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

**REVIEW OF THE COUNCIL OF EUROPE CONVENTIONS WITHIN THE DIRECT  
RESPONSIBILITY OF THE CDPC**

Document prepared by the CDPC Secretariat  
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## European Convention on Offences relating to Cultural Property (ETS No.: 119)

### I. Introduction

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. Indeed, only six States have signed it, and none have ratified it.

The main aim of this convention is to combat illicit trafficking in cultural property through criminal law and to promote co-operation between States. It thus serves as a complement to the European Convention on Mutual Assistance in Criminal Matters (ECMA) and the European Convention on Extradition (ECEx). A further aim is to protect European cultural heritage and to raise public awareness of the damages caused by illicit trafficking in cultural property.

According to some statistics, 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.<sup>1</sup> Still, as recent developments illustrate, illicit trafficking in cultural property is a significant phenomenon. Switzerland, for example, returned a number of archaeological objects to Italy in March 2014,<sup>2</sup> and in July 2014 Germany returned a few thousands artefacts to Greece.<sup>3</sup>

The importance of illicit trafficking in cultural property, whether because of its scale or because of a growing awareness of the need to protect cultural heritage, can be seen in the number of international and regional conventions, with many organisations now seeking to curb the traffic 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 probably the most important convention in this area (127 States Parties).

Similarly, 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. As will be seen below, the rules on bona fide acquisition are a key issue in combating the illicit traffic in cultural property.

At the same time, the United Nations Office on Drugs and Crime (UNODC) is currently framing guidelines on “Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking”.<sup>4</sup>

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<sup>1</sup> This is partly because clandestinely excavated objects are not inventoried before they appear on the market with the result that it is difficult to assess the scale of this traffic, owing to lack of awareness of the unlawful acts. At the same time, 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. See: [www.interpol.com](http://www.interpol.com).

<sup>2</sup> For further information: <https://www.news.admin.ch/message/index.html?lang=fr&msg-id=52210> (consulted on 26 August 2014) (French only).

<sup>3</sup> For further information: [http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_ws1\\_1\\_08/07/2014\\_541191](http://www.ekathimerini.com/4dcgi/_w_articles_ws1_1_08/07/2014_541191) (consulted on 26 August 2014) and <https://plone.unige.ch/art-adr/news-actualite/over-10-600-artifacts-looted-in-wwii-returned-to-greece> (consulted on 26 August 2014).

<sup>4</sup> <https://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-mandate.html> (consulted on 26 August 2014).

At European level, there is a Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State dated 15 March 1993<sup>5</sup> and a Regulation of 9 December 1992 on the export of cultural objects (Council Regulation No. 3911/92). The Directive concerns the export of cultural objects within EU Member States whereas the Regulation deals with the export of cultural objects outside the European Union.

When discussing illicit trafficking in cultural property, it is important to bear in mind that countries are “split” between “exporting” States which tend to favour tougher laws on trafficking and “importing” States which, on the contrary, wish to protect the art market and prefer flexible laws in this area.

In the light of the above, it is worth looking at the reasons preventing States from ratifying the Council of Europe Convention on Offences relating to Cultural Property.

## **II. Illicit trafficking in cultural property**

It is important firstly to consider briefly what illicit trafficking in cultural property involves. Usually what is meant by the term “illicit trafficking in cultural property” is the following:<sup>6</sup>

- the illicit export of cultural property
- illicit excavations
- criminal offences relating to cultural property

### a) Illicit export:

Cultural property is deemed to have been illicitly exported if it is removed from a country’s national territory (whether by its legitimate owner or otherwise), in breach of national legislation on the protection of cultural heritage. Such legislation generally comes under the heading of public law. Whenever a State requests the return of cultural property that has been illicitly exported from its territory therefore (i.e. in breach of the national legislation prohibiting the export of the property or making such export subject to authorisation) and imported into the territory of another State, the implication is that the requested State recognises the public law legislation of the requesting State. Recognising and enforcing another State’s public law is often problematic, however. As a result, illicitly exported property is seldom returned to the State of origin solely on the ground that there has been a breach of the latter’s national legislation, owing to a failure to recognise foreign public law. International co-operation in cases of illicit export of cultural property (which, furthermore, has not been the subject of a criminal offence) very often remains a dead letter therefore.

