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

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

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## I. INTRODUCTION

Further to the 67th plenary session of the CDPC from 1 to 4 December 2014, during which we made the case for revising the 1985 European Convention on Offences relating to Cultural Property (ETS No. 119) (hereafter “the Convention”), we are sending you a memorandum on certain “key” issues related to the main points highlighted.

As current events show, illicit trafficking in cultural property is an important phenomenon and one that is increasingly linked to organised crime. By way of example, in Greece, in July 2014, six icons were stolen from the Monastery of the Presentation of the Virgin in the Temple in the village of Monastiri. Also in Greece, a reliquary was stolen from the Church of St Apostles in Aidonoxori.<sup>1</sup> At the beginning of March 2015, the Mosul museum in Iraq was looted by Islamist militants who destroyed numerous important items of cultural property and kept many others with the intention of selling them on the international market in order to fund their operations.<sup>2</sup> Also in early March, several artefacts of considerable value were stolen from the Chinese museum at Fontainebleau castle in France.<sup>3</sup>

In view of the frequent nature of the criminal acts committed against cultural property, it is essential that the Council of Europe acquires the means to combat illicit trafficking in cultural property through criminal law, particularly as there are, as yet, no other conventions dealing with these issues at international level.<sup>4</sup> Revising the Convention, therefore, would provide an opportunity to specifically address the criminal aspects related not only to illicit trafficking in cultural property, but also to the destruction of cultural heritage.

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<sup>1</sup> See <http://www.unesco.org/new/fr/culture/themes/illicit-trafficking-of-cultural-property/greece-2014-thefts/>.

<sup>2</sup> See <http://mobile.reuters.com/article/idUSKBN0LW0GQ20150228?irpc=932;>  
[http://www.washingtonpost.com/world/is-looted-syrian-art-showing-up-in-london-to-fund-activities/2015/02/25/785ab630-bcd0-11e4-b274-e5209a3bc9a9\\_story.html](http://www.washingtonpost.com/world/is-looted-syrian-art-showing-up-in-london-to-fund-activities/2015/02/25/785ab630-bcd0-11e4-b274-e5209a3bc9a9_story.html).

<sup>3</sup> See [http://www.liberation.fr/culture/2015/03/02/vol-au-musee-chinois-du-chateau-de-fontainebleau\\_1212781](http://www.liberation.fr/culture/2015/03/02/vol-au-musee-chinois-du-chateau-de-fontainebleau_1212781).

<sup>4</sup>It is interesting to note, however, that in September 2014, the UN General Assembly adopted a text on “International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences”. In addition, the United Nations Office on Drugs and Crime (UNODC) is preparing Guidelines on “Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking”.

## II. WHAT ARE THE KEY POINTS THAT NEED REVISING IN ORDER TO MAKE THE CONVENTION MORE EFFECTIVE?

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

At present, the definition of cultural property provided in the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property is accepted as standard at international level and was adopted by the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.

Insofar as a large number of Council of Europe member States are Parties to the UNESCO Convention, it seems sensible to amend the Council of Europe Convention in order to bring it into line with the existing international standard. This would also obviate the need for Council of Europe States to agree on a new definition of cultural property.

Under Articles 2 and 26 of the Convention and Appendix II, moreover, the definition of cultural property is divided into two parts, one mandatory and the other optional, with the result that the Convention may not apply in the same way to all the States Parties. It is relevant, therefore, that the revised definition contained in the Convention be the same for all States Parties, so as to encourage firstly ratification and application of the Convention and, secondly, co-operation between States in combating illicit trafficking in cultural property.

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

### **2. Definition of criminal offences relating to cultural property**

Appendix III to the Convention lists the criminal offences covered.

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

Under Article 3 §1 (Appendix III §1), States must, at the very least, recognise the following acts as criminal offences:

- thefts of cultural property,
- appropriating cultural property with violence or menace, and
- receiving of cultural property where the original offence is listed in the Convention and regardless of the place where the latter was committed.

Since these three offences form the “core” of the Convention, it is essential that their content be clear and readily compatible with the domestic legislation of each State Party. At present, it is difficult, for example, to understand how violence differs from menace, or to differentiate between appropriating cultural property and theft.

When listing the offence of appropriating, moreover, specific reference could be made to unlawful appropriation of items unearthed during illegal excavations given that such acts, which are, besides, very common in illicit trafficking, already constitute an offence in most States and so would not be out of place in the “core”.

**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”?**

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

Illicit export is not a “core” offence under the Convention. There is now, however, a tendency in States to return to the country of origin cultural property that was exported in breach of their domestic legislation on the movement of cultural property. In addition, because illicit trafficking is essentially a cross-border activity, the illicit export of cultural property is a fundamental part of this trafficking. The question naturally arises, therefore, as to whether such conduct should not be included in the core.

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

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

It is a well-known fact that the differences in the legal systems protecting *bona fide* purchasers are conducive to illicit trafficking in cultural property. This is a sensitive subject, therefore. Under Appendix III §2 lit. c, “the acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft” is to be treated as a criminal offence.

The problem with this definition is as follows: under what circumstances may a purchaser be considered to have acted in a “grossly negligent” manner? The wording of Article 4 paragraph 4 of the Unidroit Convention of 1995<sup>5</sup> is helpful, for example, in determining whether a purchaser acted in good or bad faith as it provides certain criteria

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<sup>5</sup> Art. 4 of the Unidroit Convention of 1995: “(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object. (2) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought. (3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person. (4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances. (5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

for this purpose and could perhaps serve as a source of inspiration, as it did for Directive 2014/60/EU<sup>6</sup> (Art. 10).

Once again, the question arises as to whether this offence should not form part of the “core”, thereby helping to prevent the culpable acquisition of cultural property of illicit origin.

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

### **3. An *à la carte* Convention**

The choice offered to States under the current Convention, in terms of the definition of cultural property and the criminal offences covered, might have been expected to encourage more States to sign up. In the event, however, this *à la carte* Convention has proved to be less successful than hoped. Because of its structure, the definition of cultural property and the large number of criminal offences listed, the current text has perhaps hindered the process of implementation at national level.

### **III. CONCLUSION**

To conclude, we believe that revising the Convention would allow the Council of Europe to assume a major role in combating illicit trafficking in cultural property and international organised crime. Although many States already have criminal legislation on cultural property, the only way to combat this phenomenon effectively is through joint action at international level.

**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?**

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<sup>6</sup> Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast)