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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

**COMPILATION OF REPLIES TO THE MEMORANDUM
ON THE REVISION OF THE 1985 EUROPEAN CONVENTION
ON OFFENCES RELATING TO CULTURAL PROPERTY**

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ANDORRA

Question : convenez-vous que la Convention devrait contenir une nouvelle définition des biens culturels en conformité avec les standards internationaux existants ?

OUI

Questions : convenez-vous que la Convention devrait contenir des définitions plus précises des infractions qui en constituent le noyau dur ? Convenez-vous que la Convention devrait faire référence à « l'appropriation illégitime du produit de fouilles illicites » ?

OUI

Question : convenez-vous que la Convention devrait considérer l' « exportation illicite » comme une infraction faisant partie du noyau dur ?

OUI

Question : convenez-vous que la Convention devrait préciser ce qui est entendu par « négligence caractérisée » ?

OUI

Questions : auriez-vous des commentaires additionnels à ce sujet ? Souhaiteriez-vous aborder d'autres questions spécifiquement liées au droit pénal ?

NON

ARMENIA

1. Definition of cultural property: adopt a definition that meets international standards and facilitates implementation of the Convention

Question: do you agree that the Convention should contain a new definition of cultural property in line with the existing international standards?

Characteristic of cultural property and definitions on its illegal turnover adopted by different international bodies shall not only meet the international standards but also not contradict each other being enshrined in the national legislations.

2. Definition of criminal offences relating to cultural property.

a) Define the “core” offences more precisely (Appendix III §1)

Questions: do you agree that the Convention should contain more precise definitions of its “core” offences? Do you agree that the Convention should make reference to “unlawful appropriation of items unearthed during illegal excavations”?

Existing Convention should differentiate the actions the implementation of which envisages criminal responsibility for illegal turnover of cultural property. What refers to the question of making reference to “unlawful appropriation of items unearthed during illegal excavations” in the frame of Convention, it should be noted the existing necessity as it's a frequently encountered act dangerous for public as a result of which the cultural heritage of a country is endangered.

Different articles of the Criminal Code of the RA envisage punishment for the illegal turnover of cultural property. Article 180/Theft of particularly valuable items/, Article 185 /Willful destruction or spoilage of property/, Article 185, 3 point of the 3rd part /caused destruction of items of historical, scientific or cultural value/, Article 215 part 2 /illegal contraband of cultural values for the transportation of which special rules are established/, Article 264 /Destruction or damage of monuments of history and culture/ and Article 390, 4 point of the 4th part /targeting specially protected, clearly marked, cultural, spiritual and historical monuments, works of art, ceremonial places, and inflicting large damage to the latter as a result of assault, if these facilities are not in near proximity from military objectives and if there is no information attesting to the use of these historical monuments, works of art, ceremonial places by the enemy for military purposes/.

The cases of unlawful appropriation of cultural property depending on the concrete circumstances of the case is punished by Article 175 /Banditry/, Article 178 /Swindling/ and Article 179 /Squandering or embezzlement/ of Criminal Code of the RA.

b) Consider whether illicit export should not form part of the “core” (Appendix III §2 lit. h)

Question: do you agree that the Convention should consider “illicit export” as a “core” offense?

The Convention should differentiate the actions containing crime features against cultural property or historical and cultural heritage. Illicit export of cultural property in the

existence of some features is considered as a crime. Article 215 **/contraband/**of the Criminal Code of the RA envisages the punishment for the mentioned action.

c) Clarify what is meant by “grossly negligent” (Appendix III §2 lit. c)

Question: do you agree that the Convention should clarify what is meant by “grossly negligent”?

If the existing differences in national legislations on the mentioned issue gives rise to unscrupulous purchasers of cultural values to avoid liability prescribed by law and not return other state-owned illegally obtained cultural property, thus the Convention should clarify what is meant by “grossly negligent” by legitimate and precise definition.

CROATIA

Survey of conventions of the Council of Europe which are in direct competence of the European Commission for the crime issues, information

There is a need for a new definition of cultural property in the 1985 European the Convention on offences relating to cultural property. Namely, the Convention of the Council of Europe defines cultural property more narrow than UDROIT and UNESCO Conventions, and it leaves to member states that they themselves define the scope of definition. On the other hand, UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property as well as 1995 UNIDROIT Convention define cultural property in the same way, which has been already adopted as the standard at the international level. Since the possibility of various definition of cultural property is left to member countries, the above mentioned can, apart from this, lead to various application of the Convention, i.e. in some cases to non application of its regulations.

