



**EUROPEAN COMMITTEE ON CRIME PROBLEMS**

**(CDPC)**

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

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**Draft**

**Explanatory report to the  
Council of Europe Convention on  
Offences relating to Cultural Property**

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## I. Introduction

1. Cultural property is targeted with an alarming frequency in both peacetime and wartime. 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 cultural objects, illicit excavations, or the prosecution of art thieves, tomb-riders, forgers or vandals. Furthermore, several reports reveal that crimes involving cultural property are often linked with organised and white-collar criminal organisations. Indeed, not only it has become common knowledge that the trafficking in art objects is often related to tax offences and money laundering, but also that looting, illicit exportation and iconoclasm have become common in periods of armed conflicts and internal disturbances.

2. It follows that offences against cultural property put at risk the European cultural heritage and call to action the member States of the Council of Europe. Pursuant to the European Cultural Convention of 1954 (ETS No. 18), “[e]ach Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, [and] shall take appropriate measures to safeguard them [...]” (Article 5). As part of this responsibility, in 1985 the member States of the Council of Europe adopted the Convention on Offences relating to Cultural Property. However, this treaty has never entered into force.

3. In 2015, the European Committee on Crime Problems (CDPC) of the Council of Europe set up the Committee on Offences relating to Cultural Property (PC-IBC) which was given the task of preparing a draft treaty superseding and replacing the 1985 Convention. Four experts were appointed in order to assist the PC-IBC: Alessandro Chechi (Ph.D. in Law, LL.M.; senior researcher at the University of Geneva); Marie Pfammatter (Ph.D. in Law, LL.M.; lecturer at the University of Geneva); Jerome Fromageau (president of the Société internationale pour la recherche en droit du patrimoine culturel); and Sunneva Sætevik (senior adviser at the Norwegian Ministry of Culture, Department of the Arts and Museums).

4. The new Convention of the Council of Europe focuses on illicit activities in the field of cultural heritage and on the establishment of criminal sanctions, and aims to simplify and streamline the language and structure of the 1985 Convention in order to ensure the

harmonization of the relevant national rules of criminal law. As such, the new Convention can become an important instrument to enhance inter-State cooperation, 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.

## **II. Commentary on the provisions of the Convention**

### **Preamble**

5. The preamble describes the purpose of the new Convention, namely to protect cultural property through the prevention of and the fight against criminal offences, and to strengthen international co-operation among States Parties. The drafters wished to emphasise that a concerted international action is key to addressing the recurrent problems posed by the violation of the national and international norms on the protection of cultural heritage as well as the new challenges related to the increasing involvement of organised criminal groups, including terrorist organisations, in the trafficking and destruction of cultural property.

6. The preamble recalls the most important treaties which directly deal with the scope of the Convention: the European Cultural Convention (1954, ETS No. 18); the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954, 249 UNTS 240); the European Convention on Extradition (1957, ETS No. 24); the European Convention on Mutual Assistance in Criminal Matters (1959, ETS No. 30); the European Convention on the Protection of the Archaeological Heritage (1969, ETS No. 66; revised in 1992, ETS No. 143); the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970, 823 UNTS 231); the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (1972, 1037 UNTS 151); the Convention for the Protection of the Architectural Heritage of Europe (1985, ETS No. 121); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995, 34 ILM 1322 (1995)); the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001, 46 ILM 37 (2002)); and the Framework Convention on the Value of Cultural Heritage for Society (2005, CETS No. 199).

7. The preamble indicates that the drafters bore in mind the following legal instruments: the UN Convention against Transnational Organized Crime of 2000; the UNODC International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and other Related Offences of 2014; Resolution 2199 of 12 February 2015 of the UN Security Council (paragraphs 15, 16 and 17); and Resolution 2057 on Cultural Heritage in Crisis and Post-Crisis Situations of the Standing Committee of the Parliamentary Assembly of the Council of Europe of 2015.

8. Furthermore, the drafters were inspired by the following instruments: Council Regulation (EC) 116/2009 of 12 December 2008 on the export of cultural goods; EU Directive 2014/60/UE 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; the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects of 2011; the “Namur Call”, which was adopted in April 2015 by the ministers responsible for cultural heritage from the 50 States Parties to the European Cultural Convention; and Resolution 2249 of 20 November 2015 of the UN Security Council.

## **Chapter I – Purpose, principle of non-discrimination, scope, use of terms**

### **Article 1 – Purpose of the Convention**

9. Paragraph 1 sets out the purpose of the Convention, namely to protect cultural property through the prevention of and the fight against criminal offences, and to strengthen international co-operation among States Parties.

10. Paragraph 2 provides for the establishment of a specific follow-up mechanism (Articles 24-26) in order to ensure an effective implementation of the Convention.

### **Article 2 – Scope and use of terms**

11. The scope of the Convention is expressly limited to the prevention of and the fight against offences relating to tangible items of cultural heritage, either movable or immovable, that fall within the definition of cultural property set out in this article.

12. The second paragraph contains the definition of the term cultural property. This is structured in two parts in order to reflect the material scope of the Convention: the first part deals with movable cultural property (Article 2(2)(a)), the second part deals with immovable cultural property (Article 2(2)(b)).

13. The definition of movable cultural property was inspired by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, and the EU Directive 2014/60 of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State.

14. This definition – together with the non-exhaustive list of examples contained in Article 2(2)(a), which has been drawn from Article 1 of the UNESCO Convention of 1970 – not only covers movable objects that have been found in (or removed from) places located on land, but also materials found in (or removed from) underwater sites. In particular, Article 2(2)(a) comprises: archaeological objects (see (iii)), regardless of whether relics are found by chance or as a result of unauthorised, clandestine excavations; “elements” (or fragments) dismembered from a monument, building, site, moveable object, or structure of other kind, as long as such elements have at any time formed part of the monument, building, site, moveable object, or structure of other kind (see (iv)); digital archives (see (ix)); and objects of religious (or ecclesiastical) interest, that is, any objects – such as books, icons, sculptures, and relics of saints – that are essential to a specific living religious group to manifest, practice, develop, and teach its religious customs and ceremonies.

