



Explanatory Report to the European Convention on Offences relating to Cultural Property

Delphi, 23.VI.1985

I. The European Convention on Offences relating to Cultural Property drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems, was opened for signature by the member states of the Council of Europe on 23 June 1985.

II. The text of the explanatory report prepared by the committee of experts and transmitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

Introduction

1. Background

Cultural property in museums, in churches, in private collections, on archaeological sites, has become, these last few years, the victim of unprecedented pillage, theft and destruction. An organised underground brings the loot to market, usually in a country other than the one from where it comes. This situation is serious for all member states of the Council of Europe since it puts at risk the common cultural heritage of Europe.

Action in this field is the realisation of the programme established in the European Cultural Convention (ETS No. 18), Article 5 of which is worded as follows: «Each Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto». There is in this article a statement of principle and two undertakings which were subscribed to by each and every member state of the Council of Europe (plus Finland and the Holy See) in ratifying this Convention. The principle is that there exists a common cultural heritage of Europe. The undertakings are:

- a. to regard the objects of European cultural value placed under the control of each state as integral parts of that common cultural heritage of Europe, and
- b. to take appropriate measures to safeguard them.

In view of this situation but conscious that action had already been taken by other international organisations, the European Committee on Crime Problems (CDPC) charged Professor B. de Schutter (Belgium) to prepare a report on lacunae in international co-operation with a view to the punishment of the theft of works of art and similar attacks on the cultural heritage.

2. Terms of reference of the Select Committee

At its 26th plenary session in 1977 the CDPC, following the conclusions of Professor de Schutter's report, decided to set up a Select Committee of Experts on International Co-operation in the Field of Offences relating to Works of Art (PC-R-OA) and gave it the following terms of reference:

«Consideration should be given to the establishment of legal standards for the international protection of works of art, namely:

- definition of the different offences against the artistic heritage;
- prevention of such offences;
- establishment of provisions governing competence (that is, supplementary application of the universality principle, whereby the court of the place where the offender is found is competent to hear the case, irrespective of the place of commission and of the nationality of the offender or his victim); and their implementation;
- application in this field of the four European conventions concerning criminal law - the European Convention on Extradition (ETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the European Convention on the International Validity of Criminal Judgments (ETS No. 70) and the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73);
- settlement of problems inherent in the concept of '*bona fide* owner', transnational restitution and prescription.»

Professor J. Chatelain (France) was appointed Chairman of the Select Committee and secretariat duties were carried out by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

3. Working methods of the Select Committee

The Committee prepared questionnaires on national legislation and practice and statistics pertaining to the matter under consideration. On the basis of the replies thereto received from national administrations of member states, Mr S. Dockx (Belgium) prepared extensive reports which were examined by the Committee. The Committee also gave careful examination to the European Conventions on Extradition, Mutual Assistance in Criminal Matters, International Validity of Criminal Judgments, and the Transfer of Proceedings in Criminal Matters as well as to the different Unesco instruments with a bearing on this topic. On the basis of such studies and of the discussions in its midst, the Committee finally prepared the draft Convention.

4. Adoption of the draft Convention

Once examined and approved by the CDPC at its 33rd plenary session, the draft Convention was submitted to the Committee of Ministers which in its turn adopted it at the 379th meeting of the Ministers' Deputies.

The Convention was opened for signature by member states on 23 June 1985 in Delphi.

General observations

5. The paramount aim of this Convention is to afford protection to cultural property against a major danger that presently threatens it: crime. The underlying assumption is that cultural property, whether placed under the control of one or another member state of the Council of Europe, is an integral part of the common cultural heritage of Europe and therefore its protection should be jointly assumed by all. Because cultural property, both in quality and quantity, is unevenly distributed geographically, solidarity is the corner-stone to this approach.

