf.* comments to Article 4(5)).

Article 7

Article 7 contemplates two exceptions in relation to which the provisions on the return of illegally exported cultural objects do not apply: one is where the export of the object is no longer illegal at the time when a claim is lodged for its return; the other is where the object was exported during the lifetime of the person who created it or within fifty years of that person's death, with the sole exception of traditional objects belonging to tribal or indigenous communities.

Article 7 – Paragraph 1

The first of these exceptions *(sub-paragraph (a))* addresses the situation where the national law that was violated no longer regards the export as illegal at the time when a claim is lodged for its return; there would indeed be little point in the courts or competent authority of the State addressed to apply rules which that State itself had jettisoned as being too restrictive and replaced by a more liberal cultural policy; also, the object could be legally re-exported under the new rules as soon as it was returned to the State of origin. This solution also solves the problem of the temporal conflict of laws.

The second exception *(sub-paragraph (b))* lays down special rules for objects that are subject to an export ban during the lifetime of the person who created them or within a certain period following that person's death. For such objects, the non-recognition of foreign law constitutes a liberal response to the need to promote contemporary art in that it enables living artists to build a reputation abroad. This principle is applied in most national systems most of which exclude the work of living artists from the scope of application of their legislation to protect the cultural heritage. Nothing need of course stand in the way of those States seeking to restrict the export of works by contemporary artists, but such domestic rules would not be given effect internationally under the Convention.

A much-debated point was the length of the period during which the exception is to apply. While some held that the lifetime of the artist was long enough, others were of the opinion that the interests of family and heirs should also be protected for some time following the artist's death. Views differed as to the length of that period: five years, enough to allow the heirs to consolidate the artist's reputation abroad and to settle the estate; twenty years (as in some national systems), or even as much as a hundred years. The diplomatic Conference settled on fifty years, by analogy with copyright law (the 1886 Bern Convention): upon the expiry of that period, the objects come within the scope of the Convention and claims for their return may be brought. In this connection, it was advocated that States protect their cultural heritage by buying modern art rather than by imposing export restrictions which lower the value of such works and hinder the transfer of the artistic heritage world-wide.

Since the lifetime of the creator of a contemporary work of art was taken as a basis rather than the age – often difficult to establish – of the object itself, this provision does not cover those cases in which the author of the object is unknown. Since some objects nevertheless deserve special protection even though presumably created by an anonymous artist (for example, the religious art of the Orient which is often created by persons purposely not named,

as well as many ethnographic objects), specific provision was made for such objects in the following paragraph.

As was pointed out in connection with earlier provisions, the Convention lays down minimal rules only and leaves Contracting States free to take more liberal measures to protect such objects. They may, for example, invoke Article 9 and prohibit the return of objects whose creator is still living or who has been dead for less than fifty years.

Article 7 – Paragraph 2

This provision is confined to ethnographic objects – a category to which most objects belong that are created by an unknown author and whose age is difficult to determine. That an indigenous community should be entitled to recover an object made for its own use – and removed against its will – under the rules of the Convention dealing with illegal export (since the theft of such objects is not always easy to prove) was never in dispute. Neither the death of their creators (such objects are often the outcome of communal efforts) nor the age of such objects (frequently fashioned out of organic – and hence perishable – materials), were apposite criteria in this connection.

Paragraph 2 in effect lays down an exception to an exception: it allows claims to be brought for the return of cultural objects "created by a member of a tribal or indigenous community for traditional or ritual use by that community" even though it was illegally exported during the lifetime of its author or within fifty years of the author's death. The text provides that such objects must be returned to their original community, on the grounds that its illegal export has disrupted the integrity of that community; in such cases, the possessor will not have leave to choose to whom it will return the object in accordance with the provisions of Article 6(3). This provision is one of the special rules inserted to protect tribal or indigenous communities that make traditional or ritual use of a cultural object (*cf.* Preamble, sub-paragraph 4 and Articles 3(8) and 5(3)(d)).

It should be borne in mind – by those who fear (or conversely, hope) that massive use will be made of this provision – that these special rules are linked to the provisions of Article 5(3), in particular its sub-paragraph (d), which states that the requesting State must establish that "the export of the object *significantly impairs* … [its] traditional or ritual use by an indigenous or tribal community", in other words, the objects in question must be considered by that community as essential for the survival of its culture and traditions. The community must produce evidence to that effect to satisfy the courts of the State addressed.

