



Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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**Expert consultation on the use of the Convention for
combating emerging forms of crime**

Use of the United Nations Convention against Transnational Organized Crime for protection against trafficking in cultural property

Note by the Secretariat

I. Introduction

1. At its fourth session, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime considered the issue of emerging forms of crime, including trafficking in cultural property, and expressed concern regarding their links to organized crime. Moreover, in its decision 4/2, the Conference emphasized that the Convention offered the broadest scope of cooperation to address existing and emerging forms of transnational organized crime. The Conference also decided to include an item entitled “Expert consultation on the use of the Convention for emerging forms of crime” in the provisional agenda for its fifth session.

2. The Economic and Social Council, in its resolutions 2004/34 and 2008/23, entitled “Protection against trafficking in cultural property”, emphasized the importance for States of protecting and preserving their cultural heritage in accordance with international instruments.¹ In its resolution 2008/23, alarmed at the growing involvement of organized criminal groups in all aspects of trafficking in

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¹ Such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, No. 11806), the Convention on Stolen or Illegally Exported Cultural Objects (available from www.unidroit.org) and the Convention for the Protection of Cultural Property in the Event of Armed Conflict (United Nations, *Treaty Series*, vol. 249, No. 3511) and its two Protocols.



cultural property, the Council urged Member States and relevant institutions to strengthen mechanisms for international cooperation, including mutual legal assistance, and facilitate the recovery, return or restitution of cultural property. In that regard, the Council stressed that the entry into force of the United Nations Convention against Transnational Organized Crime² had created a new impetus in international cooperation in countering transnational organized crime, which would in turn lead to innovative and broader approaches to dealing with the various manifestations of such crimes, including trafficking in cultural property.

3. The expert group on protection against trafficking in cultural property, convened pursuant to Economic and Social Council resolution 2008/23, held a meeting in Vienna from 24 to 26 November 2009 (UNODC/CCPCJ/EG.1/2009/2). On that occasion, the expert group recommended that the Conference consider using the Convention to protect against trafficking in cultural property and invited the Conference to explore ways of using the provisions of the Convention as a legal basis for international cooperation. In its resolution 2010/19, the Council considered that the Organized Crime Convention and the United Nations Convention against Corruption³ should be fully used for the purpose of strengthening the fight against trafficking in cultural property, including by exploring other possible normative developments, when appropriate.

4. The present note explores the utility of applying the Organized Crime Convention, in particular its provisions on criminalization and international cooperation, to protect against trafficking in cultural property, and suggests ways of maximizing its potential.

II. The international legal framework for the protection of cultural property

A. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

5. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁴ establishes a framework for the protection of cultural property according to which the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under the Convention by its States parties shall be illicit (art. 3). In addition, States parties undertake to do the following:

- (a) To introduce an export certificate for cultural property (art. 6, para. (a));
- (b) To prohibit and impose sanctions for the exportation of cultural property unless accompanied by such a certificate (art. 6, para. (b), and art. 8);
- (c) To prevent museums and other relevant institutions from acquiring illegally exported cultural property (art. 7);

² United Nations, *Treaty Series*, vol. 2225, No. 39574.

³ *Ibid.*, vol. 2349, No. 42146.

⁴ *Ibid.*, vol. 823, No. 11806. The Convention had been ratified by 120 States as at June 2010.

(d) To facilitate the recovery of cultural property declared inalienable by another State party (art. 13, para. (d)).

6. The scope of the Convention is limited to objects stolen from inventoried public collections, not those stolen from private individuals or privately owned sites. This interpretation is substantiated by the fact that remedies operate only on a State-to-State basis and are otherwise inaccessible to private individuals. In making provisions for the recognition of export controls, it only restricts acquisition by museums, not private individuals. Given the significant involvement of individuals, including persons acting within organized criminal groups, in the trafficking of cultural property, a law enforcement mechanism that includes individuals among its subjects is necessary. Moreover, the only admissible framework for recovering and returning illegally obtained cultural property to the State party of origin under the Convention is through diplomatic offices, a procedure in which the requesting State of origin bears the burden and the expense of establishing the claim (art. 7, para. (b) (ii)).