15. The definition of immovable cultural property reproduces the classification contained in the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 1972: monuments, group of buildings, and sites. The same definition based on these three component parts of immovable cultural heritage appears in the Convention for the Protection of the Architectural Heritage of Europe (1985, ETS No. 121). This definition reflects the current trend towards the enlargement of the concept of the heritage in that it not only covers structures situated underwater, but also assets having a spiritual, religious significance to believers and communities.

16. The new Convention preserves the States Parties’ power to designate the movable and immovable property that fall within its scope of application. The designation by State

authorities is one of the main thrusts of the legal instruments that have been taken into account by the drafters. Although the quantitative or qualitative criteria vary from State to State, national legislation typically provides that protection of cultural property is conditional not only on age but also on its importance on historical, archaeological, artistic, scientific, social or technical grounds. Accordingly, the Convention contains a single definition of cultural property and a condition (designation) that have already been endorsed by the CoE member States that are parties to the UNESCO Convention of 1970 and the UNESCO Convention of 1972, or that are bound by EU Directive 2014/60.

17. The requirement that a movable art object should be defined as cultural property either by any State Party to the new Convention or by any State Party to the UNESCO Convention of 1970 reflects one of the new Convention's objectives, namely to ensure the criminalisation of offences committed against the cultural heritage of States that do not subscribe to the new Convention.

18. For the purposes of the new Convention it is immaterial whether or not the State that specifically designates an object as movable or immovable cultural property pursuant to Article 2(2) is the State of origin or the legitimate owner of such property. In other words, the State of location of a movable cultural property is entitled to designate such property under the new Convention regardless of whether its transfer and/or importation into the country were illegal, while the State of location of an immovable cultural property can designate such a property even if its ownership is disputed. This is due to the fact that the issues of restitution and dispute resolution do not fall within the scope of the new Convention.

## **Chapter II – Substantive criminal law**

19. Chapter II contains the substantive criminal law provisions of the new Convention. The drafters concentrated on the most common and serious offences that may bring about the deterioration or loss of cultural property. As such, Chapter II represents the core of the new Convention.

20. The articles from 4 to 10 aim to ensure the criminalisation of the different components of the phenomenon known as the illicit trafficking in cultural property. As such, these articles complement each other. This becomes clear considering the dynamics of the trafficking in

cultural property stolen or illicitly excavated in peacetime or during armed conflicts. After their removal, these objects are invariably transported abroad. The transnational nature of illicit activities is due to the fact that thieves and smugglers are aware of the legal differences between countries and seek to exploit them to profit from their wrongdoing. This is proved by the fact that stolen or illicitly excavated artefacts are invariably moved to countries where they can be concealed, where the tainted title can be laundered (for instance, through the norms protecting good faith purchasers or the expiry of limitation periods), and then sold, either to individual or institutional collectors, or to art trade companies, such as art dealers and private galleries.

21. The offences that do not affect directly the integrity of cultural property are not included under Chapter II. This is the case of the making and/or selling of faked or forged art objects. The reason is that this offence can bring about the disruption of the security of the art market and of commercial transactions but does not have a direct impact on the preservation of cultural heritage items. On the other hand, the use of cultural property for the purposes of laundering the proceeds of crime and money laundering has not been taken into account because there are other conventions dealing with these issues, such as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005, CETS No. 198), and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990, ETS No. 141).

22. It should be noted that the new Convention targets not only the persons responsible for the disfigurement, destruction or trafficking of cultural property, but also the persons buying or selling artefacts insofar as they disregard existing due diligence standards. In particular, not only art professionals are required to abide by the higher standards of conduct established by domestic statutory norms, but also the ethical guidelines adopted by the art trade associations to which they belong.

23. The offences contained in Chapter II are only punishable when committed intentionally or in a grossly negligent manner. The interpretation of the intention of the offender(s) is left to domestic law.

### **Article 3 – Theft and other forms of unlawful appropriation**

24. Article 3 obliges the States Parties to the new Convention to establish as a criminal offence theft and the other forms of illicit appropriation of movable cultural property. Theft is universally recognised as an offence which is subject to criminal sanction. It can be defined as the criminal act in which property belonging to another is taken without that person's consent. However, theft is a generic term. For this reason, States Parties should establish as a criminal offence any intentional and fraudulent removal of cultural property, regardless of whether the taking occurred with violence or threat of violence (robbery) or with trespass (burglary) or not.

25. In accordance with the definition of cultural property outlined above, States Parties to the new Convention should criminalise not only the removal of cultural property that is commonly defined as movable (such as paintings and vases), but also the dismemberment of elements (such as statues, frescos and friezes) of immovable cultural property. Furthermore, the notion of theft should be used to criminalise the taking of property belonging to private persons, be they natural or legal persons (such as collectors or private galleries) and to States or State-controlled institutions (such as public museums or archives).

26. With respect to publicly owned cultural property, it must be emphasised that many national legislations (patrimony laws) establish that ownership of archaeological objects is vested *ipso iure* in the State, regardless of whether such objects have been previously possessed, documented or inventoried by State officials. In particular, State ownership can extend to: archaeological objects found by duly authorised personnel; objects found and reported to the competent authorities by chance finders (for instance, by the person who finds a piece during the course of agricultural and building activities); objects found by clandestine excavators; and objects found by duly authorised personnel, but retained by them in breach of existing legislation. The fact that most national laws establish the principle of State ownership of cultural property in such clear terms means that the person removing an archaeological object without permission can be prosecuted as a thief, and that the property found by a chance finder can be forfeited to the State if the finder fails to comply with his/her obligation to declare the find to the competent State authorities. In particular, if an object is considered stolen, international judicial co-operation in criminal matters will

generally enable its return to the country where it was discovered. Also, from a private international law point of view, a foreign court having to deal with a claim for restitution, seeing that the country where the object was discovered considers it as stolen on the basis of its patrimony law, will have little difficulty in returning it. In sum, the notion of theft can be used to criminalise the removal and retention of archaeological objects found by clandestine excavators or by chance.

#### **Article 4 – Illegal excavation**

27. Article 4 obliges the States Parties to the Convention to establish as a criminal offence the excavation of movable cultural property and its retention contrary to the law of the State where the excavation took place.