6. The Parties undertake to take measures to enhance public awareness of the need to protect cultural property, to co-operate with a view to the prevention of offences against cultural property, to acknowledge the gravity of any act that affects cultural property, to penalise such acts adequately, to establish their competence to prosecute offences relating to cultural property in terms larger than usual. However, the central part of the Convention provides legal rules for international co-operation with a view to the discovery of cultural property removed as the result of an offence and its restitution to its lawful possessor in the state from where it was removed.

7. The implementation of such rules is therefore dependent on the previous commission of an offence with international implications. Their implementation, therefore, may be called for alongside rules provided in other Conventions, namely the four above-mentioned European Conventions on penal matters. Indeed, the provisions of the present Convention were designed in such a way as not to supersede or contradict the provisions of the other four Conventions, but rather to supplement them. Moreover, the layout of this Convention and the language of its articles follow closely the other four Conventions.

Commentaries on the articles of the Convention

Part I – Definitions

Part I contains one article giving definitions of four terms frequently used in the Convention, namely «offence», «proceedings», «judgment» and «sanction».

Article 1

a. The definition of «offence» is drawn from the definition contained in Article 1 of the European Convention on the International Validity of Criminal Judgments (1970) (ETS No. 70) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972) (ETS No. 73). The definition is commented as follows in the Explanatory report on the latter Convention:

«any act which is punishable under criminal law. The term is, however, extended to cover also behaviour which is not primarily within the competence of the judicial authorities, but dealt with by simplified procedure by an administrative authority whose decision is subject to appeal to a judicial authority. Such a system is used in some member states and the relevant provisions in national law are listed in Appendix I to the Convention.

The words 'tried by a court' include appeals involving a full rehearing of the case by a court as to the facts and as to the law. The word 'court' refers to administrative tribunals at all levels on condition that these institutions are independent and that they give the offender the possibility to defend himself.»

It goes without saying that the word «court» also refers to criminal courts.

b. In line with the above definition of «offence», the term «proceedings» refers to both criminal and administrative procedures. It excludes civil procedures.

c. «Judgment» is defined as a criminal judgment or a final decision, delivered by an administrative body as a result of a procedure in accordance with any of the legal provisions listed in Appendix I.

d. The definition of «sanction» is drafted as the model of the definition contained in Article 1 of the European Convention on the Transfer of Proceedings in Criminal Matters. It makes it clear that the term comprises any punishment, any repressive measures which are not legally speaking of a penal nature, as well as detention orders.

Part II – Scope

Articles 2 and 3

Part II (Articles 2 and 3) contains provisions that define the field of application of the Convention by way of reference to the cultural property which it aims at protecting (Article 2) and the offences relating to that property which it purports to combat (Article 3).

The specification of the categories of cultural property and the offences which fall within the scope of the Convention is achieved by way of enumerations. In fact, Appendices II and III to the Convention each contains a list. These lists are subdivided into two sections, the first of which is a shortlist defining the core of the Convention: that is to say that the first section of both Appendices II and III enumerates the categories of property and of offences in respect of which the implementation of the Convention is mandatory. This core of the Convention was intentionally reduced to a minimum in order to ensure that a large number of states could accept it.

However, the scope of application of the Convention may be unilaterally enlarged so as to include one or more of the categories of property and/or offences listed in section 2 of Appendices II and III provided that the contracting state makes a declaration under Article 2, paragraph 2, and/or Article 3, paragraph 2. It may, furthermore, be enlarged to include categories of property and/or offences not listed in the appendices by way of a declaration under Article 2, paragraph 3 and/or Article 3, paragraph 3. The rule of reciprocity is applicable in both these instances (see comments on Article 26).

Procedural rules concerning the declarations provided for in this part are laid down in Article 30.

The items listed in Appendix II concern private as well as public and movable as well as immovable property. The drafting is largely inspired by Article 1 of the Unesco Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (Paris, 14 November 1970) and Article 1.a of the Unesco Recommendation for the protection of movable cultural property (Paris, 28 November 1978).