7. Finally, the Convention establishes a basis for international cooperation only in cases when a State party's cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials (art. 9). The absence of concrete tools and guidelines to enable and require collaboration in the fight against trafficking in cultural property, which is largely transnational in nature, underscores the need for the Convention to be complemented by other instruments.

B. Other related instruments

8. The Convention on Stolen or Illegally Exported Cultural Objects⁵ introduces a range of provisions applicable to claims for restitution and return by and against private individuals, thus creating a specific mechanism giving individual owners the right to access a court in another State party for the purposes of suing for the return of stolen cultural objects. However, this Convention is based on civil-law principles and does not take into account the criminal dimension. The utility of the Convention is diminished, moreover, by the low number of States parties (30 as at June 2010), pointing again to the need for a more far-reaching instrument. The Protocol for the Protection of Cultural Property in the Event of Armed Conflict⁶ aims to protect cultural heritage but applies only in times of war or occupation (art. 18).

III. Trafficking in cultural property and transnational organized crime

A. Challenges in the protection of cultural property

9. One major challenge in the protection of cultural property is the lack of harmonized legislation. Not all States have adhered to the international treaties on cultural property and many have different and, sometimes, conflicting legal regimes in place, making it difficult for them to cooperate in investigations and

⁵ Available from www.unidroit.org.

⁶ United Nations, *Treaty Series*, vol. 249, No. 3511.

prosecutions. Even within national borders, States are often unaware of the increasing prevalence of trafficking in cultural property and lack the specialized knowledge and resources necessary to formulate a sound response, including a judicial response, to such trafficking. Moreover, it is expensive and at times operationally impossible to protect cultural and archaeological sites, and the absence of inventories and photographic archives, particularly for illegally excavated objects, frustrates attempts to trace and return stolen objects. The burden of proof borne by the States seeking the return of stolen cultural property can be difficult to overcome and the sensitivity with which some States approach issues of cultural heritage can lead to a reluctance to cooperate.

B. Features of the art market and its links to transnational organized crime

10. The art market is particularly vulnerable to organized crime because it is highly specialized, potentially global and requires a high level of expertise. It is also, by nature, an international business, as archaeological items originating in one country fetch high prices in another country. Cross-border business is customary. It is a rich and discreet market characterized by little advertising and the anonymity of buyers and sellers. Such a culture of privacy makes it not uncommon that cultural objects (even legally owned ones) are concealed or made to look like something they are not.

11. The theft of and trafficking in cultural property have become matters of growing concern. Cultural objects are being illegally removed from archaeological sites, excavated or stolen from museums, places of worship or private collections in one country (the source country) and smuggled internationally for sale in rich countries, where there is an interest and larger market for such goods. Sales are often conducted through an existing trade infrastructure that includes dealers, collectors and museums that deal with cultural property without necessarily knowing its provenance. Once intermingled with objects from the licit market, identifying the objects derived from illicit sources becomes difficult, particularly given the culture of anonymity of buyers and sellers in the antiquities market.

12. This traffic has links to organized crime, as it relies on modus operandi used by organized criminal groups; the strong demand for illicit objects is highly lucrative for those participating in the trade; its complex nature often requires the involvement of many actors, legal entities and third parties, who tend to operate in a structured and organized way; and the use of modern and sophisticated technologies. There is also evidence that transnational trafficking in antiquities is linked to other illicit activities in which organized criminal groups are involved, including drugs and arms smuggling, violence, corruption and money-laundering.

IV. The application of the Organized Crime Convention to the protection of cultural property

13. Trafficking in cultural property involves the commission of several offences, both domestic and transnational, and can involve organized criminal groups. Law enforcement activities undertaken in line with the Organized Crime Convention,

especially its criminalization provisions and its broad framework for international cooperation, may be effective in enhancing the States' efforts to prevent, investigate and prosecute trafficking in cultural property.⁷

A. Scope and purpose of the Organized Crime Convention

14. The Organized Crime Convention aims to promote cooperation to prevent and combat transnational organized crime. The broad scope of the Convention means that it can be applied to offences established by it and its Protocols (art. 37) and any other serious crime (as defined in art. 2), where the offence is transnational in nature and involves an organized criminal group (art. 3).

