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Draft Council of Europe Convention on Offences relating to Cultural Property

Report¹

Committee on Culture, Science, Education and Media
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Summary

The Parliamentary Assembly welcomes the initiative of the Committee of Ministers of the Council of Europe to draw up a Council of Europe Convention on Offences relating to Cultural Property, which is relevant and timely. The new convention has a broad scope and its protections will apply not only to property designated by its Parties, but to all property designated by any State that is Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage. The convention aims at enhancing the overall anti-trafficking system and providing a solid legal basis for law-enforcement actions.

The Assembly proposes a few amendments to strengthen the current provisions in the draft text to ensure that the new instrument delivers its promise and urges the Committee of Ministers to provide sufficient resources for the follow-up mechanism in order to make this new instrument efficient and dynamic in its implementation.

1. Reference to committee: [Doc. 14290](#), Reference 4284 of 24 April 2017.



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A. Draft opinion²

1. The Parliamentary Assembly welcomes the initiative of the Committee of Ministers of the Council of Europe to draw up a Council of Europe Convention on Offences relating to Cultural Property and it commends the principles inspiring the text.
2. In particular, the Assembly appreciates the broad scope of the new convention which applies protection not only to property that has been designated by a State which has ratified the Council of Europe treaty, but to all property designated by any State that is Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage.
3. The Assembly emphasises that the new convention would enhance law-enforcement efforts by requiring States Parties to criminalise certain conduct relating to trafficking and destruction of cultural property. States Parties would be obliged to ensure that their domestic criminal law provides criminal liability for both natural and legal persons and that there is a basis to apply effective, proportionate and dissuasive criminal sanctions, or, under certain conditions, non-criminal sanctions, including administrative sanctions.
4. The Assembly considers, however, that some provisions have been weakened in the course of the drafting process and would require tightening up to ensure that the new instrument delivers its promise.
5. Concerning illegal importation, States Parties can reserve the right to provide for non-criminal sanctions, instead of criminal sanctions. Such a possibility clearly weakens the whole system, which is intended to fight illicit trafficking of cultural goods which, according to Article 1.a of the draft convention is an essential scope of this legal instrument.
6. The Assembly regrets that in the last round of negotiations it was decided to delete a provision which provided for the criminalisation of other offences related to trafficking in cultural property, including storage, transportation and transfer of movable cultural property, when the offender had knowledge that such property derived from or was obtained, directly or indirectly, from criminal offences and the aim was their illegal importation, exportation or placement on the market.
7. The Assembly considers it important to include the participation in a “terrorist group” as a possible aggravating circumstance in the sentencing of persons convicted of an offence relating to cultural property, as set out in the draft convention. The explanatory report to the convention could indicate that States Parties may refer to other international instruments which define the concept, and establish that it should be aligned to the definition set out in Article 2.1 of the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), with reference also, if necessary, to Article 2.d.c of the International Convention for the Suppression of the Financing of Terrorism.
8. The Assembly regrets that the proposal for setting up a European Observatory for offences related to cultural property, which was envisaged as a central mechanism to support the Committee of the Parties in carrying out its functions, has not been retained, as initially proposed by the Committee on Offences relating to Cultural Property (PC-IBC). The Assembly therefore insists that the important function of the Observatory in recording offences related to cultural property ought to be discharged by the Committee of the Parties.
9. Finally, the Assembly notes that the current wording of Article 27.1 opens the convention for signature and ratification only by those non-member States “which have participated in the elaboration of the Convention”. For the Assembly, there is a clear interest in opening the convention also to other non-member States, subject to the usual conditions.
10. The Assembly therefore recommends that the Committee of Ministers:
 - 10.1. delete Article 5.2;
 - 10.2. introduce within the final text of the convention a new provision which (based on the previous text prepared by the PC-IBC) could read as follows:

“Each Party shall ensure that the following conducts constitute a criminal offence under its domestic law, when committed intentionally: the storage, concealment, transportation and transfer of movable cultural property, knowing that such property derived from or was obtained, directly or indirectly, from criminal offences, if aimed at their illegal importation, exportation, or placement on the market, with the purpose of obtaining an illicit profit”;

