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

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

BACKGROUND PAPER

on the Council of Europe Convention on Offences Relating to Cultural Property

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Introduction

The Council of Europe Convention on Offences relating to Cultural Property was adopted in 1985. At that time, offences against material items of cultural heritage were common and the illicit trade in art and antiquities was both extensive and profitable. This is demonstrated by the pillage of archaeological sites in southern European countries and the ensuing smuggling of artefacts, the marketing of forgeries as genuine antiquities, the theft of countless objects from museums, libraries, churches and homes, the attacks against works of art, monuments and buildings by vandals or belligerents.

The state of affairs today is comparable, yet different from the past. On the one hand, cultural heritage continues to be targeted with an alarming frequency. It is not by coincidence that today hardly a week goes by without a new case reported in the press involving stolen or illegally exported objects, illicit excavations and confiscations, the discovery of fake or forged objects, or the prosecution of thieves, tomb-riders, forgers or vandals.¹ In particular, various reports highlight that the number of antiquities from Iraq and Syria imported into the western markets skyrocketed between 2010 and 2014 in connection with the breakdown in law and order in these countries.² Other information on the totality of crime in the field of cultural property can be deduced, for instance, from the databases established by specialist crime teams³ and independent agencies.⁴ On the other hand, States and international organizations have put in place a complex legal framework and established specialized law-enforcement agencies in order to prevent, fight and punish offences against cultural property. As a result, there is more awareness today about the nature, extent, types and motives of such offences.⁵

Moreover, it is important to emphasise other characteristics of contemporary art crimes. First, illicit activities in this field are often of transnational nature. This trend can be explained by considering that, for example, thieves tend to move stolen items where they can profit from their wrongdoing, particularly to countries with weak law enforcement capacity and relaxed rules as to the protection of good faith purchasers, burden of proof or limitation periods. Second, licit and illicit trade in art passes through the same channels. For instance, the trade in antiquities involves local, small-scale groups of looters, and middlemen who have connections with dealers, auctioneers, museums and collectors. Middlemen occupy themselves with the smuggling and laundering of looted archaeological objects

¹ See Bailey M., 'Rathkeale Rovers' Gang Jailed Over £57m UK Museums Thefts', *The Art Newspaper*, April 2016, 8; and McGivern H., 'Italian Police Arrest 13 over €15m Verona Museum Theft', *The Art Newspaper*, March 2016, 8. As for restitution, a number of cases resolved in the past few years and involving a number of European States (Bulgaria, Germany, Greece, Italy and Switzerland) are reported by UNESCO at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/other-cases-of-return-or-restitution-of-cultural-objects/germany-to-iraq/>.

² See Morris L., 'Islamic State Isn't Just Destroying Ancient Artifacts – It's Selling Them', *The Washington Post*, 8 June 2015.

³ The largest database is that of the Italian Carabinieri-Cultural Heritage Protection Office.

⁴ See, e.g., the Art Loss Register and the Central Registry of Information on Looted Cultural Property.

⁵ According to some experts, illicit trafficking in cultural property is the third form of trafficking after arms and drug smuggling. However, this estimate should be treated with caution, as there are no reliable statistics that might help to estimate the size of the illegal market in cultural property. Theft and illicit trade in cultural property are clandestine activities, therefore it is not possible to provide a reliable estimate of their precise magnitude. Moreover, clandestinely excavated objects are not inventoried before they appear on the market. In addition, most States keep statistics on the types of offences committed and not the type of property affected by the offence, making it difficult to determine which of the offences recorded specifically related to cultural property. According to INTERPOL, there are no 'figures [...] to claim that trafficking in cultural property is the third or fourth most common form of trafficking'. See at <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Trafficking-in-illicit-goods-and-counterfeiting>.

