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**EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)**

**COMMITTEE ON OFFENCES RELATING TO
CULTURAL PROPERTY
(PC-IBC)**

DISCUSSION PAPER

**Elements to be included in the draft Council of Europe Convention on
Offences Relating to Cultural Property**

1st Plenary Meeting

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I. INTRODUCTION

A. BACKGROUND INFORMATION

Illicit trafficking of cultural property is the third most common form of international criminality after arms and drugs trafficking. This estimate should be treated with caution, however, as accurate figures in this area are very difficult to come by. Still, as recent developments illustrate, illicit trafficking in cultural property is a significant phenomenon being increasingly exploited by terrorist groups including the so-called Islamic State (IS).

The Convention on Offences relating to Cultural Property (known as the “Delphi Convention”) was opened for signature by Council of Europe member States on 23 June 1985, but has never entered into force. In fact, only six States have signed it, and none have ratified it.

The main aim of this Convention was to combat illicit trafficking in cultural property through criminal law and to promote co-operation between States. A further aim was to protect European cultural heritage and to raise public awareness of the damages caused by illicit trafficking in cultural property.

At an international level, on 14 November 1970, UNESCO adopted a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which is the most important convention in this area (127 States Parties). UNIDROIT adopted a Convention on Stolen or Illegally Exported Cultural Objects on 24 June 1995. The aim of this Convention is to supplement the 1970 UNESCO Convention, by focusing more specifically on civil law aspects.

The United Nations Office on Drugs and Crime (UNODC), in collaboration with UNESCO and INTERPOL, has recently developed the ‘International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences’.

Moreover, the UN Security Council has adopted a number of resolutions¹ in response to several reports revealing that trafficking in antiquities has become one of the sources of funding, along with oil and kidnapping, of terrorist organisations.

At European level, European Union (EU) institutions have adopted two instruments with a view to preventing the illicit movement of cultural objects: Regulation 116/2009 of 12 December 2008 on the Export of Cultural Goods, and Directive 2014/60 of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State. These acts aim at fostering Member States’ reciprocal recognition of domestic provisions designed to fight the illicit trade in antiquities and the application of border controls.

¹ See Resolutions No. 2199 of 12 February 2015 and No. 2249 (2015) of 20 November 2015.

In April 2015 the ministers responsible for cultural heritage from the 50 States Parties to the European Cultural Convention adopted the “Namur Call”.² With this act, the ministers condemned ‘the deliberate destruction of cultural heritage and the illicit trafficking of cultural property’ and decided to ‘reinforce European cooperation’ to prevent and punish such acts.

In order to ensure a proper follow-up to the relevant Committee of Ministers’ decision [CM/Del/Dec(2013)1168/10.2] on the review of Council of Europe conventions by evaluating the possible added value of updating certain conventions under its responsibility, the European Committee on Crime Problems (CDPC) decided that the Council of Europe should prepare a new criminal law convention to combat the illicit trafficking of cultural property.

It was deemed important that the Council of Europe take the necessary steps to ensure that this new Convention would be ratified by a greater number of States. It was felt that, in order to achieve this, a simpler approach, as regards both the definition of cultural property and the choice of optional offences, should be followed.

On 2 March 2016 the Committee of Ministers of the Council of Europe adopted the terms of reference of the Committee on Offences Relating to Cultural Property (PC-IBC) which will meet over the next two years (2016-2017) and draft the new convention. This Convention should be ready by the end of 2017 and will supersede the 1985 European Convention on offences relating to cultural property.

B. THE WAY FORWARD

A revision of the 1985 Convention could aim to simplify and streamline its language and structure in order to ensure the harmonization of the relevant rules of criminal law. As such, the new Convention could become an important instrument to enhance inter-State co-operation and crime prevention and criminal justice responses with a view to preventing, fighting and punishing the criminal offences that affect the cultural heritage of European countries and beyond.