### b) Illicit excavations:

The term “illicit excavations” refers to the unlawful appropriation of property that has been excavated either lawfully or unlawfully. Such excavations generally concern archaeological objects and many States treat the unlawful appropriation of excavated objects as a criminal offence.

### c) Criminal offences:

The most common criminal offences as regards illicit trafficking in cultural property are theft, receiving, unlawful appropriation of products of excavations and laundering. Unlike in the case of illicit export, States are favourably disposed towards international co-operation in

<sup>5</sup> This directive was revised in May 2014.

<sup>6</sup> See also Marie Boillat, *Le trafic illicite de biens culturels et la coopération judiciaire internationale en matière pénale*, Etudes en droit de l’art, vol. 22, Genève 2012, p. 197 s.

criminal matters, because the offences in question are, in general, universally recognised as criminal acts.

### **III. The Convention on Offences relating to Cultural Property:**

The Convention on Offences relating to Cultural Property is made up of the basic text and three appendices. This Convention has been drafted in such a way as to impose certain “core” requirements on any States wishing to ratify it and to enable States which wish to go further in the fight against illicit trafficking in cultural property to include additional provisions, whether in terms of how cultural property is defined (Appendix II) or in terms of the types of conduct outlawed (Appendix III).

The basic text of the Convention focuses mainly 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 (execution of letters rogatory, proceedings, competence, etc.).

The real substance of the Convention is defined in the appendices, with Appendix II providing a definition of the cultural property covered by the Convention and Appendix III listing the types of conduct considered criminal offences under the Convention. We will therefore focus our attention on the appendices to the Convention.

Before examining the appendices, it is worth concentrating particularly on article 34 of the Convention on bilateral agreements. Since the aim of the Convention is to promote cooperation among States, article 34 should be drafted positively<sup>7</sup> and not negatively as it is currently drafted.

#### **a) Definition of cultural property (Appendix II to the Convention):**

Under Article 1 of the Convention, the definition of cultural property is divided into two parts. The first paragraph constitutes the “core” of the Convention (Art. 1 §1 of the Convention) and States are therefore bound to consider the property listed here as cultural property. They may or may not consider as cultural property the property mentioned in the second paragraph of the Convention (Art. 2 §2 of the Convention).

Article 1 of the 1970 UNESCO Convention defines the concept of cultural property, a definition that is now widely accepted as standard and which was adopted by Unidroit in the Unidroit Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

The definition provided in Article 1 of the Convention on Offences relating to Cultural Property is not the same as the commonly used one found in the 1970 UNESCO Convention. It also differs from the definition used in the European Directive (Art.1 of the Directive) which refers to the concept of “national treasure”, on which individual States are then free to elaborate according to their domestic law.

In order to facilitate implementation of the Convention on Offences relating to Cultural Property, it might be helpful to adapt the definition of cultural property given in Appendix II to the definition provided in the 1970 UNESCO Convention, insofar as the vast majority of States which have ratified the 1970 Convention also belong to the Council of Europe. That said, some EU countries have admittedly entered a reservation concerning the definition

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<sup>7</sup> See for example the wording of the article 3 of the Unidroit Convention from 1995, which also deals with conclusion of bilateral agreements.

given in the 1970 UNESCO Convention, in order that it should be compatible with their domestic law.<sup>8</sup>

Again in order to make the Convention more effective, it would also be better to have a single definition of cultural property that would be binding for all member States rather than allowing them to pick and choose.