that then end up in the legal antiquities markets. Third, it should be noted that art crimes are often linked with organized and white-collar crime and the use and misuse of cultural objects in the context of armed conflicts and social unrests. Therefore, not only it has become common knowledge that theft and the looting of cultural objects is often related to financial and tax offences and to the laundering of the proceeds of their sale,⁶ but also that theft, illicit exportation and iconoclasm have become part of military strategies. In the latter respect, various episodes prove that artefacts have been stolen and smuggled abroad and the revenues used to buy weapons,⁷ and that cultural heritage has been destroyed or desecrated in order to weaken the resistance of the enemies through the mortification and humiliation of their culture. All in all, these are the reasons behind the destruction, looting and trafficking that are taking place in Tunisia, Egypt, Libya, Syria, Iraq and Afghanistan. As is well known, the trafficking in looted objects turns into a vicious circle, in the sense that the buying of artefacts by Western markets – including European art trade professionals – encourages more theft, pillaging and destruction in conflict zones and hence to finance and protract the conflict. Finally, it must be stated that the expansion of offences relating to cultural property contrasts with the relatively modest penalties which are imposed in many jurisdiction and, hence, with their little deterrence.

⁶ The crime of money laundering also refers to the act of buying art with tainted money, or to cleaning the tainted money through art deals.

⁷ See Baker A. and Anjar M., 'Syria's Looted Past: How Ancient Artifacts Are Being Traded for Guns', Time, 12 September 2012.

The legal framework for the protection of cultural heritage

As already mentioned, the international community has produced a number of legal tools in order to prevent the destruction of cultural heritage, curb the illicit trafficking in cultural materials, and foster the international cooperation for the protection of cultural heritage.

The Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was adopted on 14 May 1954, provides that States Parties must respect the cultural property located in their own territory as well as in other States; must refrain from any use of the property and its immediate surroundings for military purposes; must refrain from directing any act of hostility against such property; must prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of cultural property. The First Protocol to the 1954 Convention regulates the circulation of cultural property in time of war by contemplating obligations for occupying powers to prevent and avoid any exportation of cultural objects from occupied territories and, in the event that such exportation would occur, to provide restitution. In 1999, the system of the 1954 Convention was completed by the adoption of a Second Protocol. This established individual criminal responsibility and defined the serious violations which have to be punished.

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. This Convention formulates basic principles for the protection of cultural objects and calls on States Parties to adopt measures to combat illegal trafficking, protect the national cultural heritage, prevent the illegal export, protect the cultural objects imported unlawfully from other signatory States and ensure that such property be returned upon request from the country of origin.

On 24 June 1995 the International Institute for the Unification of Private Law (UNIDROIT) adopted the Convention on Stolen or Illegally Exported Cultural Objects. The aim of this instrument is to supplement the 1970 UNESCO Convention by focusing more specifically on civil law aspects, and in particular on the question of good faith acquisition.

Following the gratuitous demolition of the monumental statues of the Buddhas of Bamiyan committed by the Taliban in 2001, the UNESCO General Conference adopted unanimously the Declaration concerning the Intentional Destruction of Cultural Heritage. By adopting this Declaration, UNESCO Member States confirmed that the deliberate destruction of cultural heritage items of significant importance for humanity constitutes a breach of customary international law, and that State responsibility and individual criminal responsibility derive from the intentional destruction or the failure to take appropriate protective measures.

More recently, the UN Office on Drugs and Crime (UNODC) developed – in collaboration with UNESCO and INTERPOL – the ‘International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences’. Adopted in 2014 by the UN General Assembly, and aimed to harness the potential of the UN Convention against

Transnational Organized Crime of 2000, these non-binding Guidelines call on Member States to assess and review their legislation, procedures and practices 'in order to ensure their adequacy for preventing and combating trafficking in cultural property and related offences'.⁸

It must also be mentioned that the UN Security Council has adopted a number of resolutions⁹ 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 organizations including the Islamic State in Iraq and the Levant (ISIL, also known as Daesh), Al-Nusrah Front (ANF) and other entities associated with Al-Qaida. Experts say that temples and other buildings are destroyed for the camera in order to conceal the evidence of what has been looted and smuggled abroad.¹⁰

At the 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,¹¹ and Directive 2014/60 of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State.¹² 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. Essentially, Regulation 116/2009 aims to prevent the exportation outside of the EU of works of art that have been unlawfully removed from the country of origin, while the Directive concerns the export of cultural objects within the EU, and provides a system under which the judicial authorities of the Member State where a cultural object has been unlawfully imported must order its return to the requesting Member State.