The added value of a revised Convention on offences relating to cultural heritage can be summarised as follows:

- Firstly, the new Convention could become the only international treaty with a focus on illicit activities in the field of cultural heritage and on the imposition of criminal sanctions.
- Secondly, the new Convention could strengthen the fight against the illicit trafficking in works of art and antiquities in line with the existing international legal instruments.
- Thirdly, the sale of illicitly trafficked antiquities is often linked to organised crime and one of the means that terrorist organisations use to finance their activities. If the international community

² Upon the initiative of the Belgian chairmanship of the Council of Europe’s Committee of Ministers of Culture, the European ministers of culture from the fifty States Parties to the European Cultural Convention gathered in Namur (Belgium) from 22 to 24 April 2015 for their sixth Conference entitled ‘Cultural Heritage in the 21st Century for Living Better Together: Towards a Common Strategy for Europe’.

could act and move towards stamping out this source of income for terrorist organisations, it would be a step forward in the fight against terrorism.

- Fourthly, the new Convention could reflect the developments occurred in international cultural heritage law and practice in the past few decades.
- Finally, the adoption of such a Convention would allow the Council of Europe to play a major role on the international scene in the fight against criminal offences relating to cultural property in particular by enhancing international co-operation.

A first working group meeting was held in Paris on 5 April 2016 where a “Discussion Paper on elements to be included in the draft Council of Europe Convention on offences relating to cultural property”, prepared by Ms Marie Pfammatter, Ph.D. in Law, LL.M., (University of Geneva) and Mr Alessandro Chechi, Ph.D. in Law, (Art-Law Centre, University of Geneva), served as the basis for the discussions.

As a result of this meeting, a revised “Discussion Paper” has been prepared by the Council of Europe Secretariat, together with the experts, containing elements that will be discussed and developed during the first plenary meeting of the PC-IBC which is being held in Strasbourg on 31 May to 1 June 2016. These elements relate in particular to the issues of: purpose of the Convention, scope of the Convention, definitions and substantive criminal law. Based on the discussion to be held at the 1st Plenary Meeting, the Council of Europe Secretariat, with the help of the experts, will produce a first draft for the new Convention. This will also include other more general provisions such as on jurisdiction, prevention, international co-operation, monitoring and capacity building.

Finally in its drafting work the PC-IBC should make full use of the “Model provisions for Council of Europe criminal law conventions” prepared by the CDPC in 2015. This document sets out a certain number of rules to be duly considered by the Council of Europe expert committees in their drafting work when preparing new Council of Europe conventions in the criminal law field. Therefore, these “Model provisions” are intended to be used as guidance by the PC-IBC during the drafting of the future Convention.

II. SUBJECTS / QUESTIONS TO BE DISCUSSED

A. TITLE OF THE NEW CONVENTION

QUESTION 1: Should the title of the new Convention be changed to reflect recent legal and doctrinal developments by replacing the term ‘property’ with the term ‘heritage’?

The terminology in use in this field of law has changed in the last few decades and now the term ‘heritage’ is preferred to the notion of ‘property’. This is demonstrated by the title of the most recent instruments, such as the Council of Europe ‘Framework Convention on the Value of Cultural Heritage for Society’ (2005), the UNESCO ‘Convention for the Safeguarding of the Intangible Cultural Heritage’ (2003), the UNESCO ‘Declaration concerning the Intentional Destruction of Cultural Heritage’ (2003), and the UNESCO ‘Convention on the Protection of the Underwater Cultural Heritage’ (2001).

This shift in terminology aimed at transcending the narrow concept of cultural ‘property’ as the object of private or public (State) rights of a predominantly economic nature. Moreover, the use of the term ‘heritage’ derived from the transformation of the original rationales of protection. Physical protection is no longer sufficient in light of the recognition of the dichotomy between the property and cultural aspects of monuments, sites and artworks. The archetypal property aspect – which denotes the possibility to possess tangible cultural materials, focuses on physical integrity and indicates that marketable assets represent a store of financial value – is completed and accompanied by the cultural aspect – the intangible values (artistic, historical, scientific, etc.) embodied by any cultural object, irrespective of aesthetic significance and monetary value. Finally, the concept of ‘heritage’ permits to embrace the idea that monuments, buildings, sites, spaces and artworks have been inherited from the past as precious and irreplaceable resources and should be protected and nurtured for the sake of future generations.