15. Pursuant to article 2, paragraph (b), of the Convention, "serious crime" means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. Pursuant to article 3, paragraph 2, an offence is transnational in nature if: it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but it involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State. This broad and flexible definition of the term "transnational" is further broadened by the articles of the Convention on international cooperation, according to which an offence is considered to be transnational in nature if, pursuant to article 16 (on extradition), the person who is the subject of the request for extradition is located in the territory of the requested State party and if, pursuant to article 18 (on mutual legal assistance), victims, witnesses, proceeds, instrumentalities or evidence of offences are located in the requested State party. The Convention defines an "organized criminal group" as a structured group of at least three persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain a financial or other material benefit (art. 2).

16. The flexibility in the interpretation of what makes an offence transnational in nature and of what constitutes an organized criminal group, in conjunction with a broad definition of what constitutes serious crime, ensures that the widest range of traditional, emerging and future forms of criminal activities can be covered by the Convention and that international law enforcement and judicial cooperation efforts may be triggered in relevant investigations and prosecutions.

⁷ In paragraphs 14-60 below, the description of criminal offences related to trafficking in cultural property and of effective remedies for preventing and combating them is drawn from the thematic discussion on protection against trafficking in cultural property held during the nineteenth session of the Commission on Crime Prevention and Criminal Justice, in particular the presentation made by panellist Paolo Giorgio Ferri (Italy) (see *Official Records of the Economic and Social Council, 2010, Supplement No. 10 (E/2010/30)*, paras. 26-35).

B. Relevance of the offences established by the Organized Crime Convention to trafficking in cultural property

17. The Convention criminalizes four basic activities in its articles 5, 6, 8 and 23 that are of relevance to trafficking in cultural property. These offences describe typical crimes committed by organized criminal groups in order to operate efficiently, generate substantial profits and protect themselves and their gains from law enforcement, irrespective of the specific nature of the criminal activity. States parties must consider that the transnational element and the involvement of an organized criminal group are not required for the prosecution of such crimes when committed domestically (art. 34, para. 2).

1. Participation in an organized criminal group

18. Pursuant to article 5, paragraph 1 (a), of the Convention, States parties must adopt legislative and other measures to establish as criminal offences, inter alia: (a) agreeing with one or more persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group; and/or (b) conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in (i) criminal activities of the organized criminal group and/or (ii) other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim (art. 5, para. 1 (a)). These two options are reflective of the typical common-law and civil-law definitions of the offence, conspiracy and criminal association (*association de malfaiteurs*), which should facilitate the widespread adoption of the Convention and are distinct from any offence involving the attempt or completion of a criminal activity.

19. The provisions contained in article 5 are highly relevant to trafficking in cultural property, an activity that requires the support of many people and involves many transactions and interactions among thieves, mediators, shippers and drivers, customs officials, dealers, experts, restorers and auction house employees. In carrying out their activities, these people tend to create organized criminal groups or operate in structured groups (often in pyramidal structures) where tasks are clearly divided, for the purpose of committing one or more serious and often transnational crimes: from the illegal acquisition, export and import of that property to the laundering of the proceeds of those activities. By criminalizing the participation in an organized criminal group, in accordance with their obligations under the Convention, States parties could hold those groups liable for trafficking in cultural property.

2. Laundering of proceeds of crime

20. Pursuant to article 6 of the Organized Crime Convention, States parties are required to criminalize the conversion or transfer of property known to be the proceeds of crime and the concealment or disguise of the true nature, source, location, disposition, movement or ownership of such property (art. 6, para. 1 (a)); and the acquisition, possession or use of property known to be the proceeds of crime

and the participation in, association with, conspiracy or attempt to commit and aiding, abetting, facilitating or counselling the commission of any of the offences established in accordance with that article (art. 6, para. 1 (b)). States parties are also required to seek to apply the laundering of proceeds of crime to the widest range of predicate offences (art. 6, para. 2 (a)) and include as predicate offences those offences committed in other jurisdictions when dual criminality exists (art. 6, para. 2 (c)).

21. The offence covers conduct aimed at altering the nature or disguising the true origin of an object of illicit origin. This makes the provisions particularly relevant in initiating investigations related to trafficking in cultural property. Laundering of illicitly acquired goods is not only frequent, but also particularly difficult to investigate. Looted or stolen cultural property can be defined as property that is the proceeds of crime.

Common forms of laundering or concealing cultural property

22. Below are some examples of common forms of laundering of cultural property that could fall under the scope of article 6 of the Organized Crime Convention:

(a) Illicit cultural objects are often transported, through complex manoeuvres, to third countries with more permissive norms; there, they are placed on markets offering the highest profits, including in countries where the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property has not been ratified and where fewer controls and limitations apply than in two States parties. Traffickers also choose countries that attach less importance or value to those items, where such items may be considered ordinary goods and where it is easiest to obtain an export licence making illicit objects appear to have a legitimate provenance;

(b) Fragmentation of illicitly excavated archaeological objects or the deliberate non-restoration of such objects are common concealment techniques. The advantages of dealing with fragments for those who commercialize archaeological artefacts are multiple: exportation is easier; the objects can be hidden more easily and do not attract the same degree of attention at custom controls; and pieces are often divided among members of a criminal group, making it more difficult to trace and investigate them. In addition, by selling artefacts in pieces, dealers can create an almost inelastic demand from the buyers for the remaining pieces and charge more than they would when selling the complete object. Similar practices are used for paintings, which are often cut into several pieces so as to create different and apparently distinct works of art. This is usually the case for larger triptychs or altarpieces, or when the artwork is of certain notoriety. Identifying and tracing those objects through existing databases and photograph archives becomes very difficult;

(c) Well-known objects that have been fragmented tend to be recomposed only after years have passed. By delaying sale, mediators and traffickers increase the market value of the fragments, while keeping a low profile, causing less alarm in scientific circles. The final purchaser of the complete artwork is often perceived by the scientific community to be someone who has saved a cultural object that was otherwise condemned to disappear, while in fact he or she was an accomplice in its trafficking. The mere acquisition of fragments should be a strong indicator of their illegal provenance, since those objects would usually be studied and restored, then

sold as complete artefacts on the legal market, along with accompanying certification;

(d) It is not uncommon for artefacts from clandestine excavations to be introduced into a private collection. This method is often used in relation to goods that are part of a series (coins, for instance) or collections that are not documented in their entirety. Often, pieces of authentic artefacts are sold and then substituted by fake ones, dismembering an entire collection. Declaring that a cultural object belongs to a given collection when it never did can be considered and punished as an act of laundering;

(e) Simulated or fictitious auctions and sales are other recurrent means used to launder cultural property. In this method, traffickers buy back the objects they put on sale through a front company, thus allowing them to be “cleaned”, and control their commercial value for future sale, altering their market value. These transactions occur at record speed and do not leave sufficient time for investigators to detect them;

(f) Traffickers have also resorted to “freezing” or loaning stolen objects for several years, until the statutes of limitations expire (the time is usually shorter for publicly exposed objects). After that period, the objects tend to re-emerge in a third country. For years, this has been common practice by museums and involves traffickers loaning art works to lesser-known museums before selling them on to major museums; this usually works, provided that no one claims the objects in the interim.

23. These examples show that it is important for museums, collectors and auction houses to carry out preventive monitoring work and for these concealment practices to be captured through a broad and well-defined criminal offence of laundering. If trafficking in cultural property is a criminal offence under domestic law, States should ensure that it is included as a predicate offence to laundering as well.

3. Corruption

24. States parties must criminalize active and passive bribery and participation as an accomplice to bribery (art. 8). There is no requirement that the offence should necessarily be committed by an organized criminal group. Corruption of national and foreign public officials in countries of origin, transit and destination plays a crucial role in facilitating and making the traffic in cultural property possible. States could bring to justice those involved in passive and active bribery and who hamper institutional efforts to protect cultural property and to prevent and investigate cases of trafficking in cultural property and prosecute offenders by giving effect to this provision.

4. Obstruction of justice

25. Justice cannot be achieved if those involved in investigations and prosecutions are intimidated or corrupted or if evidence is manipulated. The Organized Crime Convention contains provisions to protect the integrity of the justice system from manipulations by organized criminal groups. According to its article 23, States parties must criminalize the use of inducements, threats or use of force in exchange for interfering with witnesses and officials whose role it is to provide accurate evidence or testimony.

C. Applicability of the Organized Crime Convention to other serious crimes

26. The Organized Crime Convention applies to all serious crimes, as defined in its article 2, that are transnational in nature and involve an organized criminal group. Although States do not need to define the term “serious crime” in their domestic law, they may wish to review those criminal offences commonly associated with organized crime to ensure they meet the criteria of serious crime and that the Convention would apply.

27. In order to reach a minimum level of harmonization in relation to sanctions and their seriousness, it is advisable that States maintain a common list of offences typically related to cultural property. States can facilitate foreign investigations and avoid rejections for cooperation due to lack of dual criminality if they enhance the applicability of general offences present in most jurisdictions, as well as of offences related to cultural property, and if they do not rely only on provisions that address special crimes, which may not exist in all jurisdictions.

1. Criminalization of trafficking in cultural property as a serious crime

28. The lack of harmonized legislation is a major obstacle to the protection of cultural property. Cultural property is sometimes covered only by general offences such as theft, without additional consideration for its particular nature and value, while many source countries tend to have more stringent and precise offences for trafficking in cultural property and related crimes, with stricter penalties. There are practical consequences to this imbalance. Firstly, the incongruence in the definition of the illegal act (theft versus trafficking in cultural property) makes the establishment of dual criminality difficult. Secondly, a lesser crime such as theft may not carry sufficient sanctions to qualify as serious crime under the Convention. In both cases, the applicability of the Convention and access to its instruments for international cooperation may be hampered. Such uncertainties can be remedied by placing greater focus on the harmonization of laws between States, including with regard to offences established by the Convention, such as laundering of proceeds of a crime and other serious crimes specific to trafficking in cultural property.

29. In a recent note by the Secretariat, the expert group on protection against trafficking in cultural property recommended that States should criminalize activities related to trafficking in cultural property and consider making the trafficking in cultural property (including stealing and looting at archaeological sites) a serious crime in accordance with the Organized Crime Convention (E/CN.15/2010/5, para. 17). By defining trafficking in cultural property in accordance with the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and by making such trafficking a serious crime, States could significantly strengthen the ability to protect themselves against this offence.

2. Other related serious crimes

30. Other crimes common in most States may trigger the application of the Organized Crime Convention and its international cooperation provisions, especially in the absence of harmonized legislation specifically on trafficking in cultural property. Such crimes include the following:

(a) Illegal handling of stolen or counterfeit goods, which is criminalized in most States, could be applied to cultural property. However, States should be aware that other States' legislation may require different levels of knowledge or intent in relation to these offences, such as the knowledge of the criminal provenance of the received good. Wilful ignorance may not always be sufficient to assert the criminal responsibility of a defendant charged with the offence of handling;

(b) Illegal export is often resorted to in cases of trafficking in cultural heritage. Although illegal export is a crime in all legal systems, some States do not criminalize the export of foreign cultural goods;

(c) Smuggling is one of the offences applied by States to protect their borders. Recognizing the illegal introduction of a cultural artefact into the territory of another State as smuggling involves the commission of an offence in the destination country and may facilitate cooperation between source and destination countries, making it easier to fulfil the dual criminality requirement with those countries that do not consider the illicit export of a cultural good as a separate offence;

(d) The use of the Internet for the purpose of trafficking in cultural property. Internet platforms have become a frequently used channel for the sale of all kinds of commodities, including cultural property. Online auctions operate rapidly, attract clients from across the globe and operate in an unregulated environment. The auctioning of individual items is not necessarily a significant problem, but the business as a whole causes serious damage. The expert group on protection against trafficking in cultural property has recommended that States should take effective measures to counter trafficking in cultural property via the Internet and be encouraged to promote cooperation between representatives of the public and private sectors (such as Internet providers) to track sites dealing in cultural property (E/CN.15/2010/5, paras. 31 and 32);⁸

(e) The offence of damaging is very common and can be particularly useful for the protection of archaeological objects. Damaging cultural property by removing it from its original place or through unauthorized excavations can be a special offence or be considered a form of damaging. The harm caused by so-called "archaeological looting" is twofold, since it damages both the site and the object itself, which is uprooted from its original setting and loses its identity. The remaining objects are also affected, as they too lose value and importance. International jurisprudence is becoming increasingly aware of this problem, and some legal systems have started to pay attention to the damage resulting from the removal of artefacts from their original location. For the purposes of prosecution, the offence of damaging can be coupled with the crimes of unauthorized excavation and illegal removal of archaeological items, the latter being similar to theft.

31. In conclusion, States could consider criminalizing as serious crimes a wider range of offences typically related to trafficking in cultural property and consider adopting additional specific offences in line with the international definitions of

⁸ For example, the Swiss Federal Office of Culture signed a memorandum of understanding with eBay Switzerland to better control the sale of archaeological items on the site. Authorities in Austria and Germany signed similar agreements with eBay.

trafficking in cultural property, in order to afford the broadest possible protection to items of cultural heritage and facilitate international cooperation with other States.

D. Provisions to ensure effective criminalization

32. The Organized Crime Convention establishes a framework to ensure the effectiveness of investigations of the crimes that fall under its scope and the prosecution of offenders. Some of those provisions are very useful and relevant to the protection of cultural property.

1. Jurisdiction

33. Trafficking in cultural property is a predominantly transnational offence. Given existing loopholes and disparities between legal frameworks, it is relatively easy for looters, traffickers and buyers in bad faith to evade detection and punishment for their crimes. According to article 15 of the Convention, offenders should not be able to evade investigation and prosecution, which is why the Convention provides a wide basis for States to establish jurisdiction for conducting such prosecutions.

34. Article 15 of the Convention can empower States with investigatory and prosecutorial powers that apply to offences that are transnational in nature. This includes offences linked to State territories in ways that allow for investigative measures to be taken there. States parties to the Convention are not obliged to prosecute for such offences, but are generally obliged to assist other States parties when requested to do so. Pursuant to the Convention, a State party should establish jurisdiction over the offences covered in the Convention when an offence is committed in the territory of the State or on board a vessel or an aircraft flying the flag or registered under the laws of that State (art. 15, para. 1), or when the alleged offender is present in its territory and it does not extradite him or her solely on the ground that he or she is one of its nationals (art. 15, para. 3). Also pursuant to the Convention, a State party may establish jurisdiction when the offender or the victim is a national of that State if the offence involves participation in an organized criminal group with a view of committing a serious crime in the State or under any other circumstances afforded under domestic law (art. 15, para. 2). Offences such as trafficking in cultural property or illicit exportation of (national and foreign) cultural property could be reinforced through this broad jurisdictional provision.

35. The Convention also establishes a framework for cooperation among States that have already established jurisdiction, where many parties will be called upon to cooperate in the investigation even if only a few of the most extensively involved jurisdictions will be in a position to actually prosecute the offenders.

2. Liability of legal persons

36. The Convention requires States parties to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences covered by the Convention (art. 10, para. 1). Subject to the legal principles of the State party, such liability may be criminal, civil or administrative (art. 10, para. 2) and must be without prejudice to the criminal liability of the natural persons who committed the offences (art. 10, para. 3). Liable

legal persons shall be held accountable and subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (art. 10, para. 4). This provision must be read together with article 11, pursuant to which States parties shall make the commission of offences covered in the Convention liable to sanctions that take into account the gravity of that offence and establish sufficiently long statutes of limitations.

37. Legal persons are frequently active in the art market. They may include auction houses, museums, art galleries and pawnshops and are increasingly involved through their responsible persons in the purchase and laundering of illicit cultural property. Once such property has been attributed to a company, it can be resold as legitimate. Making legal entities and their representatives responsible by attributing to them criminal, civil or administrative liability may dissuade the use of those entities as shields and encourage adherence to other preventive measures introduced by other instruments, such as codes of conduct.

3. Prosecution, adjudication and sanctions

38. In order to be effective, offenders should ideally be prosecuted and sanctioned in a way that is proportionate to the harm they have caused and the benefits that the offenders have derived from their criminal activities. When assigning the appropriate punishment for offences established by the Convention, States should ensure that a minimum level of deterrence is applied and that the gravity of the offences is duly considered (art. 11, para. 1). States have discretion in assigning penalties for other serious crimes, although in order to apply the Convention the penalty must import a maximum deprivation of liberty of at least four years, or a more serious penalty (art. 2). States should therefore consider imposing sanctions for the trafficking in cultural property and related offences in line with these requirements.

39. In addition, States are required to impose longer statutes of limitations for offences covered by the Convention and other serious crimes, while taking into account the greater difficulties involved in carrying out transnational investigations. As cultural property is often “frozen” for relatively long periods and only reappears on the market several years after it was illicitly removed or stolen, such measures would be useful in ensuring that short statutes of limitations do not jeopardize the investigation efforts of a State. Crimes that have as their object cultural goods could benefit from longer statutes of limitations or even be considered as permanent crimes.

4. Cooperation with law enforcement authorities

40. In article 26 of the Convention, measures to encourage those who participate or have participated in an organized criminal group to cooperate with law enforcement officials in order to facilitate investigation and prosecution (art. 26, para. 1) are outlined. They include granting immunity from prosecution (art. 26, para. 3) and mitigating punishment (art. 26, para. 2). Pursuant to articles 24 and 26, States parties are required to protect such persons and, if necessary, enter into agreements or arrangements with other States for that purpose. That provision could be useful in cases where buyers agree to purchase illicit fragmented property, thus becoming accomplices of the illicit trade, and are subsequently forced to maintain their silence and accept unpleasant conditions to complete the collection.

Provisions aimed at offering incentives to those involved in trafficking in cultural property who collaborate in recuperating goods illegally obtained or transferred abroad, such as through decreased penalties or other means, may prove useful in breaking the complicity demonstrated by sellers and purchasers.

5. Seizure and confiscation of cultural property

41. The Organized Crime Convention contains provisions on preventive measures that allow for the confiscation of property (permanent deprivation) and the seizure or freezing of property (temporary prohibition on the transfer, conversion, disposition or movement) (art. 12, para. 2). Property subject to seizure and confiscation includes proceeds of crime derived from offences covered by Convention (including property converted or intermingled with legitimate proceeds and any income or benefits derived from the proceeds) and property, equipment or instrumentalities used to commit offences covered by the Convention (art. 12, para. 1). Cultural property can be considered proceeds of crime and can, therefore, be preventively seized and then confiscated on the basis of the provisions of the Convention.

42. States parties are required to adopt measures to enable the identification, tracing, freezing and seizing of property for the purpose of eventual confiscation (art. 12, para. 2). With regard to cultural property, this can imply controlling the movements of such property and increasing efforts to document cultural property held by public and private bodies, including that which has been excavated illegally. Documentation authorizing the transfer of cultural property should be as detailed as possible and, if possible, be accompanied by photographs. Particular consideration should be given to the model export certificate for cultural objects prepared jointly by the United Nations Educational, Scientific and Cultural Organization and the World Customs Organization.⁹ States are also encouraged to guard, monitor and police archaeological sites as a means of prevention. These frequently difficult tasks can be carried out through the use of technologies such as satellites, metal detectors and other means.