28. Article 4(a) focuses on the unauthorised, unscientific looting carried out by clandestine diggers and treasure hunters either in recorded or undiscovered archeological sites. The seriousness of the phenomenon is emphasized by several reports revealing that trafficking in looted antiquities has become one of the major sources of funding, along with oil and kidnapping, of terrorist organisations such as the Islamic State in Iraq and the Levant (ISIL, also known as Daesh), Al-Nusrah Front and other entities associated with Al-Qaida.

29. Many art-rich countries provide laws that require archaeological excavations to be authorised with an administrative process. This legislation represents a confirmation of the principle of the State ownership of cultural property. The primary function of these laws is to deter and prohibit the clandestine excavation of archaeological sites, the removal of antiquities, human remains and associated objects, on the one hand, and to punish looters, on the other. The reason is that illegal excavations not only cause the disappearance of art treasures and the destruction of objects that are not marketable, but also the loss of historical, scientific and educational information that historians, archaeologists and anthropologists could collect through the scientific excavation and the physical preservation of the site where objects are found. Archaeology considers virtually useless an object deprived of its context.

30. Article 4(b) addresses the situation whereby a cultural object has been excavated by duly authorised personnel in compliance with existing legislation, but it has been retained by them in breach of such legislation. The most common case relates to the situation whereby an

antiquity is not delivered to the competent bodies (such as a museum) by the archaeologist that found it. In the event that the legislation of the State where the excavation took place endorses the principle of State ownership over archaeological objects, unlawfully retained objects can be considered stolen.

### **Article 5 – Illegal exportation**

31. Article 5 obliges the Parties to the Convention to criminalise the exportation of movable cultural property in two different situations. In the first case (Article 5(a)), the exportation is prohibited or subject to the authorization by the law of the State from which the cultural property is being exported – or being caught in the process of exportation. In the case of absolute prohibition, the property concerned is normally inventoried as belonging to the inalienable cultural heritage of the State. In the second case (Article 5(b)), the exportation is prohibited because the property had been previously exported from another State, in breach of the legislation in force in that State (which is often the country of origin), and in turn imported in the State from which such property is being exported – or being caught in the process of exportation (on this second scenario, see also the commentary on Article 6).

32. Many States have adopted legislation prohibiting or restricting the export of cultural property. In the latter case, the (definitive or temporary) exportation of cultural property is subject to an authorization to be issued by the competent national authorities. Export controls not only apply to artefacts inscribed in the national patrimony as components of the inalienable cultural heritage of the State, but also to objects that are in private ownership at the time of their enactment. Generally speaking, these export regulations do not affect the ownership title of cultural property as their purpose is simply to prevent or control their movement.

33. The formal distinction between export regulations and the above-mentioned patrimony laws establishing that ownership of certain categories of cultural property is vested *ipso iure* in the State is critical because only the latter category enjoys extraterritorial effect. This is due to the fact that theft is universally recognised as a crime to be subject to criminal sanction. As a result, a State is not obliged to recognise and enforce the export regulations of another State in the absence of a treaty or a statute. In other words, although source nations could

legitimately enact export control laws, they cannot create an international obligation for market nations to recognise and enforce those measures. However, today a trend is discernible that States are progressively moving towards accepting the extraterritoriality of export laws – and hence facilitating the restitution of illicitly traded cultural property – provided that these laws unequivocally indicate that ownership of such property is vested in the State, either through an explicit statement in the text or through a reference to other national laws.

### **Article 6 – Illegal importation**

34. Article 6 obliges the States Parties to the Convention to establish as a criminal offence the importation of movable cultural property that have been removed from the territory of another State in breach of the legislation of that State. This means that the importation of cultural property into the territory of a State Party should be criminalised as long as the exportation of such property is illegal under the legislation of the country of origin (or the country of its last location).

35. States can legitimately enact legislation prohibiting or restricting the export of cultural materials. However, they cannot create an international obligation for other States to enforce such measures and declare as unlawful the importation of cultural objects. In other words, in the absence of bilateral or multilateral agreements, export regulations do not enjoy extraterritorial effect. One of the reasons is that cultural objects – unlike drugs, firearms, counterfeit currency, human organs, etc. – are not regarded as illicit goods. Nevertheless, as said above in the commentary to Article 5, the number of States that are now committed to recognising and enforcing the export rules of foreign States is growing – as long as these rules unequivocally indicate that ownership of cultural property is vested in the State. The reason is that awareness is growing that international co-operation should be strengthened in order to make preventing and combating transnational crimes concerning cultural property more effective.

## **Article 7 – Acquisition**

36. Article 7 obliges the States Parties to the Convention to establish as a criminal offence the acquisition of cultural property which has been stolen (or otherwise lost against the will of the owner) or removed in breach of the law of the State of its last location, provided that the person that receives the property acted intentionally or in a grossly negligent manner.

37. The term “acquisition” refers to all situations whereby the possession or ownership title to a given cultural object is transferred from one subject to another. It should therefore be understood to cover, in the widest sense, a vast array of hypothesis, either onerous or gratuitous, including sale, donation, loan, and exchange.

38. Article 7 covers the sale of cultural property taking place both through traditional channels (such as flea markets, antique shops and auction houses) and through modern means, notably over the Internet. Several reports demonstrate that countless artefacts are sold on the internet market, for instance on eBay or on the web sites of auction houses, but also via social networks. An examination of a few of these internet platforms reveals that the objects on sale are normally small and low-priced, thereby indicating that artefacts that previously would not be worth looting have now become profitable.

39. Under Article 7, the obligation for the States Parties to criminalise the acquisition of cultural property is limited to those situations where the perpetrator acts intentionally or in a grossly negligent manner. The wording of this article is inspired by the UNESCO Convention of 1970, the UNIDROIT Convention of 1995, and EU Directive 2014/60. According to these instruments, the restitution of illicitly traded cultural property to the requesting entity is subject to the payment of compensation to the possessor, provided that the possessor demonstrates that he/she exercised due care and attention in acquiring the object. In particular, Article 4(4) of the UNIDROIT Convention codifies an international standard of diligence for a flexible assessment of the circumstances of the acquisition: “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". Similarly, Article 10 of Directive 2014/60 provides that: "In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances".