CHAPTER IV – GENERAL PROVISIONS

Article 8 – Paragraph 1

This Article contemplates a uniform rule on jurisdiction for claims for the restitution of a stolen cultural object and for the return of an illegally exported object: jurisdiction lies with "the courts or other competent authorities of the Contracting State where the object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States."

In addition to the jurisdictional rules in force in the Contracting States (domestic rules and/or rules applied by virtue of international instruments, in particular European instruments – the 1968 Brussels Convention and Regulation No. 44/2001 of the Council of the European Communities, as well as the 1988 Lugano Convention and the pan-American Conventions), the Convention provides a new basis of jurisdiction to adjudicate, namely that of the courts or competent authorities of the State where the cultural object is located. This, for a number of legal systems, is quite a novel concept and is likely to be of great assistance in implementing the Convention since it allows the claimant to take action swiftly and enables the courts to order effective measures to secure restitution or return: the decision of the court or competent authority will be applied directly without resorting to the enforcement procedures required when an object is located in a Contracting State other than the forum State.

It was this point that persuaded the diplomatic Conference to dispense with any provisions on recognition and enforcement since not only were such provisions rarely found in private law instruments of universal application but they would also make it extremely difficult, if not impossible, for some Governments to accept the Convention. This matter, which is of relevance when the claimant chooses to base its action on a general ground of jurisdiction, is therefore left to be regulated by the applicable multilateral or bilateral treaties.

Although one delegation admitted to misgivings that paragraph 1 might give rise to practical difficulties related to the immunity of States, the Conference drew attention to the widespread practice in international public law whereby a State bringing a claim before the courts of another State loses its right to jurisdictional immunity by virtue of that claim.

Article 8 – Paragraph 2

The parties are free to submit their dispute to a court or any other competent authority (specified in Article 16 – see comments *infra*) or to arbitration. Such a choice was regarded as a matter of procedural freedom which if omitted might have dissuaded some States from ratifying the Convention.

In addition, it was argued 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 is confidential as well as swift and neutral. A further advantage was that arbitration would enable experts to act as arbitrators, thus bringing to the proceedings expertise in relation to the type of object under dispute. Finally, an arbitral award is probably easier to enforce, the defendant being less loath to comply with a decision handed down by the arbitral tribunal of its choice.

Article 8 – Paragraph 3

This supplements the general jurisdiction provision in paragraph 1 in respect of claims brought in a Contracting State other than the State where the object is located, in that it provides for the implementation of "provisional, including protective, measures available under the law of the Contracting State where the object is located," wording that differs only slightly from that employed in Article 24 of the 1968 Brussels Convention (Article 31 of Regulation No. 44/2001), but it was felt that spelling it out (as it is in most legal systems) would help to protect both the object itself (from physical harm) and the claimant's rights (by preventing the object from disappearing due to its being sold or exported – a risk greatly enhanced by the fact that such

objects often have great commercial value) for the duration of the proceedings and until such time as the court hands down its decision on the merits.

Article 9 – Paragraph 1

Mindful of the fact that the Convention addressed an extremely complex and highly sensitive issue and that the adoption of even the most basic set of common, minimal legal rules must be reckoned a success, the drafters established early on that while the purpose of the Convention was to facilitate the restitution and return of stolen or illegally exported cultural objects, there could be no question of lowering the level of protection already granted by some States – simply for the sake of uniformity – in compliance with rules more favourable to restitution or return.

Thus, the first draft [39] allowed Contracting States to broaden the scope of the protection afforded by the Convention. On the premise that any departures from the rule should be strictly defined, an attempt was at first made to list those situations in which a Contracting State might accord more favourable treatment than that provided under the Convention: for example, by extending the concept of what constituted a cultural object, by extending the limitation periods for the bringing of claims under the Convention, by disallowing the possessor the right to compensation even though it has exercised the necessary diligence, by taking into consideration interests other than those contemplated under Article 5(3) or by applying domestic law when this would permit the application of Chapter III in cases otherwise excluded by Article 7, or by applying the Convention to objects stolen or illegally exported before it entered into force for that State.[40] When it proved impossible to agree on an exhaustive list of rules more favourable to the restitution or return of cultural objects than the system proposed by the Convention, it was decided to dispense with examples to illustrate the principle. This is now referred to in the Preamble (sub-paragraphs 5 and 6 (*cf. supra*), and Article 9 confines itself to a general formulation.