The Council of Europe has adopted a number of conventions on the protection of various aspects of cultural heritage. These include the European Cultural Convention, the European Convention on Offences relating to Cultural Property, and the European Convention on the Protection of the Archaeological Heritage. The European Cultural Convention proclaims that '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' (Article 5), while the Convention on the Protection of the Archaeological Heritage calls on the States Parties to institute a legal system for the protection of the archaeological heritage and to take the necessary steps to ensure that museums and similar institutions do not acquire antiquities suspected of coming from uncontrolled finds or illicit excavations (article 10). The Convention on Offences relating to Cultural Property was adopted to combat illicit trafficking in cultural property through criminal law, to promote co-operation between States in criminal matters and to raise public awareness of the damage caused by the illicit trade. It thus served as a complement to the European Convention on Mutual Assistance in Criminal Matters and the European Convention on Extradition. Moreover, it is worth mentioning the 'Namur Call', which was adopted in

⁸ See at <http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-mandate.html>.

⁹ See Resolutions No. 2199 of 12 February 2015 of 21 May 2015, and No. 2249 (2015) of 20 November 2015.

¹⁰ See Fisk R., 'Isis Profits from Destruction of Antiquities by Selling Relics to Dealers – and Then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting', *The Independent*, 3 September 2015; and D'Arcy D., 'Isil Holds Heritage to Ransom to Fund Fighters, US Expert Warns', *The Art Newspaper*, 2 July 2015.

¹¹ This repealed and replaced Regulation 3911/92 of 31 December 1992.

¹² This repealed and replaced Directive 93/7 of 27 March 1993.

April 2015 by the ministers responsible for cultural heritage from the 50 States Parties to the European Cultural Convention.¹³ 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.

¹³ 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’.

Why the Convention on Offences relating to Cultural Property has not attracted support from CoE member States?

The Convention on Offences relating to Cultural Property was opened for signature by Council of Europe Member States in Delphi on 23 June 1985, but has never entered into force. Only six States have signed it, and none have ratified it.

Arguably, the Convention has not attracted much international support because of its formulation. The main text of the 1985 Convention focuses on the scope, the principles governing co-operation in criminal matters, and methods of inter-State co-operation with a view to the restitution of cultural property. The specification of the categories of cultural property and the criminal offences which fall within the scope of the Convention is achieved by way of enumerations in Appendix II (which lists examples of cultural objects) and Appendix III (which lists types of criminal offences). The lists provided for in Appendices II and III are subdivided into two sections. The first section of the two appendices defines the core of the Convention. In other words, the first section of both Appendices II and III enumerates the categories of cultural property and of criminal offences in respect of which the implementation of the Convention is mandatory. These categories were intentionally reduced to a minimum in order to have a large number of States on board to ratify the Convention. However, States were given the possibility to enlarge the scope of application of the Convention by including one or more of the categories of property and / or offences listed in the second section of Appendices II and III. It follows that the 1985 Convention does not contain a single and unique definition of cultural property applicable to all State Parties and gives a large leeway to States as to the criminalization of offences not comprised in the first section of Appendix III. In other words, it allowed for an implementation *à la carte* of its rules. As part of the same problem, it must be emphasized that, under Article 26 on the reciprocity rule, a State has a duty to co-operate with another State 'in so far as it would itself apply this Convention in similar cases'. In other words, the Convention allows inter-State cooperation only between the States that have adopted the same choices as to the categories of cultural property and criminal offences that fall within the scope of the Convention.