2. Draft opinion adopted unanimously by the committee on 25 April 2017.

10.3. amend Article 15.c as follows:

*“the offence was committed in the framework of organised crime **or of a terrorist group**”;*

10.4. amend Article 22.5 as follows:

*“The Committee of the Parties **shall maintain a register of offences referred to in this Convention committed within the jurisdiction of parties to the Convention, to include details of persons convicted of such offences and of the sentences imposed on them, and may propose to the Committee of Ministers appropriate ways to engage relevant expertise in support of the effective implementation of the Convention**”;*

10.5. as a consequence of the foregoing amendment, amend Article 19, so as to require Parties to provide the relevant information to the Committee of the Parties;

10.6. after Article 27.1, add the following paragraph:

“This Convention shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a non-member State to sign the Convention shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by a unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers”;

10.7. if applicable, make the necessary amendments to the explanatory report to the draft convention so as to reflect the amendments to the draft text.

11. The Assembly insists that in order to make this new instrument efficient and dynamic in its implementation, the Committee of Ministers should allocate sufficient resources to the functioning of the Committee of the Parties to allow for regular meetings and exchanges, at least every two years.

12. Lastly, the Assembly encourages all member States to initiate as quickly as possible the necessary internal procedures for the ratification of the new convention.

B. Explanatory memorandum by Mr Stefan Schennach, rapporteur

1. Introduction

1. The European Convention on Offences relating to Cultural Property (ETS No. 119, “Delphi Convention”) was opened for signature by the 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.
2. The main aim of the Delphi convention was to combat illicit trafficking in cultural property through criminal law and to promote co-operation between States. A further aim was to protect European cultural heritage and to raise public awareness of the damages caused by illicit trafficking in cultural property.
3. The illicit trade in cultural goods has become a highly profitable enterprise, as precious artefacts, antiquities and art are excavated, looted or stolen in order to be sold to private collectors. Trafficking in stolen artefacts and antiquities not only robs people of their unique cultural heritage and cultural identity, but can also facilitate gross acts of violence and destruction through the financing of organised crime and terrorist groups. High-profile cultural property crimes in the Middle East and North Africa, such as the notorious demolitions and looting at Palmyra, Syria, and archaeological sites around Mosul, Iraq, among others, resulted in many so-called “Blood Antiquities” being smuggled abroad and sold through unscrupulous dealers on foreign markets.
4. In reaction to this, the ministers responsible for cultural heritage from the 50 States Parties to the European Cultural Convention (ETS No. 18) at their meeting in Belgium, adopted the “Namur Call”³ in April 2015. With this act, the ministers condemned “the deliberate destruction of cultural heritage and the illicit trafficking of cultural property” and decided to “reinforce European co-operation” to prevent and punish such acts. They also referred to the Parliamentary Assembly report on “Cultural heritage in crisis and post crisis situations”⁴ which had been prepared by our former colleague Ms Ismeta Dervoz (Bosnia and Herzegovina, EPP/CD) and resulted in the adoption of Assembly [Resolution 2057 \(2015\)](#) and [Recommendation 2071 \(2015\)](#).
5. In order to ensure a proper follow-up to the relevant Committee of Ministers decision⁵ on the review of Council of Europe conventions, the European Committee on Crime Problems (CDPC) decided that the Council of Europe should prepare a new criminal law convention to combat the illicit trafficking of cultural property.
6. It was deemed important that the Council of Europe take the necessary steps to ensure that this new convention would be ratified by a greater number of States. It was felt that, in order to achieve this, a simpler approach, as regards both the definition of cultural property and the choice of optional offences, should be followed.