Paragraph 1 provides that nothing in the Convention "prevents a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention." Since such "rules" are not further specified, this provision may come to be interpreted quite freely. However, it emerged in the course of the discussions that the chief focus was on rules to which the Contracting State might be bound by international treaty or that are part of its national law, including any conflict of laws rules leading to the application of the law of another State that were more favourable to the restitution or return of a stolen or illegally exported cultural object.

The wording makes it clear that this is not an obligation but an option open to Contracting States which, if taken up, is in keeping with the objectives of the Convention. It should also be recalled that it is of relevance only for the State addressed in respect of claims brought before its own courts or other competent authorities and that it does not require other Contracting States to reciprocate: a requesting State is not entitled to claim the benefit of more extensive rights than are provided under the Convention.

39 *Cf. supra* note 9, Article 9.

40 *Cf. Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Article 11, *supra* note 15.

Article 9 – Paragraph 2

One delegation to the diplomatic Conference expressed fears that paragraph 1 might tempt claimants to choose the courts of whichever State was likely to hand down the decision most favourable to them (*forum shopping*), thereby perhaps depriving the diligent possessor of compensation upon returning the object. This would be tantamount to despoliation, which was incompatible with fundamental principles of its law. None of the other delegations shared this concern, arguing that if such situations arose it was because of divergences between national laws and that the Convention was not to blame; moreover, the applicable law would not necessarily be that of the forum but rather that designated by the *lex fori* rules of private international law and would generally lead to the *lex causae* being applied, *i.e.* the law of the place where the object was located at the time of its acquisition.

The wording of paragraph 2 – drafted in the final stages of the Conference – broke the deadlock by providing that Article 9 should "not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention." Clumsy though this language may appear (it is difficult to see how the application of more favourable rules can "depart" from the provisions of the Convention), the underlying intention will be clear to the authorities responsible for its enforcement.

Article 10

The temporal scope of the Convention gave rise to intense debate at the drafting stage. Some States felt that the Convention should permit the restitution or return of cultural objects stolen or illegally exported *before* its the entry into force; however, this would have ruined the Convention's chances of being adopted by those very States most likely to be required to return stolen or illegally exported cultural objects. None of these States would have entered into the negotiations in the first place had they suspected that such a contingency might arise.

The Committee of governmental experts had agreed not to allude to this issue in the draft Convention so that it would appear neutral: the general principle would be that of denying retroactive effect to treaties, a principle endorsed by the *1969 Vienna Convention on the Law of Treaties*,[41] while a separate – non-binding – provision would be inserted in the Preamble to make it clear that the Convention distanced itself from any illicit traffic that had occurred in the past. The issue was again debated during the diplomatic Conference, where it was finally accepted that express reference should be made to the fact that the Convention had no retroactive effect; agreement on this point was made subject to the inclusion in the body of the text – in addition to the general clause in the Preamble – of a provision that would dispel any suspicion that the Convention condoned illicit traffic that had occurred before its entry into force, and enable States to adopt other measures not falling within the scope of the Convention to secure the restitution of cultural objects.

[41] Article 28: "Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party."

The underlying intention here is also educational: it aims at promoting ethical and moral (and indeed legal) principles in defence of the national cultural heritage, and although it relates strictly to future situations it nevertheless reflects – as do the instruments of other intergovernmental or professional organisations, binding or otherwise – the changing standards of conduct which all those connected with the international art world (private or public collectors, dealers, politicians, judges, restorers, etc.) will increasingly be expected to bring to their operations.

Among the rules which States are free to implement in accordance with Article 9 – which allows Contracting Parties to grant treatment more favourable to the restitution or return of stolen or illegally exported cultural objects than that afforded by the Convention – must be counted the possibility of giving retroactive effect to the Convention and applying it to cases of theft or illegal export committed before its entry into force for those States. However, this leaves intact the problem of enforcement in other States (see comments to Article 9(2) *supra*).