40. The objective of Article 7 is to criminalise the behaviour of any persons – be they experienced collectors or dilettanti – who have acquired illicitly traded cultural property without having taken the necessary steps, for instance, to request evidence of the seller's legal title, and to check (or request) a verification of the origin and licit provenance of such property, including documents providing evidence of legal export (or import). Failure to engage in reasonable efforts to investigate the provenance of the art to be bought means that the standard of care regarding due diligence has not been met. This requirement should also apply to online buyers. In the case of art professionals, it should take into consideration that they are required to abide by the higher standards of conduct established by domestic statutory norms (if any), and the ethical guidelines adopted by the art trade associations to which they belong (if any). For instance, art professionals are required to establish the identity of the seller; obtain a written declaration of the seller's legal title and on his/her right to dispose of the cultural property; inform customers on existing import and export regulations; and maintain an inventory for each transaction including records as to the description of the property, date of transfer of ownership, sale price or appraised value. Apart from international legal instruments, the judicial practice of various States shows the existence of a tendency towards the tightening of the obligation to enquire and research on the part of purchasers, and that the increase in the level of diligence affects the distribution of the burden of proof: a claimant has to prove that the buyer failed to investigate suspicious circumstances, whereas the defendant has to present proof that he/she complied with all obligations of due diligence.

## **Article 8 – Placing on the market**

41. Article 8 obliges the States Parties to the new Convention to establish as a criminal offence the placing on the market of cultural property which has been stolen (or otherwise lost against the will of the owner) or removed in breach of the law of the State of its last location, provided that the person that receives the property acted intentionally or in a grossly negligent manner.

42. The term “placing on the market” should be understood to cover, in the widest sense, the acts of offering for sale and to supplying illicitly traded cultural property as well as its promotion, including through advertising this property.

43. The term “market” should be understood in the widest sense. As such, it covers traditional (flea markets, antique shops and auction houses) and modern (Internet platforms) marketplaces. As said above in the commentary to Article 7, several reports demonstrate that countless artefacts are sold over the Internet, for instance on eBay, on the web sites of auction houses, and via social networks.

44. Under Article 8, the obligation for the States Parties to criminalise the placing on the market of cultural property is limited to those situations where the offender acts intentionally or in a grossly negligent manner. It follows that a person – whether an art trade professional, a collector or a dilettante – can be found guilty of this offence in two different situations. In the first case, the person places on the market an item of cultural property knowing or believing that that property has been stolen (or otherwise lost against the will of the owner) or removed in breach of the law of the State of its last location. The second scenario occurs when a person places on the market an item of cultural property that was acquired without having exercised the required due diligence checks (for instance, requesting evidence of the seller’s legal title, and checking or requesting corroboration of the origin and licit provenance of such property, including documents providing evidence of legal export or import). This second hypothesis is therefore related to the offence under Article 7.

**Article 9 – Falsification of documents**

45. Article 9 aims to criminalise the falsification of documents relating to the origin and ownership history of cultural property. The issue of forgery, that is the production of a spurious work that is claimed to be genuine, is outside of the scope of this Convention.

46. Under Article 9, the States Parties to the new Convention should criminalise the act of making false or incorrect documents relating to cultural property in order to deceive and induce others to believe that such property is authentic or has a licit provenance.

47. Under Article 9, the States Parties should also criminalise the tampering with documents relating to cultural property, which means every act aimed at modifying, altering or defacing documents relating to cultural property in order to deceive and induce others to believe that such property is authentic or has a licit provenance.

**Article 10 – Other offences related to the trafficking in cultural property**

48. The purpose of Article 10 is to ensure that the conducts of the persons supporting the illicit activities of traffickers are covered and criminalised by the Convention. In that sense, this article completes the criminal offences provided for in Articles 3-9 of the Convention.

49. The various conducts described in Article 10 (storage, conservation, restoration, transportation and transfer) should be criminalised by States Parties when committed intentionally and with the knowledge that the property in question derives from or was obtained, directly or indirectly, from a criminal offence. Moreover, this article requires that the perpetrator's involvement is aimed at the illegal exportation, importation, or placement on the market of the property concerned. The illegal exportation, importation and placing on the market constitute criminal offences under the present Convention and are respectively defined at Articles 5, 6 and 8.

50. The term "storage" means the act of keeping cultural property for future use.

51. The term "conservation" means the act of storing cultural property with the additional element of adopting the measures necessary to ensure the proper preservation and protection of such property.

52. The term “restoration” means the process of bringing an item of cultural property to its former, original, or unimpaired condition.

53. The term “transportation” means the act of moving cultural property from one place to another.

54. The term “transfer” means the act with which a person conveys the possession or ownership title of an item of cultural property to another person.

### **Article 11 – Destruction and damaging**

55. Article 11 applies both to movable and immovable cultural property.

56. Under Article 11(a), the term “disfigurement” means the act or process aimed at changing or damaging the external appearance of cultural property without necessarily destroying it.

57. The term “destruction” means the act or process aimed at wrecking or tearing down an item of movable or immovable cultural property to the extent that it no longer exists or cannot be repaired.

58. The ownership status of the property which is disfigured or destroyed is irrelevant, in the sense that States Parties should criminalise these actions even if committed by the owner of the cultural property concerned.

59. Under Article 11(b), States Parties should criminalise under their domestic law the dismemberment of elements of movable or immovable cultural property, such as statues, frescoes, mosaics, with a view of exporting, importing or placing on the market such elements. The illegal exportation, importation and placing on the market constitute criminal offences under the present Convention and are respectively defined at articles 5, 6 and 8 of the Convention.

### **Article 12 – Travelling abroad for the purpose of terrorism in order to commit an offence relating to cultural property**

60. The aim of the provision is to oblige a Party to criminalise the act of travelling to a State other than that of the nationality or residence of the traveller from the territory of the Party

in question, or by its nationals, if the purpose of that travel is terrorism in order to commit an offence relating to cultural property. The travel to the State of destination may be direct or by transiting by other States en route.

61. Due note is taken of the fact that the right to freedom of movement is enshrined in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as in Article 12 of the International Covenant on Civil and Political Rights of the United Nations. However, both of the aforesaid international human rights instruments allow for the right to freedom of movement to be restricted under certain conditions, including the protection of national security, and (as regards Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms) for the prevention of crime.