2. The international legal context

7. At international level, on 14 November 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which is the most important convention in this area (127 States Parties). UNIDROIT subsequently 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.
8. The United Nations Office on Drugs and Crime (UNODC), in collaboration with UNESCO and Interpol, has recently developed the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences.
9. Moreover, the United Nations Security Council has adopted a number of resolutions⁶ in response to several reports revealing that trafficking in antiquities has become one of the sources of funding of terrorist organisations, along with oil and kidnapping.

3. Upon the initiative of the Belgian chairmanship of the Council of Europe’s Committee of Ministers of Culture, the European ministers of culture from the 50 States Parties to the European Cultural Convention gathered in Namur (Belgium) from 22 to 24 April 2015 for their sixth Conference entitled “Cultural Heritage in the 21st Century for Living Better Together: Towards a Common Strategy for Europe”.

4. [Doc. 13758](#).

5. [CM/Del/Dec\(2013\)1168/10.2](#)

10. At European level, European Union institutions have adopted two instruments with a view to preventing the illicit movement of cultural objects: Regulation 116/2009 of 18 December 2008 on the export of cultural goods, and [Directive 2014/60](#) of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State. These acts aim at fostering Member States' reciprocal recognition of domestic provisions designed to fight the illicit trade in antiquities and the application of border controls.

3. The added value of the new Council of Europe convention

11. A revision of the 1985 Convention was aimed at simplifying and streamlining its language and structure in order to harmonise the relevant rules of criminal law.

12. The new convention has a broad scope and will go an important step further: its protections will apply not only to property that has been designated by a State which has ratified the Council of Europe treaty, but to all property designated by any State that is Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage. As a result, the coverage is therefore much wider. This feature is one of the several ways the convention aims to contribute to the international legal framework relating to cultural property while also making sure that its provisions are fully compatible with relevant existing international and supranational legally binding standards.

13. As none of these international instruments address criminal law issues, the convention's added value is that it enhances law-enforcement efforts by requiring State Parties to criminalise certain conduct relating to the trafficking and destruction of cultural property. As such, the Committee on Offences relating to Cultural Property (PC-IBC) was tasked with drafting substantive criminal law provisions in such a way that they can be effectively implemented by States Parties and enable national criminal law provisions based on the draft convention to be sufficiently clear and precise.

14. Upon implementation, the convention aims to ensure that there are no obvious gaps for criminals to exploit in the anti-trafficking system and that there is a comprehensive and coherent set of rules and regulations providing a solid legal basis for law-enforcement actions. The convention obliges States Parties to ensure that their domestic criminal law provides criminal liability for both natural and legal persons and that there is a basis to apply effective, proportionate, and dissuasive criminal sanctions, or, under certain conditions, non-criminal sanctions (including administrative sanctions).

15. By obliging States to criminalise offences relating to cultural property, this approach will build on the 1970 and 1972 UNESCO Conventions and the 1995 UNIDROIT Convention, "closing the circle" by addressing the gaps which remain in international criminal law.

4. Key elements of the convention

16. The substantive criminal law provisions in Articles 3 to 10 cover offences such as theft (and unlawful appropriation), illicit excavation and retention, import/export, acquisition, placing on the market, falsification of and tampering with documents, and destruction of cultural property. Article 11 on aiding or abetting and attempt ensure that auxiliary and preparatory offences are also covered. Article 15 obliges States to consider a number of aggravating circumstances, particularly where persons abuse their professional role or official positions, and where persons commit the offences with a nexus to organised crime. The convention thus enhances the capacity of States to investigate, prosecute, sentence and/or extradite persons suspected or convicted of the offences covered by the convention.

17. However, though the convention was in many ways inspired by the offences committed by terrorist organisations, the PC-IBC determined that there was no need for express provisions directly relating to terrorist activity. Earlier drafts of the convention contained a provision asking States to consider aggravating circumstances when determining sanctions for situations where cultural property offences were committed in connection with terrorist activity. The drafters determined that such offences would primarily be prosecuted as terrorist offences rather than cultural property crimes. However, I strongly believe that States should, where appropriate, also consider offences connected with terrorism or terrorism financing as an aggravating circumstance under Article 15.

6. See [Resolutions No. 2199](#) of 12 February 2015 and No. 2249 (2015) of 20 November 2015.

18. The convention also facilitates international co-operation in criminal matters and encourages a number of preventive measures at both the domestic and international level in order to reduce the likelihood of offences contained within this convention from occurring. At the domestic level, it covers an array of recommended measures for public and private entities and is broadly reflective of national best practices and pre-existing international treaties. These measures also serve to protect and aid the law-abiding actors in the art trade who lose out to black market operators. At the international level, the convention requests States Parties to co-operate, to the widest extent possible, to prevent the commission of offences covered under the convention, including by exchanging relevant information on cultural property, linking national databases and inventories, and taking appropriate measures to protect cultural property in times of instability or conflict.

19. In terms of oversight, the convention provides for a Committee of the Parties under the convention in order to facilitate the effective implementation of the convention, play an advisory role, and facilitate the exchange of information on significant developments relevant to the provisions of the convention. A proposal to establish a European Observatory on Offences relating to Cultural Property was discussed during negotiations in order to facilitate implementation and reduce the burden placed upon States in matters of enforcement and co-operation. Given the potential added value of such a permanent institution to systematically monitor and co-ordinate efforts to fight against cultural property crimes, I propose that the Assembly support this proposal.

5. Proposals for improvements

20. Considering the above, I make the following proposals to improve the current draft.

5.1. *Illegal importation*

21. Article 5 of the draft convention deals with “Illegal importation” and provides that:

“1. Each Party shall ensure that, when committed intentionally, the importation of movable cultural property, the importation of which is prohibited pursuant to its domestic law on the grounds that it has been:

a. stolen in another State;

b. excavated or retained under circumstances described in Article 4 of this Convention; or

c. exported in violation of the law of the State that has classified, defined or specifically designated such cultural property in accordance with Article 2 of this Convention, constitutes a criminal offence under its domestic law where the offender knew that the cultural property had been stolen, excavated or exported in violation of the law of that other State.”

22. This provision is very cautious, as the obligation therein is subject to a double condition that the importation is already prohibited under the domestic law and that the offender knew that the cultural property had been stolen, excavated or exported in violation of the law of the State of origin.

23. In addition, Article 5.2 states that:

“2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to provide for non-criminal sanctions, instead of criminal sanctions for the conduct described in paragraph 1 of the present Article.”

24. Such a possibility is odd, because it clearly weakens the whole system which is intended to fight illicit trafficking of cultural goods which, according to Article 1.a of the draft convention is an essential scope of this legal instrument. Therefore, my proposal would be to recommend deleting Article 5.2.

5.2. *Other offences related to trafficking in cultural property*

25. In the last round of negotiations it was decided to delete a provision (the former Article 10) which provided for the criminalisation of other offences related to trafficking in cultural property and in particular the storage, conservation, restoration, transportation and transfer of movable cultural property, when the offender had knowledge that such property derived from or was obtained, directly or indirectly, from criminal offences and the aim was their illegal importation, exportation, or placement on the market.

26. I understand that there may be objections in criminalising activities such as “conservation” and “restoration” (which could possibly be elements in favour of the offender). But for the rest, I believe that this was a wrong decision because again, the lack of a harmonised approach and of effective sanctions in this domain will certainly hamper the effective fight against illegal trafficking of cultural goods. When conducts such as storage, transportation and transfer – and I would certainly add concealment – of movable cultural property are connected to the principal criminal acts and are instrumental to the introduction of the illegal goods into the market, it is nothing more than logical to punish them. Indeed, it is necessary to consider the whole chain and not just the initial and final links.

27. Therefore – though realistically I fear it is late to reopen this question – I would suggest inviting the Committee of Ministers to reconsider this issue and reintroduce within the final text of the convention a provision which (based on the previous text now deleted) could read as follows:

“Each Party shall ensure that the following conducts constitute a criminal offence under its domestic law, when committed intentionally: the storage, concealment, transportation and transfer of movable cultural property, knowing that such property derived from or was obtained, directly or indirectly, from criminal offences, if aimed at their illegal importation, exportation, or placement on the market, with the purpose of obtaining an illicit profit.”