The appreciation of the nature and cultural interest of the categories of property in respect of which a declaration may be made under paragraph 3 is left to each Party.

Part III – Protection of cultural property

Article 4

The draftsmen judged that the best protection that can be afforded to cultural property should come from the community. Indeed public co-operation is indispensable to protect public cultural property while public opinion should be involved in scrutinising the effectiveness of the means used to protect such property. Moreover, private owners should be made aware of their responsibility in protecting the cultural property that they keep.

Article 5

Under this article, the Parties give an open-ended undertaking to co-operate with each other with a view to

- a. preventing offences relating to cultural property and
- b. discovering cultural property removed subsequent to such offences.

Such co-operation should take the form and be carried out in the way that is most appropriate depending on the precise circumstances of each case. It may consist of police co-operation (particularly through ICPO-Interpol), customs co-operation, border controls, measures with a view to the protection of cultural property during international transport, etc.

Part IV – Restitution of cultural property

Part IV comprises Articles 6 to 11. Under Article 6, Parties give a general undertaking to take all necessary measures with a view to the restitution of cultural property. The provisions in Articles 7 to 11 define the circumstances under which the Parties shall take specific measures with a view to restitution and lay down procedural rules to that effect.

By «restitution» is meant the return of cultural property from the territory of one to that of another Party with a view to it being handed over to its lawful owners. It presupposes: a. that cultural property was found on the territory of a Party (State A); b. that that cultural property had been removed from the territory of another Party (State B); and c. that this removal was the result of an offence against cultural property committed in the territory of a Party (State C), it being understood that State C can be a third state or the same as either State A or State B.

The term «territory» used in Part IV means the territory of the Party in question or, if that Party has made a declaration under Article 24, the territory or territories specified in that declaration.

Article 6

This article calls for no comments further to those made above.

Article 7

This article provides for different notifications concerning cultural property which was removed or found in order to facilitate either its discovery or the institution of proceedings with a view to its restitution. Procedural rules concerning these notifications are contained in Article 33.

The notification provided for in paragraph 1 aims at bringing to the attention of a Party that cultural property has been conveyed, or is believed to have been conveyed, to its territory as the result of an offence against cultural property. The Party thus notified becomes bound by the provisions of Articles 4 and 5. Furthermore, if the property in question is discovered on its territory, it is bound under paragraph 3 to notify the Parties deemed to have competence to prosecute the offender. A Party will not deem it necessary to notify under paragraph 1 when, for example, it cannot identify properly the property in question.

Paragraph 2 imposes an obligation upon State B to notify as soon as possible the Party concerned: this may be the state to which the cultural property removed belongs, or the state of which its owner is a national. That notification aims at bringing the facts and circumstances to the attention of a Party presumed to be interested in the sense that it may use its competence to prosecute the offender and subsequently obtain restitution.

It follows that there is no obligation under this paragraph to notify a Party which availed itself of the right not to apply Article 13, paragraph 1, sub-paragraph e (see Article 28).

Paragraph 4 imposes upon State A the obligation to notify immediately the other Parties that are supposed to have competence to prosecute the offender. A major purpose of this notification is to identify the owner of the cultural property found.

It is underlined that the purpose of the provision in paragraph 6 is twofold: to facilitate the discovery of the property and, especially, to alert the public against getting involved in transactions concerning such property. ICPO-Interpol on its own initiative already affords good publicity to thefts of cultural property. The Parties concerned should facilitate the circulation of the Interpol notices.

Any Party may, under the conditions laid down in Article 27 decide not to apply this article.

Article 8

This article concerns the execution of letters rogatory. By «letters rogatory», in this article, is meant a mandate given by an authority of the requesting Party to an authority of the requested Party to perform in its place one or more actions which are specified in the mandate. The authority of the requesting Party is either an authority that has instituted proceedings, or an authority that has delivered a judgment, or an authority that has the power to enforce a judgment that was given. It should be understood that both «proceedings» and «judgment» are being used in the sense given to these words in Article 1 of the Convention.