In sum, today the term (cultural) ‘heritage’ can be regarded as a broad, all-encompassing term of which (cultural) ‘property’ forms a subsection. However, the question is whether the new instrument should cover movable objects or also immovable objects. The 1970 UNESCO Convention speaks of “cultural property”, the 1995 UNDRIT Convention speaks of “cultural objects”. If the new instrument aims at covering only “movable objects” then the notion “heritage” would be too broad.

B. THE MATERIAL SCOPE OF APPLICATION OF THE NEW CONVENTION

QUESTION 2: How should cultural property / object be defined?

The new Convention should contain a single definition of cultural property / heritage in the main text. The condition of designation entails that State authorities identify the categories of objects – according to type, age thresholds, etc. – that qualify for protection. This requirement is contained in both the EU Directive 2014/60 and the 1970 UNESCO Convention. The former act recognizes that each Member State identifies the objects that are among the ‘national treasures’, while the latter establishes that each State designates the objects that are of ‘importance for archaeology, prehistory,

history, literature, art or science'. The fact that both the Directive 2014/60 and the 1970 UNESCO Convention contain this requirement means that most European States agree with this condition. Indeed, many States have passed legislation establishing protective and less trade-oriented rules for designated categories of cultural property. The requirement of designation is an expression of State power. Only State authorities are empowered to identify the assets that belong to the national heritage and that must be protected through legislative, enforcement and diplomatic actions.

It is suggested to adopt a definition based on two texts, the 1970 UNESCO Convention and the EU Directive 2014/60/EU, keeping the main thrust of these documents, namely the power of States to designate the category 'cultural object' and the non-exhaustive list of examples of the 1970 UNESCO Convention. The definition could read as follows:

"This Convention applies to cultural objects that are specifically designated by [each Party]³ as being [among the national treasures of / of national]⁴ importance for archaeology, prehistory, history, literature, art or science, and which belong to the following categories:

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

³ c.f. question 2A below

⁴ c.f. question 2B below

(k) articles of furniture more than one hundred years old and old musical instruments.”

It must be mentioned that the definition contained in the 1970 UNESCO Convention largely inspired the drafting of Appendix II of the 1985 Council of Europe ‘Convention on Offences Relating to Cultural Property’. Furthermore, most Council of Europe member States have ratified the 1970 UNESCO Convention.⁵

QUESTION 2A: Should the definition refer to designations made by the parties to the new Convention (only)?

If the definition proposed above refers to ‘each Party’, the Convention could only serve to protect – by way of criminal law – the cultural heritage of those states that become Party to the Convention. In particular, this would mean that the provisions of the Convention would apply to cultural heritage of non-member States of the Council of Europe only if they are invited to become a Party and accede to the new Convention (c.f. also question 6 below).

Alternatively it could be considered to extend the scope of the new Convention also to all cultural property designated by all States that are Party to the 1970 UNESCO Convention. At least it should be considered to foresee application of the new Convention also to all cultural heritage protected as UNESCO World Heritage (in addition to property designated under national law by the Parties to the new Convention).

Finally, it is to be debated whether the convention could envisage protection for cultural objects, even in the absence of a definition or designation by a Party / State, in order to protect the goods coming from States where such definition does not exist, or is impossible to trace (rogue States, States where strife or civil war has brought administration to collapse).

QUESTION 2B: Should the new Convention refer to “National Treasure” as contained in the EU Directive 2014/60 of 15 May 2014 on ‘The return of cultural objects unlawfully removed from the territory of a Member State’?

The EU Directive 2014/60 uses (based on Art. 36 TFEU) the following definition of “cultural objects”:

“Cultural object means an object which is classified or defined by a Party as being among the ‘national treasures possessing artistic, historic or archaeological value’ under national legislation or administrative procedures.”