5.3. Aggravating circumstances

28. The Preamble to the draft convention states that the Parties are “concerned that terrorist groups are involved in the deliberate destruction of cultural heritage and use the illicit trade of cultural property as a source of financing”. Indeed, the drafting of the convention was in large part motivated by the fact that Daesh in particular has been heavily involved in the illicit trade in cultural property looted from the areas under its control.

29. I would therefore suggest the following amendment to Article 15.c:

*“the offence was committed in the framework of organised crime **or of a terrorist group**,”*

30. The main purpose of the proposed amendment would be to ensure that the connection with a terrorist group is included as a possible aggravating circumstance in the sentencing of persons convicted of an offence set out in the draft convention. As to the meaning of “terrorist group” in this context, it is not necessary to give a specific definition for the purpose of this convention. The explanatory report to the convention could indicate that States Parties may refer to other international instruments which define the concept, or better establish that it should be aligned to the definition set out in Article 2.1 of the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, with reference also, if necessary, to Article 2.5.c of the International Convention for the Suppression of the Financing of Terrorism (CETS No. 217). I also consider that the reference to “organised crime” is more encompassing than the reference to “criminal organisation”; additionally in my opinion “organised crime” should not be qualified as an “organisation” (institution).

5.4. Register of offences

31. Article 15.d of the draft convention establishes as a possible aggravating circumstance to be taken into account in sentencing the fact that the perpetrator has previously been convicted of the offences referred to in this convention. Article 16 requires Parties to take the necessary measures to provide for the possibility to take into account final sentences passed by another Party in relation to the criminal offences referred to in this convention when determining the sanctions. For either of these things to happen, however, the court that is sentencing the perpetrator must be aware of the fact of relevant previous convictions and sentencing that occurred within the jurisdiction of another Party. Systematically making such information available via the central mechanism of the Committee of the Parties would be an efficient and effective means of achieving this important goal.

32. It is therefore regrettable that the former Article 24.3 concerning the setting up of a European Observatory for offences related to cultural property to support the Committee of the Parties in carrying out its functions has not been retained, as initially proposed by the PC-IBC expert group. I would therefore suggest that the function of the Observatory in recording offences related to cultural property could alternatively be discharged by the Committee of the Parties, and would therefore suggest amending Article 22.5 as follows:

“The Committee of the Parties shall maintain a register of offences referred to in this Convention committed within the jurisdiction of parties to the Convention, to include details of persons convicted of such offences and of the sentences imposed on them, and may propose to the Committee of Ministers appropriate ways to engage relevant expertise in support of the effective implementation of the Convention.”

33. This amendment, if agreed, would necessitate a consequential amendment of Article 19, so as to require Parties to provide the relevant information to the Committee of the Parties.

34. Regarding signature and entry into force, I would propose amending Article 27 to allow all interested non-member States to sign and ratify the convention. The current wording limiting non-member States to those “which have participated in the elaboration of the Convention” is in my opinion too restrictive.

35. The provision of Article 27.1 should be completed by a new paragraph as follows:

“This Convention shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a non-member State to sign the Convention shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by a unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.”

36. Finally, as a general comment, I would insist on the need for the Committee of Ministers to allocate sufficient resources in the functioning of the Committee of the Parties to allow for regular meetings (at least once every two years) so as to ensure efficient implementation of the convention through more regular exchanges and review of the existing co-operation mechanisms and practice.

6. Conclusions

37. I invite the Assembly to welcome this timely initiative to adopt a new Convention on Offences related to Cultural Property and I commend the approach and principles inspiring the draft convention. The proposals for amendments which are included in the draft opinion correspond to those that I have sought to justify in the previous section; they are intended to strengthen its effective implementation – and therefore its value for all the partners – by strengthening its follow-up mechanism.