Another problem is the selection and the scope of the 'core' offences listed in Appendix III (§1 lit. b). For example, the offence 'appropriating cultural property with violence or the use of threats' is questionable as it could refer to theft with violence or the use of threat or the appropriation of undiscovered cultural property with violence or the use of threat. However, the appropriation of property that has been illicitly excavated is usually carried out without either violence or the use of threats. Also, the distinction between violence and the use of threats is rather blurred. Therefore, it is not easy to determine to which type of conduct this offence refers to.

One can also submit that most States decided not to ratify the 1985 Convention because some of the classical offences against cultural property were not among the core offences listed in the first section of Appendix III, namely the destruction or damaging of cultural property, the illicit excavation of archaeological objects, and the illicit exportation of cultural property.

The possible revision of the Convention on Offences relating to Cultural Property

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 can become an important instrument to enhance inter-State cooperation 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.

Besides the fact that it would lead to the criminalization of the conducts set forth therein, the added value of a revised Convention on offences relating to cultural heritage can be summarized 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. In effect, existing international instruments display greater caution in mobilizing punitive responses in this field. The 1954 Convention and its two Protocols – as well as the other instruments adopted in the areas of international humanitarian law¹⁴ and international criminal law¹⁵ that contain norms on the protection of cultural property – focus only on extreme situations of armed conflict and on the most important cultural assets. Therefore, it appears that these instruments cannot be used to impose sanctions on situations other than war crimes, such as in the case of the destruction of minor artefacts by negligent or inexperienced soldiers. Likewise, the instruments that have been adopted in the field of the circulation of cultural objects – such as the 1970 UNESCO and the 1995 UNIDROIT Conventions – mostly rely on preventive measures and the procedures of return, restitutions and compensation, whereas criminal law sanctions have a residual role. The main reason is that in this field other relevant interests have to be taken into account, notably the principle of free circulation and the rights of good faith possessors. Moreover, it should be mentioned that the idea to introduce a new protocol on illicit trafficking in cultural objects to the UN Convention against Transnational Organized Crime has not been taken up. However, UNODC presented in 2014 “International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences”, available online: https://www.unodc.org/documents/organized-crime/trafficking_in_cultural/RES-681-86/A_RES_69_196_E.pdf.¹⁶
- Secondly, the new Convention could strengthen the fight against the illicit trafficking in works of art and antiquities. Available evidence demonstrates that looters in the Middle East, whether or not related to terrorist groups, smuggle looted artefacts via Turkey, Jordan and Lebanon to sell them to dealers and other middlemen based in Europe and elsewhere. It should be noted, however, that States could harvest the full potential of the revised Convention only by combining

¹⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (1977); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977).

¹⁵ See Statute of the International Criminal Court (1998), and Statute of the International Criminal Tribunal for the former Yugoslavia (1993).

¹⁶ See footnote n° 8.

the revision of criminal legislation with the strengthening of national laws which implement international legal instruments, such as the 1970 UNESCO Convention, as regards the definition of State ownership of cultural heritage items, in particular concerning archaeological heritage.¹⁷

- Thirdly, the revised Convention could require the States Parties to prosecute and punish not only the persons that have committed offences against cultural heritage in other States, such as the so-called foreign fighters that have participated in the looting or destruction of the cultural heritage items in present-day conflict zones in the Middle East, but also the juridical persons that have participated, directly or indirectly, in the trafficking in cultural property.
- 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 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.

¹⁷ In this sense, it is useful to remind the UNESCO - UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects (<http://www.unidroit.org/english/documents/2012/study70a/s-70a-main-e.pdf>). These non-binding provisions constitute a model that can be used by States to modify their legislation in order to declare explicitly that archaeological objects, including undiscovered antiquities, belong to the national patrimony, and hence that the cultural objects excavated contrary to the law or legally excavated but illicitly retained are deemed to be stolen objects. In the absence of similar resolute statements, the courts of the States where stolen objects are found are unable to order restitution.