Equally, in the Croatian Penal Code, the seizure of someone else's movable property for the purpose of misappropriation is a theft. It is a matter of aggravated theft when the stolen cultural property or object is of scientific, artistic, historical or technical significance or is in the public collection, protected public collection or is exposed to for public, or if the object is used for religious purposes or is stolen from the church or other building or premises which serve for religious services. It is also a matter of aggravated theft if it is committed in especially dangerous or in brazen manner, as well as by breaking, burglary or overcoming greater obstacles in order to get objects from closed buildings or premises, and if the perpetrator had any weapons or dangerous tools with him.

So, criminal offences of theft and aggravated theft are more detailed defined than in the subject Convention, which could, if we take into consideration that they are about the same defined in details in other member countries of the Convention, bring to difficulties in implementation of the Convention, due to non existence of the uniformed approach to definition of the key terms.

Furthermore, the Croatian Penal Code contains the criminal offence of Illicit Research Activities and usurpation of cultural heritage so we are doing our best that the mentioned activity is one of the key illegal activities to which the Convention on offences relating to cultural property refers. It is logical due to the fact that the first definition of cultural heritage from the Convention refers to the objects of the archaeological researches and excavations (including legal and illegal) which are carried out on land and under water.

We also think that due to existed movements in the international and European practise, which refer to illegal traffic in cultural property and their return, it is necessary that the illegal export of cultural property is entered into key illegal activities covered by the Convention. Moreover, chapter IV of the Convention refers to the return of illegally

exported cultural property so we think that that's why it is necessary to supplement the list of key illegal activities covered by the Convention.

We certainly support the intention that the term "extremely negligent", which refers to acquiring of cultural heritage, is closely defined and explained, in a way as it was done in art. 4 of the UNIDROIT Convention, which later on served for definition of "due diligence" in art. 10 of Directive 2014/60/EU on the return of cultural property which are illegally exported from the state territory of the member countries.

MALTA

According to its preamble the convention seeks to adopt international standards to 'end the offences that too often affect that heritage', and to recognise a common responsibility and solidarity in the protection of the European Cultural heritage. The text of the convention then speaks mostly about trans-frontier offences against cultural heritage.

In particular, the convention addresses the illicit trafficking of cultural heritage. The convention mainly promotes a framework of international cooperation on criminal matters relating to offences involving cultural heritage. In this the main objectives are the establishment of agreed methods of cooperation, restitution of cultural property, proceedings, authorities, etc.

The convention applies to a series of material, natural and anthropological cultural heritage assets which are listed in Annex II. The convention omits references to intangible cultural heritage assets.

As the report states, the convention has not entered into force, given the lack of signatories.

In considering the future of this convention the Council of Europe may wish to examine:

- (i) The value of the convention in its current form, especially in the context of similar instruments that more or less provide frameworks for addressing international illicit trade in cultural heritage assets; in this respect, the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, the *Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995)* and the *EU Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (and 2014 revision)* are key instruments which already fulfil the intended objectives of the Council of Europe convention.
- (ii) The scope and coverage of the convention, especially in those matters which are adequately covered by national legislation; in such cases the Council of Europe convention may be superfluous.
- (iii) Whether the convention should be simplified and re-written entirely (revised) in order for it to be more flexible and relevant as a pan-European instrument, for it not to repeat the provisions and objectives of the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, the *Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995)* and the *EU Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (and 2014 revision)*, as well as the Granada (1985) and Valletta (1992) conventions.
- (iv) Whether the operational measures envisaged in the convention are too cumbersome and difficult to put into practice, especially if such measures might

not adequately parallel, or even if they might hinder, national legislation on the protection of cultural heritage. In this regard, article 1, referring to the definition of cultural property and related offences, is ambiguous and therefore somewhat superfluous in its current version; in any case a number of national legal instruments, such as Malta's Cultural Heritage Act, are not ambiguous about defining heritage and related criminal proceedings/and offences.

In the matter of the restitution of cultural property in the case of illicit trade, the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, the *Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995)* and the *EU Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State* provide better-worded frameworks, a factor which weakens the European Convention on the matter. In reviewing and revising the convention the Council of Europe may therefore wish to examine eliminating those aspects which repeat or weaken other instruments, and at the same time explore those areas which the aforementioned instruments do not cover.

Certain ambiguities which effect the intra-state operations of international conventions should be eliminated: the conventions should adopt definitions which are also common to *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, the *Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995)* and the *EU Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State*, while at the same time allowing state parties to enact their own national definitions of cultural heritage.