## **b) Criminal offences covered by the Convention**

Appendix III to the Convention on Offences relating to Cultural Property lists the different criminal acts outlawed under the Convention. According to the Convention's explanatory report, this appendix is divided into two sections. The first section constitutes the "core" of the Convention, and is mandatory for all States wishing to ratify the instrument (Art. 3 § 1 of the Convention), while the second section contains a list of additional offences which individual States can decide to include or not when ratifying the Convention (Art. 3 § 2 of the Convention). According to Article 3 § 3 of the Convention, States may also add other behaviours that affect cultural property and are not listed in Appendix III to the Convention.

### **i) The core of the Convention (Appendix III §1)**

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

- thefts of cultural property
- appropriating cultural property with violence or menace
- receiving of cultural property where the original offence is listed in §1 and regardless of the place where the latter was committed.

This handful of offences makes up the "core" of the Convention. Theft (Appendix III §1 lit. a) and receiving (Appendix III §1 lit. c) are treated as offences in most legislations, whether they relate to cultural property or not. In principle, therefore, such illicit acts are already part of criminal law in the majority of States.

Appropriating cultural property with violence or the use of threats, on the other hand (Appendix III §1 lit. b) perhaps constitutes a more recent offence whose substance, because of how it is worded at present, is not easy to grasp. The limits between this type of conduct and theft with violence, for example, are very difficult to be determined. The appropriation of property that has been illicitly excavated is usually carried out without either violence or the use of threats. The difference between violence and the use of threats is likewise rather blurred. It is not easy, therefore, to determine to which types of conduct derived from illicit trafficking in cultural property this offence refers. In addition, "appropriating cultural property with violence or menace" is also related to the offence of receiving, because property which the perpetrator has appropriated with violence or menace may be the subject of a further offence, namely "receiving", under the terms of Appendix III §1. Since "appropriating cultural property with violence or menace" is one of the "core" offences listed in the Convention, it is important that it be defined more clearly.

Moreover, the offence of "Destruction or damaging of cultural property of another person" (appendix III §1 lit. d) could be a principal offence due to the frequent and recent episodes

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<sup>8</sup> For a comprehensive assessment on this subject, see Marie Cornu, *La mise en œuvre de la Convention de l'UNESCO en Europe*, Paris 2012  
[http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Cornu\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Cornu_en.pdf) (consulted on 30 September 2014).

as well as the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, which has been approved unanimously by all the UNESCO member States in 2003.

**ii) Illicit export (Appendix III §2):**

Recognising the illicit export of cultural property as a criminal offence is not a *sine qua non* for ratifying the Convention (Appendix III § 2 lit. h) as it is not part of the “core”.

The Council of Europe was the first to tackle the problem of illicit export of cultural property by outlawing such acts, the aim being to encourage international co-operation whenever property is illicitly exported from a State’s national territory (even if no criminal offence has been committed).

It would appear, however, that States are not ready to make illicit export a criminal offence. If we look, for example, at the 1970 UNESCO Convention, it will be observed that, when it comes to implementing this Convention, national attitudes to illicit export can be broadly divided into two groups. Canada, for example, regards as illicit any import carried out in breach of national export legislation. The majority of States, however, have concluded bilateral agreements with various other States Parties to the 1970 UNESCO Convention, and regard as having been illicitly exported only the property referred to in those agreements.

Similarly and in an effort to achieve the best possible consensus, the text of the Unidroit Convention of 1995 has one set of rules for stolen property<sup>9</sup> and another for property that has been illegally exported. Because the Unidroit Convention is a legally binding instrument which places heavy obligations on the States concerned, it was important that property which had been stolen (and hence the subject of an offence) be treated differently from property that had been illegally exported.

Given States’ reaction to the 1970 UNESCO Convention and the 1995 Unidroit Convention, and the fact that governments are already reluctant to recognise national legislation banning the export of cultural property, suggest it is too early to make illicit export a criminal offence. The mere mention of illicit export of cultural property as a criminal offence might be enough to deter some States from ratifying the Convention therefore.

**iii) *Bona fide* acquisition (Appendix III § 2)**

Protecting *bona fide* acquirers is a central plank in the fight against illicit trafficking in cultural property. In civil law systems, *bona fide* acquirer usually enjoys protection, unlike in common law systems where the “*nemo dat quod non habet*” rule applies.