62. The seriousness of the threat posed by terrorist committing offences relating to cultural property warrants a robust response.

63. In order for a Party to criminalise behaviour under Article 12 of the Convention, two basic requirements must thus be fulfilled: firstly, the real purpose of the travel must be for the perpetrator terrorism in order to commit an offence relating to cultural property; secondly, the perpetrator must commit the crime intentionally and unlawfully. Such purpose and intention are essential elements of the criminal offence as defined by Article 12. They must be proven in accordance with the domestic law of a Party.

64. The Parties are free to choose the manner including the language in which Article 12 of the Convention is transposed in their domestic legislations.

### **Article 13 – Aiding or abetting and attempt**

65. Paragraph 1 requires Parties to ensure that an intentional act of aiding or abetting a criminal offence, as referred to in this Convention, that has been committed by another person, also constitutes a criminal offence. Thus Parties are only required to ensure criminal liability for aiding or abetting where the person who commits a crime is aided by another person who also intends the crime to be committed.

66. Paragraph 2 provides for the criminalisation of an attempt to commit the criminal offences referred to in this Convention. The interpretation of the word “attempt” is left to domestic law. The principle of proportionality should be taken into account by Parties when distinguishing between the concept of attempt and mere preparatory acts which do not warrant criminalisation.

67. As with all the offences referred to in this Convention, Article 13 requires the criminalisation of aiding or abetting and attempt only if committed intentionally.

#### **Article 14 – Jurisdiction**

68. This article lays down various requirements whereby Parties must establish jurisdiction over the offences referred to in this Convention. The obligation in this respect is only to make the necessary provisions in their domestic law, which allow exercising of jurisdiction in such cases. The provision is not intended to require law enforcement authorities and/or courts to actually exercise statutory jurisdiction in a specific case. This Article is considered to set “minimum rules”. Thus it only contains an obligation to “at least” criminalize offences and/or foresee a competence for their courts when the offence is committed under the circumstances described in that article on jurisdiction (c.f. paragraph 5).

69. Paragraph, 1.a is based on the territoriality principle. Each Party is required to punish the offences referred to in the Convention when they are committed on its territory.

70. Paragraph 1.b and .c are based on a variant of the territoriality principle. These subparagraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is useful when the ship or aircraft is not located in the country’s territory at the time of commission of the crime, as a result of which paragraph 1, letter a. would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft, which is merely passing through the waters or airspace of another State, there may be significant practical

impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

71. Paragraph 1.d is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under that principle, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d, if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute him/her.

72. Paragraph 2 concerns the principle of *aut dedere aut judicare* (extradite or prosecute). Jurisdiction established on the basis of paragraph 2 is necessary to ensure that Parties that refuse to extradite a person have the legal ability to undertake investigations and proceedings domestically instead.

73. Paragraph 3 provides for a possibility for Parties to enter reservations on the application of the jurisdiction rules laid down in paragraph 1.d. A Party may determine that it reserves the right not to apply, or to apply only in specific cases or conditions paragraph 1.d.

74. In certain cases, it may happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, in order to avoid duplication of procedures and unnecessary inconvenience for suspects and witnesses or to facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution. In some cases it may be best for one country to prosecute some alleged perpetrators, while one or more other countries prosecute others. Either method is permitted under paragraph 4. The obligation to consult is not absolute; consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

75. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 5 of this article confirms that this Convention does not prevent Parties from establishing in its domestic law further reaching provisions on exercising extra-territorial jurisdiction such as,

for example, in respect of offences committed by persons who are not nationals but habitual residence of that State.

### **Article 15 – Liability of legal persons**

76. Article 15 is consistent with the current legal trend towards recognising a liability of legal persons for criminal offences committed by certain natural persons. The intention is to make commercial companies, associations and similar legal entities (“legal persons”) liable for criminal actions performed for their benefit by anyone in a leading position in them. Article 15 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences referred to in the Convention for the benefit of the entity.

77. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity’s benefit. Third, a person in a leading position must have committed the offence. The term “person who has a leading position” refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

78. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity (“legal person”) where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity’s authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity’s benefit; and 3) commission of the offence was made possible by the leading person’s failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity’s

behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

79. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any one or all of these forms of liability as long as the requirements of Article 16, paragraph 2 are met, namely that the sanction or measure be “effective, proportionate and dissuasive” and includes monetary sanctions.

80. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In particular, foreseeing a liability of the legal person should not be considered as an alternative to imposing a criminal sanction on the offender and vice versa.

#### **Article 16 – Sanctions and measures**

81. This article is closely linked to Articles 3 to 12 of this Convention, which define the various criminal offences that shall be punishable under domestic law. Paragraph 1 applies to natural persons and requires Parties to match their criminal law response to the seriousness of the offences and lay down sanctions which are “effective, proportionate and dissuasive” and which may include penalties involving deprivation of liberty and/or monetary sanctions. It should be noted that, under Article 2 of the European Convention on Extradition (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

82. Paragraph 2 concerns the liability of legal persons in accordance with Article 16. In this case, the sanctions shall also be “effective, proportionate and dissuasive”, but may be criminal or noncriminal monetary sanctions such as administrative sanctions or civil liability.

83. In addition, paragraph 2 gives examples of other measures which could be taken in respect of legal persons, with particular examples given: temporary or permanent disqualification from the practice of commercial activities; exclusion from entitlement to public benefits or aid; placing under judicial supervision; or a judicial winding-up order. The list of measures is not mandatory or exhaustive and Parties are free to apply none of these measures or envisage other measures.

84. Paragraph 3 requires Parties to ensure that measures concerning seizure and confiscation of the proceeds derived from criminal offences can be taken. This paragraph should be read in the light of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which are based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon.

85. Paragraph 3a provides for the seizure and confiscation of any instrumentalities, which have been used in the commission of any of the offences in accordance with this Convention. Paragraph 3 b, provides for the seizure and confiscation of proceeds of the offences, or property whose value corresponds to such proceeds.