Article 10 – Paragraph 1

This provision deals with stolen cultural objects and lays down the criteria that determine whether the Convention applies: the time of the theft and the fact that the State addressed must be a Contracting State, as must be the State where the theft was committed or the State where the object is located. A preliminary condition (introductory provision) is that the object must have been stolen after the Convention's entry into force for the State where the action is brought (*i.e.*, the State addressed must perforce be a Contracting State). In addition, one of the following alternatives must apply: the theft must have been committed on the territory of a Contracting State after the Convention's entry into force for that State, or the object must be located there.

The first solution (*sub-paragraph (a)*) provides that the Convention applies if the object was *stolen* on the territory of a Contracting State after it entered into force both for that State and for the State addressed. In such cases, it does not matter if at the time of bringing the claim the object is located on the territory of a non-Contracting State. The only difficulty that might arise in this connection is in relation to the enforcement of a restitution order in the State where the object is located.

Under the second solution (*sub-paragraph (b)*), the Convention applies if the object is *located* on the territory of a Contracting State after it entered into force both for that State and for the State addressed. In such cases, it does not matter if the object was stolen in a non Contracting State or in a Contracting State after the Convention's entry into force for that State. This provision does not, however, require that the object be located in *another* Contracting State, since the State where the claim is brought and the State where the object is located may well be one and the same (see comments to Article 1, sub-paragraph (a) *supra*).

Article 10 – Paragraph 2

This paragraph concerns illegally exported cultural objects. Here, the Convention applies the principle of strict reciprocity (this flows from the judicial and administrative co-operation system introduced by the Convention): claims must be brought by a Contracting State before the courts or competent authority of another Contracting State (*cf.* Article 5(1)) – and apply only to cultural objects illegally exported after the Convention's entry into force for both these States.

Again, however, States are free to apply rules more favourable to the return of the object in accordance with Article 9 and to declare the Convention applicable to cultural objects illegally exported before it entered into force for that State or for the requesting State.

Article 10 – Paragraph 3

Those countries whose cultural heritage had already been heavily pillaged were concerned that the fact that the Convention only regulated the future might be understood as condoning or legitimising illegal transactions effected before its entry into force or that fell outside the geographical or temporal scope of application as defined in paragraphs 1 and 2. The Conference largely shared this concern which found expression both in the Preamble (sub-paragraph 7: "the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention") and within the body of the text itself in Article 10(3): "This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention."

By the same token, it was felt prudent to specify that the Convention would in no way interfere with existing or alternative procedures for the return of objects falling outside its geographical and temporal scope of application, for example through diplomatic channels or under bilateral treaties, or in the context of *ad hoc* negotiations. It is worth recalling in this connection the *Intergovernmental Committee for the Promotion of the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* which meets every other year and assists States in conducting bilateral talks.

CHAPTER V – FINAL PROVISIONS

The final provisions, which often reflect the practice of the organisation that drafted the instrument, follow the example – where appropriate – of the solutions contained in previous UNIDROIT Conventions (*1983 Geneva Convention on Agency in the International Sale of Goods*; *1988 UNIDROIT Conventions on International Financial Leasing and International Factoring*).

Article 11

This Article lays down the procedure for signing the Convention as well as for its ratification, acceptance, approval or accession. It is largely based on the standard provisions traditionally to be found in UNIDROIT instruments and indeed in those of a number of United Nations Organization Conventions such as the *1980 Vienna Convention on Contracts for the International Sale of Goods*. While practice varies as to the length of time during which international conventions of private law remain open for signature after their adoption, the average is approximately twelve months and for this reason the date of 30 June 1996 was included in *paragraph 1*.[42] Signatory States may ratify, accept or approve the Convention (*paragraph 2*), while States that are not signatories may accede to it (*paragraph 3*). It should be recalled that all States may become Contracting Parties whether or not they are members of the International Institute for the Unification of Private Law (UNIDROIT).

42 *Cf. supra* note 24 for a list of signatory States.

Ratification, acceptance, approval or accession [43] are subject to the deposit of a formal instrument to that effect with the depositary (*paragraph 4*), that is, the Italian Government (*cf.* Article 21 *infra*).