In contrast to the 1970 UNESCO Convention which is not self-executing, the 1995 Unidroit Convention is directly applicable and contains rules whereby persons who acquired stolen property in good faith are not protected. It is mainly because of this lack of protection for *bona fide* acquirers that the Unidroit Convention has proved less popular than the UNESCO one, with States whose laws protect *bona fide* acquirers unwilling to change the rules in

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<sup>9</sup> It is worth noting that under Art. 3 para. 2 of the Unidroit Convention, any object derived from clandestine excavation is considered stolen, when consistent with the law of the State where the excavation took place.

cases where the acquisition related to cultural property. As a result, only 36 States, most of them “exporting States”, have signed up to the Unidroit Convention.

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 (§2 lit. c Appendix III) is not one of the “core” offences listed in the Council of Europe Convention on Offences relating to Cultural Property. States can thus decide whether to include it or not at the time of ratification. It is not clear from reading this offence whether a *bona fide* acquirer, even if guilty of gross negligence, might, in certain circumstances, be protected. Similarly, it could be useful to specify what we mean by “circumstances” surrounding the acquisition<sup>10</sup>.

Even though 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 not among the “core” offences listed in the Convention, this could still pose an impediment to ratification therefore. It might also be advisable to make it clear what is meant by “grossly negligent”. Even in civil law systems, an acquirer will only benefit from *bona fide* protection if they are deemed to have exercised due diligence when acquiring the cultural property.

#### **IV. Final considerations**

To sum up, the Convention on Offences relating to Cultural Property introduces a system for combating illicit trafficking in cultural property through criminal law. It is important that the Council of Europe takes the necessary steps to ensure that this Convention, which responds to a real need to combat this problem, is ratified by a greater number of States.

It is felt that, in order to achieve this, a more readable text is needed. For with its dual definition of cultural property and large number of optional offences, the Convention is difficult to implement in practice.

As far as defining cultural property is concerned, it would seem sensible to adopt a definition in line with the one used in the 1970 UNESCO Convention or the European Directive. The disparity between the definitions is hardly conducive to a clear understanding and effective implementation of the Convention.

As regards criminal offences, the “core” of the Convention ought to be clarified, and in particular the offence of “appropriating cultural property with violence or menace”.

In view of States’ attitudes towards illicit export and the acquisition of cultural property in a negligent manner, it makes sense to keep such acts as non-core offences.

That said, the fact that offences are divided into “core” and non-core offences is hardly helpful when it comes to implementing the Convention. Under Article 26, which establishes the reciprocity rule, States have a duty to co-operate only if the cultural property affected by the act in question is defined as cultural property in both States and if both States have elected to include this act in the list of offences.

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<sup>10</sup> For example, article 4 par. 4 of the Unidroit Convention describes the circumstances allowing to judge the buyers’ good or bad faith: “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.”

Other points:

- Might it be helpful to take stock of European Union law (Directive and Regulation)?
- Might it be worth creating a link with the Council of Europe Convention on the Protection of the Archaeological Heritage (Malta Convention)?
- Would it be helpful to make a link to UNODC's work and, in particular, the Convention against Transnational Organized Crime? The Council of Europe Convention perhaps does not do enough to underline the international dimension of the illicit trafficking of cultural goods.
- Would it be helpful to make a link with the treaties about the protection of heritage in times of war (simply in the preamble) since recent history demonstrates that it is in periods of instability that the most offences listed in appendices III are committed?

### **Conclusion**

At its Plenary Session in December 2014, the CDPC considered this topic to be very interesting with the offences relating to cultural property worth examining in more detail. The CDPC asked the consultants to draft a Memorandum, containing some key issues on this subject. The Memorandum also contains some questions addressed to all CDPC delegations and has been sent to member States before the Plenary Session of June 2015. At this Session, following the replies received to these questions, the CDPC decided to set up a small drafting group of experts in order to continue working on this Convention.