86. The Convention does not contain definitions of the terms “confiscation”, “instrumentalities”, “proceeds” and “property”. However, Article 1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) provides definitions for these terms, which may be used for the purposes of this Convention. The term “seizure” means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority. “Confiscation” refers to a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. “Instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences. “Proceeds” means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any “property” as defined below. The wording of paragraph 3 takes into account that there may be differences of domestic law as regards the type of property, which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds (“substitute assets”). “Property” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

## **Article 17 – Aggravating circumstances**

87. Article 17 provides a list of circumstances (mentioned in letters (a) to (f)) that States Parties may take into consideration under their domestic law in the determination of the sanction for the offences established in this Convention. The obligation to take account of these circumstances does not apply where they already form part of the constituent elements of the offence under the law of the State Party.

88. The objective of the first aggravating circumstance (a) is where the offence was committed by persons abusing the confidence placed in them in their capacity as professionals. Such persons will generally be the experts and specialists working in the art and cultural environment, such as restorers, conservators, curators, auctioneers and dealers. The drafters are of the opinion that the definition of the persons targeted under Article 17(a) should be left to the States Parties.

89. The second aggravating circumstance (b) is where the offence was committed by public officials tasked with the conservation or the protection of movable or immovable cultural property, such as the personnel of public museums, monuments or archaeological sites. This aggravating circumstance is triggered when a public official abuses his or her position and refrain from performing his or her duties with a view to obtaining an undue advantage or a prospect thereof.

90. Under the third aggravating circumstance (c), the commission of a criminal offence in the framework of a criminal organisation should be considered as an aggravating circumstance. The Convention does not define the term “criminal organisation”. States Parties may refer to other international instruments which define the concept, such as the United Nations Convention against Transnational Organized Crime.

91. The fourth and fifth aggravating circumstances (d) and (e) focus specifically on terrorism. States Parties should consider as an aggravating circumstance the fact that an offence against cultural property was committed for terrorist purposes or for the purpose of financing terrorism activities.

92. The last aggravating circumstance (f) indicates that recidivism – that is, the fact that the perpetrator has previously been convicted of offences established under the Convention –

should be considered as an aggravating circumstance by the State Parties under their domestic law.

### **Article 18 – Previous sentences passed by another Party**

93. At domestic level, many legal systems provide for harsher penalties where someone has been previously convicted for a similar offence. Traditionally, previous convictions by foreign courts were not taken into account on the grounds that criminal law is a national matter and that there can be differences of domestic law, and because of a degree of suspicion of decisions by foreign courts.

94. Such arguments have less force today in that internationalisation of criminal law standards is tending to harmonise different countries' law.

95. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts' notice for sentencing purposes is an additional practical difficulty. However, in the framework of the European Union, Article 3 of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member States of the European Union in the course of new criminal proceedings has established in a general way – without limitation to specific offences – the obligation of taking into account a previous conviction handed down in another (EU member) State.

96. Therefore, Article 18 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts may, to the same extent as previous convictions by domestic courts would do so, result in a harsher penalty. They may also provide that, under their general powers to assess the individual's circumstances in setting the sentence, courts should take those convictions into account. This possibility should also include the principle that the offender should not be treated less favourably than he would have been treated if the previous conviction had been a national conviction.

97. Under Article 13 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter. In the framework of the European Union, the issues related to the exchange of information contained in criminal records between member States are regulated by the Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member States. However, Article 18 does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts.

### **Chapter III – Investigation, prosecution and procedural law**

#### **Article 19 - Initiation and continuation of proceedings**

98. Article 19 is designed to enable the public authorities to prosecute criminal offences referred to in this Convention *ex officio*, without a victim having to file a complaint. The purpose of this provision is to facilitate prosecution, in particular by ensuring that criminal proceedings may continue regardless of pressure or threats by the perpetrators of offences towards victims.

#### **Article 20 – Investigations**

99. Article 20 lays down the principle that professionals responsible for criminal proceedings concerning offences relating to cultural property should be trained in this area.

100. Article 20 provides for Parties to ensure the effective investigation and prosecution of offences established under the Convention in accordance with the fundamental principles of their domestic law. Conducting effective criminal investigations may imply the use of special investigation techniques in accordance with the domestic law of the Party in question, such as financial investigations, covert operations, and controlled delivery, taking into account the principle of proportionality.

101. In order to take account of the diversity of States, resources available and systems for organising investigation services, the negotiators wanted to make this provision very flexible, the aim being that it should be possible to mobilise specialised personnel or services for investigations into the sexual exploitation and abuse of children. Thus, Article 20 provides for specialised units, services or, quite simply, persons, for example when the size of the State concerned is such that there is no need to set up a special service.

### **Article 21 - International co-operation in criminal matters**

102. The article sets out the general principles that should govern international co-operation in criminal matters.

103. Paragraph 1 obliges Parties to co-operate, on the basis of relevant international and national law, to the widest extent possible for the purpose of investigations or proceedings of crimes referred to in this Convention, including for the purpose of carrying out seizure and confiscation measures. In this context, particular reference is made to the European Convention on Extradition (ETS No. 24), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30), the Convention on the Transfer of Sentenced Persons (ETS No. 112), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the Council of Europe Convention Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism (CETS No.198) but also to the United Nations Convention of 15 November 2000 against Transnational Organized Crime (UNTOC, Palermo Convention).

104. Paragraph 2 invites a Party that makes mutual assistance in criminal matters or extradition conditional on the existence of a treaty to consider the Convention as the legal basis for judicial co-operation with a Party with which it does not have a treaty relationship referred to in paragraph 1. This provision is of interest because of the possibility provided to third States to sign the Convention. The requested Party will act on such a request in accordance with the relevant provisions of its domestic law which may provide for conditions or grounds for refusal. The additional reference here to Articles 16 and 18 of the UNTOC Convention are intended to refer Parties to the possibility to utilize in this context also these provisions even where the UNTOC Convention as such cannot be applied as the

particular type of crime falls outside of its scope of application. Any action taken under this paragraph shall be in full compliance with the Party obligations under international law, including obligations under international human rights instruments.

#### **Chapter IV – Measures for prevention and other administrative measures**

105. It is standard for recent criminal law conventions of the Council of Europe to contain provisions aiming at the prevention of criminal activity. The present Convention is no exception, and the drafters found that such preventive measures should be implemented at both domestic and international levels in order to have effect.