Article 12

International practice varies as to the number of instruments required for the entry into force of Conventions, but in order to give even a small number of Contracting States the benefit of the new regime as soon as possible, the minimum number of three instruments for a multilateral treaty is often agreed (this indeed was the number stipulated for the 1988 UNIDROIT Conventions on International Financial Leasing and International Factoring and for several of the Conventions drafted by the Hague Conference on Private International Law such as the *1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*). The diplomatic Conference opted for the slightly higher number of five Contracting States, which was attained when Romania deposited its instrument of ratification on 21 January 1998.

The Convention entered into force on 1 July 1998, the first day of the sixth month following the date of deposit of the fifth instrument of ratification, acceptance, approval or accession *(paragraph 1).* The Convention enters into force in respect of each new Contracting State six months following the deposit of its instrument to this effect *(paragraph 2).*

Article 13 – Paragraph 1

It is customary for international conventions of private law to contain a provision to regulate their application in respect of existing agreements dealing with the same or similar matters, so as to determine the rule that will apply in case of conflict between the provisions contemplated by the different instruments. This paragraph lays down the principle that international instruments by which the Contracting State is already bound prevail unless a contrary declaration is made by that State. In the absence of further specification, such a declaration may be made at any time and takes effect in accordance with Article 15(3).

States Parties to existing international instruments that deal with similar subject-matter need make no declaration to this effect nor transmit a copy of the text to the depositary of the Convention (contrary to what is provided under paragraph 2 dealing with agreements concluded to improve the application of the Convention).

Article 13 – Paragraph 2

This provision gives Contracting States leave to enter into agreements with other Contracting States to improve the application of the Convention in their mutual relations. This principle is contained in the *1993 Hague Convention on the Protection of Children* (Article 39(2)), but interestingly, unlike that instrument, the UNIDROIT Convention does not require States to designate central authorities to co-ordinate its implementation. It was included in recognition of special relationships between certain States (for example States within a single geo-political region, members of economic integration organisations, or States that maintain special bilateral relations, and so forth) and indeed to encourage States to form such special links. Such agreements must be notified to the depositary.

[43] *Cf. supra* note 25 for a list of Contracting States.

Article 13 – Paragraph 3

At the request of the delegation that held the Presidency of the Council of the European Union at the time, a so-called "disconnection clause" was inserted to enable those States that are members of economic integration organisations or regional bodies to declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of the Convention the scope of application of which coincides with that of those rules. While originally intended for the member States of the European Union, already linked among themselves by EEC Council Directive 93/7 (which also applies between the member States of the Agreement on the European Economic Area), it was felt that it was also of relevance to any other organisation of economic integration or regional body already concerned or which might become so under future agreements.

Contracting States that are also members of economic integration organisations or regional bodies are free to decide whether or not to bring the disconnection clause into play in respect of the Convention, by making a declaration to that effect. Failing further specification, declarations to this effect may be made at any time and take effect in accordance with the provisions of Article 15(3).[44]

Article 14

This article refers to States made up of several territorial units, usually States with a federal system of government involving a constitutionally guaranteed division of power among the constituent units of the federation. The word "territorial" to designate jurisdiction under this provision should be interpreted broadly and, as was pointed out by one delegation to the diplomatic Conference, might not refer to a strictly geographical concept.

Such States may accept the Convention for all its territorial units or for some of them only *(paragraph 1)* by means of a declaration notified to the depositary and stating expressly the territorial units to which the Convention extends *(paragraph 2)*. Failing such declaration, the Convention is understood to apply to all the territorial units of that State *(paragraph 4)*. To facilitate the implementation of those of the Convention's provisions that refer to a "Contracting State", *paragraph 3* (using the same technique as that set out in Article 36(3) of the *1993 Hague Convention on the Protection of Children*) specifies how the language should be construed in respect of each territorial unit *(sub-paragraphs (a) to (e))*.

Article 15

The Convention contains several provisions expressly included to enable States to adjust some of its general rules: here, the need for compromise overrides the need for uniformity. In other cases, details of a procedural nature may throw light on the way in which the Convention is implemented. The circumstances in which such adjustments may be made and the way in which they should be communicated are regulated by the Convention, in particular by means of declarations which are to be formally notified to the depositary; such notification also serves publicity purposes vis-à-vis other Contracting States.