The definition proposed – above – for the new Convention attempts to combine the concepts of the UNESCO Convention and the EU Directive by inserting the reference to “national treasure”. This would take into account that the majority of Council of Europe member States are also Member States of the European Union and, as such, are obliged to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2014/60. On the other hand, it could be considered that the presence of such qualified language in the definition of cultural heritage entails

⁵ The exceptions being Ireland, Latvia and Malta.

the risk that small, low-priced items are not deemed worth of protection. Available practice demonstrates that great objects, in terms of dimension and value, are often broken in pieces by traffickers as part of a calculated policy. Fragmented objects can be hidden more easily, do not attract attention at police controls, and can be subdivided amongst various criminals. Criminal groups put on sale fragmented objects to earn greater profits and create a strong and often extortionist bond with buyers. Available reports also demonstrate that small, low-value artefacts looted in conflict zones are on sale on online market platforms, thereby contributing, albeit indirectly, to the financing of criminal and terrorist organisations.

QUESTION 3: Do you agree that the new Convention shall require that each Party adopts such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following offences?

a) *Theft and any other form of unlawful appropriation of cultural objects belonging to another person, with or without violence or threat of violence.*

This offence is universally recognized as a crime to be subject to criminal sanction. Nevertheless it would be appropriate for the new Convention to also apply to the theft of cultural objects.

b) *Destroying, damaging, vandalizing or directing attacks against cultural heritage.*

This offence reflects the serious concern about the growing number of acts of intentional destruction of cultural heritage in the context of civil or international armed conflicts committed in defiance of existing obligations by non-State armed groups.

c) *The actual or attempted exportation of cultural objects, the exportation of which is prohibited or subject to authorization pursuant to national legislation.*

Many States have adopted legislation prohibiting or restricting the export of cultural materials. In contrast to the national laws that provide that ownership of art objects is vested *ipso iure* in the State, export controls do not affect the title to objects as their purpose is simply to prevent or at least control the outflow of artworks (whether they belong to private or public owners).

d) *The actual or attempted importation of cultural objects, the exportation of which is prohibited or subject to authorization pursuant to national legislation.*

Cultural objects – unlike drugs, firearms, counterfeit currency, human organs, etc. – are not regarded as illicit goods as such and, correspondingly, trading in artworks and antiquities becomes illegal only when these items have been stolen, illicitly excavated or illicitly exported. It is submitted that a revision of national legislation to include this offence is necessary in the light of the magnitude of illicitly exported objects flowing into the European art market, especially from conflict zones in the Middle East.

e) *The acquisition in a grossly negligent manner of cultural objects stolen, illicitly exported, or illicitly excavated.*

This offence concerns those persons – be they art professionals, experienced collectors or regular consumers – who have acquired wrongfully removed art objects without having taken the necessary steps to investigate the origin of the objects they were interested in and the status of the transferor and whether it has been legally dealt with. Criminal or administrative sanctions thus stem from the failure to comply with the due diligence standards that are required to those buying and selling art objects.

f) *The making and/or the selling of faked or forged cultural objects, or the fabrication of false documents, with the intention to induce others to buy such cultural objects either as being authentic or as having a licit provenance.*

This offence, which is common to many jurisdictions, aims at preventing and sanctioning the sale of counterfeit art. The recent and well known Bertracchi and Knoedler cases exemplify this issue. Another example is provided by the numerous fake antiquities on sale on online platforms that has been spotted by archaeologists.

g) *Violation of the national rules that prevent or circumscribe the transfer of ownership of specific categories of cultural assets:*

- The alienation of cultural objects which are inalienable according to the legislation of the Party concerned.
- The acquisition of cultural objects which are inalienable according to the legislation of the Party concerned, if the person acquiring the objects knows that they are inalienable.
- The alienation of cultural objects in violation of the legal provisions of a Party which make such alienation conditional on prior authorisation by the competent authorities.
- The acquisition of cultural objects in violation of the legal provisions of a Party which make such alienation conditional on prior authorisation by the competent authorities, if the person acquiring the objects knows that the property is alienated in violation of the law.
- The violation of the legal provisions of a Party according to which the person who alienates or acquires a cultural object is held to notify the competent authorities of such alienation or acquisition.

h) *Violation of the national rules regarding the archaeological objects owned by the State (illicit excavation).*

The legislation of many States provides that archaeological objects are owned by the State. In particular, State ownership extends to objects excavated by duly authorized personnel, objects reported and delivered to the competent authorities by chance finders, objects excavated contrary to the law by clandestine excavators, objects lawfully excavated but unlawfully retained. The role of the State is not that of the guardian or custodian on behalf of the real owners, but that of exclusive owner. The primary function of these laws is to deter the clandestine excavation, to facilitate the recovery of antiquities, and to punish looters.

The following are the most common violations of the national rules regarding the archaeological heritage:

- The violation of the legal provisions of a Party according to which the person who fortuitously discovers an archaeological object is held to declare the find to the competent authorities.
 - The concealment or alienation of an archaeological object discovered fortuitously.
 - The acquisition of an archaeological object discovered fortuitously and not declared to the competent authorities, if the person acquiring the objects knows that they were obtained in violation of the legal provisions of a Party.
 - The violation of the legal provisions of a Party according to which archaeological excavations may only be carried out with the authorisation of the competent authorities.
 - The violation of the legal provisions of a Party according to which the person duly authorised to conduct archaeological excavations is held to declare to the competent authorities the objects discovered as a result of such excavations.
 - The concealment or alienation of archaeological objects discovered as a result of duly authorised excavations.
 - The acquisition of archaeological objects discovered as a result of duly authorised excavations but which have not been declared to the competent authorities as required by the legal provisions of a Party, if the person acquiring the objects knows that the property was obtained in violation of the legal provisions of a Party.
 - The concealment or alienation of an archaeological object discovered as a result of non-authorized excavations.
 - The acquisition of archaeological objects discovered as a result of non-authorized excavations, if the person acquiring the objects knows that they were obtained as a result of such excavations.
 - The violation of the legal provisions of a Party according to which the use of metal detectors in archaeological contexts is either prohibited or subject to conditions.
- i) *The violation of the legal provisions of a Party which make the demolition, modification and restoration of a protected monument, building, site, or structure conditional on prior authorisation by the competent authorities.*
- j) *The violation of the legal provisions of a Party which make the removal of frescoes, coats of arms, inscriptions, tabernacles and other cultural objects from a protected monument, building, site or structure conditional on prior authorisation by the competent authorities, where such cultural objects have at any time formed part of such monument, building, site or structure.*
- k) *Handling cultural objects, which have been stolen or otherwise illegally been removed, regardless of where the original offence was committed.*

This offence, which is generally recognized as a crime to be subject to criminal sanction, is committed by the person who, knowing or believing them to be stolen (or illegally removed) objects, receives the objects, or undertakes or assists in their retention, transfer, disposal or realisation by or for the benefit of another person. This offence relates to the laundering of proceeds of crime and money laundering.

QUESTION 4: Should the new Convention provide for an aggravating factor in the case where an offence is committed by art professionals (such as dealers, auctioneers, experts in museums, libraries, archives etc.) in the exercise of their commercial activity?

This question stems from the following two facts: first, art trade professionals are often required to abide by the higher standards of conduct established by statutory norms or codes of ethics; second, available evidence demonstrates that a number of offences related to the cultural heritage can be committed by art trade professionals. In particular, it has been proved that criminal organizations need the expertise of dealers, restorers, auctioneers and other professionals to give to cultural objects a licit provenance through the fabrication of false papers and/or a false provenance history.

C. OTHER QUESTIONS

QUESTION 5: Which other specific provisions should be included in the draft Convention?

The new Convention will include a number of other provisions that are normally contained in Council of Europe criminal law conventions (c.f. Articles 5 to 16 of the document on “Model Provisions”). For many of these, the standard language set out in that document will be used also to produce the first draft of the new Convention. Do you see a need for any additional provisions to be included in the draft Convention?

QUESTION 6: Shall the new Convention be open for ratification by third States?

Should it be open for ratification by third States, the new Convention would have a broader territorial scope of application. This question is related to the issue discussed under Question 2A above. However, irrespective of whether the scope of the new Convention will be extended also to cultural property designated by States that are not party to the Convention, it could be considered to foresee in the Convention the possibility to invite States that are not members of the Council of Europe to either take part in the negotiations of the draft Convention or to subsequently accede to the Convention (following its entry into force).