#### **Article 22 – Measures at domestic level**

106. Article 22 provides that States Parties should adopt legislative and other necessary measures in view of achieving the purposes of the Convention. Essentially, States Parties are obliged to address some of the root causes of the offences relating to cultural property, such as the lack of data and specialised national bodies, and the lack of awareness among the general public and the stakeholders of the art market.

107. The objective of Article 22(a) is to ensure that all States Parties have an inventory concerning the cultural property designated pursuant to Article 2 of the present Convention in order for such property to be easily identified.

108. Article 22(b) indicates that the issue of export and import certificates by the competent State authorities is very important in the fight against trafficking as it simplifies the work of custom officers in determining whether cultural property is legally exported and/or imported.

109. Under Article 22(c), States Parties should oblige dealers, auction houses and other persons involved in the second-hand trade to maintain records of all transactions. This requirement is important in order to record the ownership history of cultural property and to fight against the trafficking in cultural property. States Parties should also adopt measures to make sure that such records are available, under certain conditions defined by their domestic law, to competent authorities.

110. Article 22(d) encourages States Parties, in order for the cooperation between national authorities and international cooperation to be efficient, to designate or create a central national authority with the task of coordinating the activities related to the protection of cultural property.

111. Article 22(e) provides that special measures of protection in times of instability or conflict should be taken by each State Party where cultural property is endangered in their own territory or abroad. This is exemplified by the recent initiatives adopted by Russia and Switzerland. In September 2015, Switzerland offered to protect, through refuges (or “safe havens”) established on Swiss territory, Syrian cultural treasures.

112. Article 22(f) refers to the importance for States Parties to maintain records of the number of offences committed against cultural property under their jurisdiction in order to take proper actions and make requests for international assistance.

113. Article 22(g) obliges States Parties to pay special attention to the increasing trafficking of cultural property over the Internet and to adopt all necessary measures to monitor existing internet platforms.

114. Article 22(h) obliges States Parties to make it mandatory for finders to report and deliver to the competent authorities the cultural property found by chance (for instance, during the course of agricultural and building activities).

115. Under Article 22(i), each State Party should promote awareness-rising campaigns addressed to the general public regarding the importance of cultural property as a component of the national heritage, of the European cultural heritage and of the common heritage of humankind. Moreover, the public should be informed of the criminal sanctions which could be imposed as a result of the committing any of the offences set out in the present Convention.

116. Article 22(j) focuses on State-controlled museums, archives and similar institutions. Each State Party should ensure that these collecting institutions do not acquire cultural property that has been the object of a criminal offence under the present Convention. Moreover, this article encourages States Parties to provide information and training to the personnel of such institutions on the prevention and fight against criminal offences related to cultural property.

117. Article 22(k) focuses on private entities, such as museums, galleries, dealers, auction houses and other similar institutions. Each State Party should ensure that these entities do not acquire cultural property that has been the object of a criminal offence under the present Convention. In addition, States Parties should subject these private entities to an obligation to report suspicious cases of illicitly traded cultural property.

118. The purpose of Article 22(l) is to ensure that internet providers and all actors involved in on line sales take proactive measures in the fight against criminal offences relating to cultural property, for example by posting disclaimers advising prospective buyers to check and request a verification of the licit provenance of the cultural property they are interested in, or establishing self-regulation policies.

119. Article 22(m) focuses on the role of free ports in the trafficking of cultural property. As seen in available practice, free ports have been often used by art dealers and collectors to store illicitly traded artworks. Under this article, States Parties should ensure that free ports are not used to store stolen or illicitly excavated cultural property either by adopting legislative measures or by encouraging free port authorities to establish and implement internal norms. For instance, as a result of a 2015 regulation adopted by the Swiss Parliament, the managers of free ports now must keep a list of the tenants of the areas of the free port as well as of the “sensitive goods” present in the free port. The notion of “sensitive goods” includes items of cultural property, which should be inventoried with all information concerning their value, their certificate of origin and the identity of the person entitled to dispose of them. These lists must be presented to the customs authorities, who may request access to free ports and conduct controls at any time.

### **Article 23 – Measures at international level**

120. Article 23 obliges States Parties to cooperate, to the widest extent possible, with the aim of preventing the commission of the offences covered under the present Convention. In particular, States Parties should cooperate with a view to facilitating consultation and the sharing of information pertaining to cases of illicitly traded cultural property recovered within their respective jurisdictions. Moreover, States Parties should ensure collaboration with regard to data collection. This provision aims to change the current state of affairs

whereby the inventories or databases on illicitly traded cultural property that have been created by State bodies function independently from one another. States Parties should thus enter into a dialogue not only to link these national databases, but also to link them to international ones, such as the INTERPOL database on stolen works of art.

## **Chapter V – Follow-up mechanism**

121. Chapter V of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The follow-up system foreseen by the Convention is based essentially on a body, the Committee of the Parties, composed of representatives of the Parties to the Convention.

### **Article 24 - Committee of the Parties**

122. Article 24 provides for the setting-up of a committee under the Convention, the Committee of the Parties, which is a body with the composition described above, responsible for a number of Convention-based follow-up tasks.

123. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year of the entry into force of the Convention by virtue of the 10th ratification. It will then meet at the request of a third of the Parties or of the Secretary General of the Council of Europe.

124. It should be stressed that the negotiators sought to allow the Convention to come into force quickly while deferring the introduction of the monitoring mechanism until such time as the Convention was ratified by a sufficient number of States for it to operate under satisfactory conditions, with a sufficient number of representative States Parties to ensure its credibility.

125. The setting up of this body will ensure equal participation of all the Parties in the decision-making process and in the Convention monitoring procedure and will also strengthen co-operation between the Parties to ensure proper and effective implementation of the Convention.

126. The Committee of the Parties must adopt rules of procedure establishing the way in which the monitoring system of the Convention operates, on the understanding that its rules of procedure must be drafted in such a way that the Parties to the Convention are effectively monitored.