- (v) In matters of criminal offences, the convention should be simplified to recognise that any offence against cultural heritage (whether private property or a public good) is regulated by respective national legislation; an over definition of an offence, as in the case of the convention, dilutes the value of cultural heritage and introduces ambiguity at both national and international levels. In particular, national measures against criminal offences can be weakened, as would be the principle of restitution and timely operational redress in the case of international illicit trade in cultural property. By way of definition, a criminal offence concerning cultural heritage need not be conditioned by several different types of offences, whereas a substantive core offences would suffice (eg illegal excavation, illegal trade, illegal appropriation of cultural assets, illegal exploration for antiquities, illegal conservation/restoration, wilful damage, negligence, illegal movement of cultural assets across national frontiers, etc.).

Definitions and categories of criminal offences must not contradict those definitions and categories of offences found in other international instruments or in national legislation.

Offences must form part of a single framework of definitions (of offences) and not classified into 'core' and 'non-core'; there should be no lesser offences.

Finally, for the convention to be truly applicable, the principle of mutual recognition of criminal offences involving cultural heritage assets/property, must not be weakened; this would be contrary to other international instruments and to potential state parties.

- (vi) In revising the convention the Council of Europe may wish to examine how best to simplify the instrument and link it more closely to the Granada Convention (1985) and the Valetta Convention (1992). These European conventions already promote the various actions that state parties have to take in order to protect cultural heritage. Any revisions should consider other international instruments.

- (vii) The convention has to have a focus: should it address international illicit trade, which is already covered by other instruments, or should it address other matters of criminal offences involving cultural heritage?

- (viii) In exploring focused objectives of the convention, the Council of Europe may wish to examine the instrument's operational objectives and relevance.

MOLDOVA, REPUBLIC OF

Question: do you agree that the Convention should contain a new definition of cultural property in line with the existing international standards?

YES

Questions: do you agree that the Convention should contain more precise definitions of its “core” offences? Do you agree that the Convention should make reference to “unlawful appropriation of items unearthed during illegal excavations”?

YES

Question: do you agree that the Convention should consider “illicit export” as a “core” offense?

YES

Question: do you agree that the Convention should clarify what is meant by “grossly negligent”?

YES

Questions: would you have any other additional comments on this topic? Would you like to address any other issues specifically linked to criminal law matters?

NON

NORWAY

Question: do you agree that the Convention should contain a new definition of cultural property in line with the existing international standards?

CoE should also encourage CoE-member states to ratify the UN Conventions on this matter, inter alia UNESCO-1970 and UNIDROIT Convention on the return of objects.

a) Define the “core” offences more precisely (Appendix III §1)

Norway can support this.

Relating to the destruction of cultural property for symbolic purposes by terrorists, should this offence be included?

Questions: do you agree that the Convention should contain more precise definitions of its “core” offences? Do you agree that the Convention should make reference to “unlawful appropriation of items unearthed during illegal excavations”?

Norway can support this. The Convention should refer to «*unlawful appropriation of items unearthed during illegal excavations*».

b) Consider whether illicit export should not form part of the “core” (Appendix III §2 lit. h)

Could CoE consider to implement the principle that both import and export is covered? And that the import is considered “legal” so long as the export” is considered to be “legal” by the country of origin?

Question: do you agree that the Convention should consider “illicit export” as a “core” offense?

See above

Question: do you agree that the Convention should clarify what is meant by “grossly negligent”?

A common understanding is important, but it could be difficult to achieve. Can CoE instead introduce the criteria or normative guidelines to what is considered to be “to exercise due care”/ “due diligence”? “Negligence” would be implied if its noncompliance with the “due diligence”.

Questions: would you have any other additional comments on this topic? Would you like to address any other issues specifically linked to criminal law matters?

The need for national database concerning these offences, inter alia over the criminal complaints regarding the theft of art etc.

PORTUGAL

Question 1: do you agree that the Convention should contain a new definition of cultural property in line with the existing international standards?

YES, in order to have a consistent international framework on this matter.

Question 2 (a): do you agree that the Convention should contain more precise definitions of its “core” offences? Do you agree that the Convention should make reference to “unlawful appropriation of items unearthed during illegal excavations”?

YES

Question 2 (b): do you agree that the Convention should consider “illicit export” as a “core” offense?

YES

Question 2 (c): do you agree that the Convention should clarify what is meant by “grossly negligent”?

YES

Questions: would you have any other additional comments on this topic? Would you like to address any other issues specifically linked to criminal law matters?

NO

SLOVAK REPUBLIC

Question: do you agree that the Convention should contain a new definition of cultural property in line with the existing international standards?

YES

Questions: do you agree that the Convention should contain more precise definitions of its “core” offences? Do you agree that the Convention should make reference to “unlawful appropriation of items unearthed during illegal excavations”?

