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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

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

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Purpose of the Convention

- 1 The purpose of this Convention is:
- a) The purpose of this Convention is to prevent and combat [all crimes and infractions relating to cultural property/objects, including destruction, theft and illicit trade];
 - b) [to protect the rights of victims of the offences established-under this Convention];
 - c) [to strengthen international cooperation among the Parties against all crimes and infractions relating to cultural property/objects taking into account existing international agreements in matters of criminal cooperation and cultural protection].
- [2 In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a [specific] follow-up mechanism.]

Scope and use of terms

QUESTION 1: HOW SHOULD CULTURAL PROPERTY/OBJECT BE DEFINED?

We suggest the adoption of a definition based on two texts, the EU Directive 2014/60 and the 1970 UNESCO Convention. We kept the main thrust of these documents, namely the power of States to designate the category 'cultural object'. In addition, we kept the non-exhaustive list of examples of the 1970 UNESCO Convention, and we propose not to retain the definition 'national treasure' provided by the EU Directive.

- 1 This Convention applies to cultural property/objects that, on religious or secular grounds, are specifically designated by each Party as being of 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;
- (k) articles of furniture more than one hundred years old and old musical instruments.

2 For the purposes of this Convention:

QUESTION 2: SHOULD THE CONVENTION DEFINE THE TERMS ‘OFFENCE’, ‘PROCEEDINGS’, ‘JUDGMENT’, ‘SANCTION’?

We do not think that it is necessary to define the terms ‘offence’, ‘proceedings’, ‘judgment’, ‘sanction’ (as in the current text of the 1985 Convention) because (i) these are defined by national laws, (ii) a definition by the CoE may hamper national implementation.

Substantive criminal law

[QUESTION 3: SHOULD THE PARTIES TO THE CONVENTION COMMIT TO PENALIZE ALL OFFENCES AGAINST CULTURAL PROPERTY PROVIDED FOR BY THE CONVENTION, OR SHOULD THEY BE ALLOWED TO CHOOSE THE OFFENCES THAT CAN BE PENALIZED (AS IN THE CURRENT 1985 CONVENTION)?

We suggest that all offences should be penalized by the Parties in order to ensure the effective implementation of the Convention.

QUESTION 4: WHICH OFFENCES SHOULD BE PROVIDED FOR BY THE CONVENTION? SHOULD THE CONVENTION INCLUDE OFFENCES COMMITTED WITH NEGLIGENT BEHAVIOUR?

To achieve the declared purposes, we suggest that the Convention should cover the following criminal behaviours:

- theft of cultural property/objects
- illicit excavation of cultural property/objects: the legislation of many States (the so-called ‘patrimony laws’) provide that ownership of archaeological objects excavated contrary to the law or licitly excavated but illicitly retained is vested *ipso iure* in the State. The role of the State is not that of the guardian or custodian on behalf of the real owners, but that of exclusive owner. For this reason, this type of legislation may require the finder of a cultural object to declare it to the State, and, consequently, it may provide for such an object to be forfeited to the State in the event that the finder does not report the find. This means that the person removing an antiquity without permission is a thief and that such antiquity is stolen property. The primary function of these laws is to deter the clandestine excavation of archaeological sites by making looted antiquities unsaleable. Logically, they also aim to recover the possession of antiquities from subsequent purchasers and to punish the looters.)
- destruction or damaging of cultural property/objects
- the (knowing) reception of stolen of cultural property/objects
- illicit exportation of cultural property/objects: many States have adopted legislation prohibiting or restricting the export of cultural materials. In contrast to patrimony laws, export controls do not affect the title to objects because their purpose is to prevent the outflow of artworks. These export regulations do not enjoy extraterritorial effect in the sense that a State is not obliged to recognize or enforce the export regulations of another State. In other words, although source nations can legitimately enact domestic export control laws prohibiting or restricting the export of cultural materials, they cannot create an international obligation for other States to recognize or enforce those measures.

QUESTION 5: HOW SHOULD THE CONVENTION ADDRESS THE QUESTION OF THE ACQUISITION OF CULTURAL PROPERTY/OBJECTS IN A 'GROSSLY NEGLIGENT MANNER' (APPENDIX III, 2.C, 1985CONVENTION)? SHOULD THE CONVENTION ESTABLISH A DUE DILIGENCE STANDARD?

We believe that the Convention should contain a due diligence standard in order to address all hypothesis where objects stolen, illicitly excavated or illicitly exported are transferred and acquired on the market. As a standard, the Convention could adopt the criteria provided by both the 1995 UNIDROIT Convention (Articles 4(4) and 6(2)) and the EU Directive 2014/60 (Article 10): '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'.

(QUESTION 6: should the Convention deal with the issues of restitution and its conditions?)