The rule of double incrimination applies here to the extent that the scope of this Convention is limited in Article 3 to those offences that are listed in Appendix III and are considered as offences relating to cultural property by both the requesting and the requested Parties. (see Article 26).

The conditions for implementing this article are the following:

- a. that proceedings have been instituted in the requesting Party in respect of an offence relating to cultural property, and
- b. that the letter rogatory be addressed by an authority of the requesting Party to an authority of the requested Party, both authorities being the competent authorities within the meaning given in Article 33, paragraph 3, and
- c. that the requested Party does not avail itself of the rights conferred by Article 27.

Paragraph 1 is worded along the lines of Article 3 of the European Convention on Mutual Assistance in Criminal Matters (1959) (ETS No. 30). It has a general scope.

The expression «in the manner provided for by its law» has a procedural meaning and is therefore not intended to set out a condition for implementation.

Paragraphs 2 to 4 only apply when cultural property has been removed, or is believed to have been removed, to the territory of the requested Party subsequent to an offence relating to cultural property.

Paragraph 2 concerns the seizure and restitution to the requesting Party of cultural property that was the object of an offence in respect of which proceedings were instituted by this Party. Its inclusion in the Convention stems from the fact that the Convention on Mutual Assistance (ETS No. 30), namely Articles 3 and 6 thereof, provides no legal basis for restitution of unlawfully removed property. Indeed these provisions are limited to the seizure and transmission of articles to be produced in evidence. They do not regard property obtained as

the result of an offence as a separate category. The phrase «articles to be produced in evidence» is usually taken to include not merely objects used for committing an offence, but also objects which appear to be the product of it, such as property obtained as the direct result of a theft. But the fact that the latter kind of property is not treated separately means that its transmission remains subject to the general conditions laid down in Articles 3 and 6, namely that the property is requested for evidence and that it must be returned to the requested state.

However, it is to be noted that the Committee of Ministers of the Council of Europe adopted, on 2 December 1977, Resolution (77) 36 recommending to the governments of member states, Contracting Parties to the European Convention on Mutual Assistance in Criminal Matters “that, when applying Articles 3 and 6 of that Convention, the requested party waive the return by the requesting party of property handed over whenever this would facilitate the rapid restitution of the property to its presumed owner”.

Paragraph 3 concerns the restitution of cultural property by way of letters rogatory concerning foreign judgments ordering the return of that property.

It is to be noted that the Convention on the Validity (ETS No. 70), namely its Articles 46 and 47, does not provide a legal basis for the restitution of unlawfully removed property. It refers to confiscation as a sanction whereas the seizure of property with a view to restitution, ordered in a judgment, is not a sanction within the meaning of Articles 1 and 2 of that Convention.

Paragraph 4 contemplates the cases where the request for the return of cultural property is formulated within the framework of an extradition procedure. It is worded on the model of Article 20, paragraph 2, of the European Convention on Extradition (1957) (ETS No. 24). Its scope, however, is modified to include not only cases of death or escape of the person claimed but also any other reasons of fact, such as serious illness, not allowing the transportation of the person.

Paragraph 5 seeks to prevent the provisions in the preceding paragraphs which, although under different conditions, impose on the requested Party an obligation to reconstitute cultural property removed to its territory subsequent to an offence, from being circumvented by that Party's applying certain measures pertaining to its *jus imperium*. Such measures are in particular the seizure or confiscation of property as the result of a fiscal or customs offence committed in respect of that property, such as where the property was seized as a security for the payment of evaded import duties due for the importation of that property.

Articles 9 to 11

These articles set out the rules of procedure applicable to the letters rogatory mentioned in Article 8.

As for the language in which letters rogatory will be written, Article 9, paragraph 1, allows for the Parties to agree on the language which they wish to use in their bilateral relations. In the absence of such an agreement, it gives the requesting Party the choice of either using the language of the requested Party or the official language of the Council of Europe (English or French) that the requested Party indicated by way of a declaration addressed to the Secretary General of the Council of Europe. Where such a declaration has not been made, the requesting Party may use either the English or the French language.

Articles 10 and 11 correspond, in substance, to Articles 19 and 20 of the above-mentioned Convention ETS No. 73.

With a view to meeting particularly strict requirements concerning the formalities involved in producing evidence and documents in some member states, the provisions in Article 10 are open to reservations.

The provisions in Article 10 concern the authentication by an administrative authority of evidence and documents. Therefore they do not conflict with the requirement in Article 9.2 to support a request with an immediately enforceable document.

Part V – Proceedings

Part V is subdivided into four sections which concern respectively:

- I. the punishment of acts against cultural property;
- II. rules of international competence to prosecute and try offences relating to cultural property;
- III. conflicts of competence; and
- IV. the principle of *ne bis in idem*.

Article 12

This article emphasises the gravity of any act that affects cultural property even if it is not, or not yet, an offence relating to cultural property. Moreover, it makes provisions for an obligation incumbent on the Parties to enact legislation or to amend existing legislation in order that such acts should receive a punishment commensurate with their gravity.

Article 13

Paragraph 1 of this article imposes on Parties an obligation to take all necessary measures in order to establish their criminal jurisdiction in respect of offences against cultural property committed under the conditions laid down in sub-paragraphs a to f. However, Parties may make reservations in respect of any of the provisions of this article (see Article 28).

It should be understood that for the purposes of this article, the term «territory» means the territory of the Party in question or, if that Party has made a declaration under Article 24, the territory or territories specified in that declaration.

Sub-paragraph f refers to cultural property reported or believed to be in the territory of the state in question at the time when attention was first given to it in modern times.

Article 14

These articles provide for solutions to positive conflicts of jurisdiction which may arise in particular from the implementation of Article 13. They are inspired by the provisions of Articles 30 to 32 of the Convention ETS No. 73. In accordance with the Convention's general aim, Article 16 adds the criterion of restitution to the other criteria contained in Article 32 of the Convention ETS No. 73.

Articles 17 to 19

These articles are drafted on the model of Articles 35 to 37 of the Convention ETS No. 73. Articles 17 and 18 refer to proceedings or judgments concerning offences relating to cultural property. As to Article 19, it refers to domestic provisions, the implementation of which has a wider effect of *ne bis in idem* than that which would result from the implementation of Section IV.

Part VI – Final clauses

Articles 20 to 36 are, for the most part, based on the «Model Final Clauses for Conventions and Agreements concluded with the Council of Europe» – which were approved by the Committee of Ministers of the Council of Europe at the 315th meeting of the Ministers' Deputies in February 1980. For the most part they do not call for comments.

Article 25

This article contains a federal clause drafted along the lines of Article 34 of the Unesco Convention for the protection of the world cultural and natural heritage (1972). It was deemed necessary to insert such a clause as in some member States of the Council of Europe (for example the Federal Republic of Germany and Switzerland) the federated States (Länder Cantons) have wide, sometimes exclusive competence for the matters dealt with in the Convention. The same may apply to non-member States which might wish to accede to the Convention.

Article 26

By way of a declaration under Articles 2 or 3 any Party may unilaterally extend the Convention's scope of application to certain categories of property or to certain offences. It follows from the rule of reciprocity contained in this article, that such declarations do not bind any other Party which has not itself made a declaration with respect to the same categories of property or the same offences.

Article 27

This article corresponds, in substance, with Article 2 of the Convention ETS No. 30. However, the phrase «other essential interests» appearing in that article was not retained by the draftsmen because they considered that the interest of affording protection to cultural property is an essential interest common to all member states of the Council of Europe that cannot be weighed against other interests.

The scope of application of this article is limited to the provisions of Articles 7 and 8.