[44] By 31 December 2001, such declarations had been made by the Netherlands (at the time of signature) and Finland (at the time of ratification) to the effect that they would apply, in respect of the other members of the European Union, those internal rules of the Union whose scope of application coincides with that of the Convention.

Of the declarations contemplated by the Convention, only that in respect of the procedures governing the submission of claims (Article 16(1)) is mandatory. The others are optional and referred to in Articles 3(5) (limitation of actions for the restitution of stolen objects), 13(1) (the Convention prevails over other international instruments with respect to matters governed by the Convention), 13(3) (disconnection clause), 14(1) (multiple territorial units) and 16(2) (courts or other competent authorities) (*cf.* the comments to each of these provisions).

Article 15 contains a list of technical provisions with regard to declarations and contemplates declarations made at the time of signature *(paragraph 1)*, the form and deposit of declarations *(paragraph 2)*, the time when they take effect *(paragraph 3)*, and their withdrawal and the time when it takes effect *(paragraph 4)*.

Article 16

The body designated by the Convention to hear claims both for restitution and return is described in all its provisions as a "*court*" or "*other competent authority*". This language echoes that of other international instruments such as the *1980 Hague Convention on the Civil Aspects of International Child Abduction*. Indeed, some countries give (or intend to give) jurisdiction to bodies other than the competent State courts; for example, the services set up by the 1970 Convention, which are administrative rather than judicial in nature. Such alternatives may, moreover, prove less costly than recourse to the courts. Each country would thus be able to designate either a court (collegiate or a single judge) or an *ad hoc* joint committee of lawyers and cultural experts, to suit its own requirements, in particular those of a constitutional order.

On the other hand, the Convention does oblige States to declare, at the time of signature, ratification or accession, the procedure or procedures under which a claim for the return or restitution of a cultural object must be brought before its courts or competent authorities, when that claim is brought by a State *(Paragraph 1)*. Three options are envisaged for such applications: directly to the courts or other competent authorities *(sub-paragraph (a))*; through an authority or authorities designated by that State to receive such claims or requests and to forward them to the courts or other competent authorities of that State *(sub-paragraph (b)*; or through diplomatic or consular channels *(sub-paragraph (c))*. As to claims between private individuals, there was no reason to depart from ordinary procedural rules.

States that elect to have claims submitted directly to a court or other competent authority must ensure that provision is made in national law for claims for the restitution of movable property and if not, to do so. It should be noted that the "designated authority" option is the rule both under Directive 93/7/EEC (*cf.* Articles 3 and 4) – the member States of the European Union are therefore likely to provide (although not exclusively) in this sense where the UNIDROIT Convention is concerned – and the *Commonwealth Scheme* (*cf.* Article 6).[45]

[45] The following Contracting States to the Convention (as of 31 December 2001) have opted for direct submission to the courts: Brazil, China, Finland, Italy, Norway and Peru; the following have chosen to designate an intermediate authority: Argentina, China, El Salvador, Finland, Hungary, Lithuania and Romania; Italy, Hungary, Paraguay and Peru have opted for diplomatic or consular channels; several States have chosen more than one option.

In the interests of legal certainty and to enable requesting States to lodge their claims before the appropriate body with a minimum of delay, a provision (Article 16 *infra*) was included whereby Contracting States may make a declaration in respect of the body that is competent to deal with claims under the Convention. European Directive 93/7/EEC (Articles 3 and 4) includes a similar arrangement which is, however, mandatory.

Contracting States are free at any time to modify their declaration as to the competent authority and the procedure for the bringing of claims by foreign States *(paragraph 3)*. Finally, the general principle set out in Article 13(1) is further defined in *paragraph 4* which provides that declarations made under Article 16 do not affect any bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between Contracting States.

Article 17

Since the principle of return of cultural objects – and indeed, claims for such – is based on the infringement of national export regulations (*cf.* Articles 1(b) and 5(1)), the other Contracting States need ready access to the details of these regulations to ensure that the Convention functions smoothly. Prospective buyers, in particular, need to know the tenor of the relevant legislation in the object's country of origin, so that if there are problems they can still back out of the purchase; it is, after all, their conduct at this stage of the proceedings which will count in assessing their diligence at the time of acquisition.