YES

Question: do you agree that the Convention should consider “illicit export” as a “core” offense?

YES

Question: do you agree that the Convention should clarify what is meant by “grossly negligent”?

YES

SWITZERLAND

- 1) Convenez-vous que la Convention devrait contenir une nouvelle définition des biens culturels en conformité avec les standards internationaux existants ?**

Nous adhérons à l'idée d'une harmonisation de la définition de « bien culturel » afin de faciliter de la mise en œuvre d'une législation internationale et la coopération entre les Etats en matière de lutte contre le trafic illicite de biens culturels. En ce sens, et vu le grand nombre d'Etats l'ayant ratifiée, la définition proposée par la Convention de l'UNESCO de 1970 semble une solution judicieuse.

- 2) Convenez-vous que la Convention devrait contenir des définitions plus précises des infractions qui en constituent le noyau dur ? Convenez-vous que la Convention devrait faire référence à « l'appropriation illégitime du produit de fouilles illicites » ?**

Nous partageons le fait que les définitions des infractions constituant le « noyau dur » de la Convention doivent être plus précises et refléter le plus largement possible les infractions existantes dans les législations nationales des Etats concernés par la Convention (afin de faciliter la ratification). Dans cette optique, il nous semble plus important de mentionner explicitement l'« appropriation du produit de fouilles illicites » comme une infraction à part entière que de préciser ce qu'il faut entendre par appropriation par menace ou violence, éléments difficiles à définir et sujets à de multiples interprétations. Le fait que ces deux éléments entre en compte aggrave certes l'état de fait mais ne permet pas d'atteindre mieux le but premier qu'est celui de la protection du patrimoine culturel et de la lutte contre son trafic illicite.

- 3) Convenez-vous que la Convention devrait considérer l' « exportation illicite » comme une infraction faisant partie du noyau dur ?**

Il nous paraît intéressant et important d'analyser cette possibilité. Néanmoins, il ne faudra pas perdre de vue la question de l'application concrète en pratique. Afin qu'elle ne demeure pas lettre morte, cette disposition impliquerait sûrement la nécessité que chaque Etat connaissance la législation à l'exportation des autres Etats parties.

- 4) Convenez-vous que la Convention devrait préciser ce qui est entendu par « négligence caractérisée » ?**

Il nous semble parfaitement avisé de redéfinir et reformuler cette notion difficile à déceler et à appréhender. En outre, il convient de garder à l'esprit qu'il s'agit d'une notion très discutée par les Etats qui a pu engendrer une certaine réticence chez certains d'entre eux à la ratification de la Convention d'UNIDROIT 1995. Pour cela, nous sommes plutôt de l'avis de ne pas l'intégrer dans le « noyau dur » de la Convention.

- 5) Auriez-vous des commentaires additionnels à ce sujet ? Souhaiteriez-vous aborder d'autres questions spécifiquement liées au droit pénal ?**

Nous trouverions intéressant que la problématique de la confiscation pénale soit abordée, laquelle suite à une infraction pourrait mener concrètement à une restitution au pays d'origine du bien culturel définitivement saisi.

Conclusion

Nous sommes d'avis que la révision de cette Convention permettrait de faire un pas en avant supplémentaire aussi bien dans la lutte contre le trafic illicite de biens culturels et la criminalité organisée à l'échelle internationale que dans la préservation et la sauvegarde du patrimoine culturel.

Elle pourrait en effet permettre de mettre en place une législation pénale commune portant sur les biens culturels et donnant plus de poids et d'efficacité au travail et aux mesures déjà mis en place par chaque Etat.

UNITED KINGDOM

Question: do you agree that the Convention should contain a new definition of cultural property in line with the existing international standards?

Answer: yes, it would be sensible for the definition to follow the existing international standards.

Questions: do you agree that the Convention should contain more precise definitions of its “core” offences? Do you agree that the Convention should make reference to “unlawful appropriation of items unearthed during illegal excavations”?

Answer: yes, it would be sensible for the wording of the offences to be precise and readily compatible with existing legislation in the majority of states. Yes, it would seem to be appropriate for the offences to include illegal excavation.

Question: do you agree that the Convention should consider “illicit export” as a “core” offense?

Answer: yes, this would seem to be a sensible consideration.

Question: do you agree that the Convention should clarify what is meant by “grossly negligent”?

Answer: yes, this would be important to clarify and the wording of the UNIDROIT convention may be a helpful template.

Questions: would you have any other additional comments on this topic? Would you like to address any other issues specifically linked to criminal law matters?

Answer: no additional comments