### **Article 25 – Other representatives**

127. Article 25 contains an important message concerning the participation of bodies other than the Parties themselves in the Convention follow-up mechanism in order to ensure a genuinely multisectoral and multidisciplinary approach. It refers, firstly, to the Parliamentary Assembly and the European Committee on Crime Problems (CDPC), and the Steering Committee for Culture, Heritage and Landscape (CDCPP), secondly, more unspecified, to other relevant intergovernmental or scientific committees of the Council of Europe which, by virtue of their responsibilities would definitely make a worthwhile contribution by taking part in the follow-up of the work on the Convention.

128. The importance afforded to involving representatives of relevant international bodies and of relevant official bodies of the Parties, as well as representatives of civil society, in the work of the Committee of the Parties is undoubtedly one of the main strengths of the follow-up system provided for by the negotiators. The wording “relevant international bodies” in paragraph 3, is to be understood as inter-governmental bodies active in the field covered by the Convention. The wording “relevant official bodies” in paragraph 4, refers to officially recognised national or international bodies of experts working in an advisory capacity for Parties to the Convention in the field covered by the Convention.

129. The possibility of admitting representatives of inter-governmental, governmental and non-governmental organisations and other bodies actively involved in preventing and combating offences relating to cultural property as observers was considered to be an important issue, if the follow-up of the application of the Convention was to be truly effective.

130. Paragraph 6 prescribes that when appointing representatives as observers under paragraphs 2 to 5 (Council of Europe bodies, international bodies, official bodies of the Parties and representatives of non-governmental organisations), a balanced representation of

the different sectors and disciplines involved (the law enforcement authorities, the judiciary, the cultural authorities, as well as civil society interest groups) shall be ensured.

#### **Article 26 - Functions of the Committee of the Parties**

131. When drafting this provision, the negotiators wanted to base itself on the similar provision of the Council of Europe Convention against Trafficking in Human Organs (CETS No. 216), creating as simple and flexible a mechanism as possible, centered on a Committee of the Parties with a broader role in the Council of Europe's legal work on combating offences relating to cultural property. The Committee of the Parties is thus destined to serve as a centre for the collection, analysis and sharing of information, experiences and good practice between Parties to improve their policies in this field using a multisectoral and multidisciplinary approach.

132. With respect to the Convention, the Committee of the Parties has the traditional follow up competencies and:

- plays a role in the effective implementation of the Convention, by making proposals to facilitate or improve the effective use and implementation of the Convention;
- plays a general advisory role in respect of the Convention by expressing an opinion on any question concerning the application of the Convention, including by making specific recommendations to Parties in this respect;
- serves as a clearing house and facilitates the exchange of information on significant legal, policy or technological developments in relation to the application of the provisions of the Convention. In this context, the Committee of the Parties may avail itself of the expertise of relevant committees and other bodies of the Council of Europe.

133. Paragraph 4 states that the European Committee on Crime Problems (CDPC) and the Steering Committee for Culture, Heritage and Landscape (CDCPP) will be kept periodically informed of the activities mentioned in paragraphs 1, 2 and 3 of Article 26.

## **Chapter VI – Relationship with other international instruments**

### **Article 27 – Relationship with other international instruments**

134. Article 27 deals with the relationship between the Convention and other international instruments.

135. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 27 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. Article 27, paragraph 1 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which the Parties to this Convention are also Parties or will become Parties, and which contain provisions on matters governed by this Convention.

136. Article 27, paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other legal instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from this Convention.

## **Chapter VII – Amendments to the Convention**

### **Article 28 – Amendments to the Convention**

137. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to the non-member States which have participated in its elaboration and to any State invited to sign the Convention.

138. The CDPC will prepare opinions on the proposed amendment, which will be submitted to the Committee of the Parties. After considering the proposed amendment and the opinion submitted by the Committee of the Parties, the Committee of Ministers may adopt the amendment by the majority provided for in Article 20.d of the Statute of the Council of Europe.

139. Before deciding on the amendment, the Committee of Ministers shall consult and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the

Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

## **Chapter VIII – Final clauses**

140. With some exceptions, Articles 29 to 34 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

### **Article 29 – Signature and entry into force**

141. The Convention is open for signature by Council of Europe member States and non-member States which have participated in its elaboration.

142. Once the Convention enters into force, in accordance with paragraph 3, other non-member States may be invited to accede to the Convention in accordance with Article 30, paragraph 1.

143. Article 29, paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at [five]. This number is not very high in order not to delay unnecessarily the entry into force of the Convention, but reflects nevertheless the belief that a minimum group of Parties is needed to successfully set about addressing the major challenge of combating trafficking in human organs. Of the five Parties which will make the Convention enter into force, at least [three] must be Council of Europe members.

### **Article 30 – Accession to the Convention**

144. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to the Convention having the right to sit on the Committee of Ministers.

**Article 31 – Territorial application**

145. Article 31, paragraph 1 specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for States Parties to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

146. Article 31, paragraph 2 is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

**Article 32 – Reservations****Option 1**

147. Article 32 does not allow the Parties to make reservations to this Convention.

**Option 2**

148. The reservations listed in paragraph 1 of this article have been introduced in the Convention with regard to Articles for which unanimous agreement was not reached among the negotiators, despite the efforts achieved in favour of compromise. These reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Parties to preserve some of their fundamental legal concepts.

149. Paragraph 1 specifies that no other reservations may be made to the provisions of this Convention, with the exception of those provided for in this paragraph.

150. Paragraph 2, by making it possible to withdraw reservations at any time, aims at reducing in the future divergences between legislations which have incorporated the provisions of this Convention.

**Article 33 – Denunciation**

151. This provision aims at allowing any Party to denounce this Protocol. The sole requirement is that the denunciation be notified to the Secretary General of the Council, in his or her role as depositary of the Convention.

152. This denunciation takes effect [three, six, twelve...] months after it has been received, that is, as from the reception of the notification by the Secretary General.

**Article 34 – Notifications**

153. Article 34 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and designates the recipients of these notifications.

154. This provision, which is a standard final clause in Council of Europe treaties, concerns notifications to Parties. The Secretary General must inform Parties also of any other acts, notifications and communications, within the meaning of Article 77 of the Vienna Convention on the Law of Treaties, relating to the Convention and not expressly provided for by this article.