Article 17 accordingly requires Contracting States to provide the depositary with written information in respect of the relevant legislation. This information (in the form either of the full text of the legislation or an abstract) will be collected in a public-access database to be set up by UNIDROIT. The information must be supplied in one of the two languages of the Convention, namely English or French, so as to be readily understood by as many users as possible.

Article 18

The Convention provides a coherent system which strictly delimits the degree of flexibility allowed in respect of its individual provisions. Thus, Article 18 permits no reservations except those expressly authorised by the Convention. Accordingly, States may make only such declarations as provided under Article 15 (see comments *supra*), and they may neither modify or exclude the application of single provisions by means of a reservation.

This principle is consistent with the purpose and content of the instrument, which adopts a pioneering approach to restitution and provides an effective tool for the implementation of the 1970 Convention, particularly where illegally exported objects are concerned. It signals a firm commitment on the part of the international community to combat illicit traffic in cultural objects on all fronts. Consensus was reached on a final package consisting of a set of inter-dependent provisions, and to apply these *"à la carte"* would upset the fine balance achieved and render the Convention much less effective. For example, the diplomatic Conference discussed but ultimately rejected a proposal to permit those States that wished to do so (on grounds of constitutionality) to exclude the application of either the section dealing with theft (Chapter II) or the section on illegal export (Chapter III).

Article 19

The Convention may be denounced by any Contracting Party by the deposit of an instrument to that effect with the depositary *(paragraph 1)*, which will take effect six months following its deposit, except where a longer period is specified *(paragraph 2)*. However, the Convention will remain applicable to claims for the restitution or return of a cultural object submitted prior to the date on which the denunciation takes effect *(paragraph 3)*; denunciation, in other words, does not have retroactive effect.

Article 20

The Conference took the view that the Convention should include a mechanism to monitor its application, in the shape of a special follow-up committee. Such bodies already exist in the framework of several instruments drawn up by the Hague Conference on International Private Law (the "special commissions" in its legal and administrative assistance conventions) and by the Council of Europe ("permanent committees" or "Convention committees"). The Convention does not specify what the functions of such a committee should be other than that it is to "review the practical operation" of the Convention: presumably, this includes monitoring the case law of the courts and competent authorities and drafting proposals and recommendations which, although not legally binding, are likely to have considerable moral authority.

The special committee is to convened at the initiative of the President of UNIDROIT ("regularly" – the Conference clearly intended to see UNIDROIT take an active part in the follow-up work) or at the request of five Contracting States. Common sense suggests that the special committee will not meet until there is enough practical evidence of the operation of the Convention. Nothing is indicated as to its composition (normally the prerogative of the President of UNIDROIT), but its members will presumably include representatives of the Contracting States as well as of the relevant international organisations.

Article 21

The functions of depositary of international Conventions are often exercised by the Government of the State where the Diplomatic Conference for their adoption is held. This Convention was adopted in Rome, and the Italian Government is its depositary. Article 21 lists the functions of the depositary, namely to register the instruments deposited by States in respect of the Convention and to inform the other States as well as the President of UNIDROIT, and generally to perform all those functions customary for the depositary (Article 77 of the *1969 Vienna Convention on the Law of Treaties* may serve as an example in this regard).

Declaration of authenticity and signature

The Convention was adopted in Rome and is dated 24 June 1995. The English and French texts are equally authentic. Any problems in interpreting another language version of the text must be settled by reference to the authentic texts.

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Designed to implement the restitution principle enshrined in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects concentrates on a twofold aim: on the one hand, to solve the technical problems arising from disparate national rules, and, on the other hand, to curb the growth in illicit trafficking in cultural objects and demonstrate that national efforts to protect the cultural heritage can go hand in hand with co-operation between States. A welcome addition to the existing panoply of instruments geared to facilitating the return or restitution of cultural objects, its primary goal is nevertheless to reduce illicit traffic by bringing about a gradual but deep-seated change in the conduct of all operators, those in the marketplace as well as government authorities.

The Convention's very existence signals that the time is ripe for an improvement in ethical standards in the art trade: a great number of States representing the different interests at stake were involved in its drafting, as were members of the relevant professional circles, and it has already left its mark not only on other international instruments but also on several codes of practice. It is to be hoped that as many States as possible will become Parties to the UNIDROIT Convention, to give it a chance to develop its full potential.