43. In developing the judicial framework for seizure and confiscation, States may consider the appropriate burden of proof. In article 12, paragraph 7, of the Organized Crime Convention States parties are invited to consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation. Shifting the burden of proof in this manner would help States to overcome the difficulties they encounter in asserting their ownership over cultural property, particularly when the property was taken from an archaeological site and no means of identifying the object exists. One example of the application of a reverse burden of proof to claims over cultural property came in response to Security Council resolution 1483 (2003), in which the Council decided that all Member States should take appropriate steps to facilitate the safe return of cultural property illegally removed from Iraq by establishing, *inter alia*, a prohibition on trade in and transfer of such items known or reasonably suspected to have been illegally removed. The United Kingdom of Great Britain and Northern Ireland has adopted a legal instrument requiring the reverse burden of proof that has resulted in notable successes in the retrieval and return of such

⁹ Available from <http://unesdoc.unesco.org/images/0013/001396/139620E.pdf>.

cultural property to Iraq.¹⁰ The reverse burden has also encouraged due diligence prior to buying, reducing the flow of objects of suspicious provenance into the United Kingdom. In this regard, the use of a reverse burden of proof in accordance with article 12, paragraph 7, appears promising for combating trafficking in cultural property.

E. Provisions to facilitate effective investigations

1. Special investigative techniques

44. Special investigative techniques (art. 20) such as controlled delivery, electronic and other forms of surveillance and undercover operations have proven to be very powerful in combating organized crime. Recognizing the importance of transnational investigations, the Convention encourages international collaboration between law enforcement entities through bilateral or multilateral agreements or on a case-by-case basis when such agreements are not in place (art. 20, paras. 2 and 3). Illicitly removed or stolen cultural property is frequently transferred to third States through auctions and, increasingly, through the Internet. Proactive investigations are required to monitor the art markets and detect illegal trade. Undercover and controlled delivery operations (including simulated auctions) have given good results in the investigation of trafficking in cultural property.

2. Establishment of specialized multi-disciplinary investigation units

45. In the Organized Crime Convention, States are encouraged to develop specialist training programmes for law enforcement personnel to prevent, detect and control offences covered by the Convention (art. 29). Given the specialized knowledge required to properly participate in the market of cultural goods, the establishment of dedicated units with specialized training could greatly contribute to the fight against such trafficking.

46. In its resolution 2008/23, the Economic and Social Council urged Member States to protect cultural property and prevent trafficking in such property by, inter alia, developing the capacities and human resources of institutions such as the police, customs services and the tourism sector. In developing these capacities, specialized units can benefit from studying stolen works listed in art databases, receiving training in foreign legislation and languages, and having the authority to collaborate and make direct contact with their counterparts in other countries. Training should also be provided to border patrol officials, as they often lack the specialized knowledge necessary to identify cultural property of illicit origin, which is why such objects are rarely intercepted at State borders.

¹⁰ The Iraq (United Nations Sanctions) Order 2003 of the United Kingdom introduces as new offences the dealing in cultural objects illegally removed from Iraq, the possession or control of such objects and the failure to cause the transfer of such objects to a constable. In addition, it applies an exceptional burden of proof, whereby the defendant has to show that he or she did not know and did not have reason to suppose that the cultural object in question was illegally removed from Iraq since 6 August 1990.

3. Joint investigation teams

47. Pursuant to article 19 of the Organized Crime Convention, States may establish joint investigation bodies or undertake joint investigations on a case-by-case basis. States should cooperate closely with one another to enhance the effectiveness of law enforcement action; strengthen channels of communication; cooperate in conducting inquiries concerning persons, the movement of proceeds of crime and the movement of property, equipment or other instrumentalities used or intended for use in committing crime; and share information and personnel (art. 27, para. 1). In addition, States should consider entering into agreements on direct cooperation between their law enforcement authorities (art. 27, para. 2). In its resolution 2008/23, the Council echoed the importance of fostering international law enforcement cooperation to combat trafficking in cultural property and the need to increase the exchange of information and experiences.

48. With cultural property moving between States through suspicious transactions carried out, for example, through Internet auctions and methods such as fragmentation, the exchange of information on persons of interest, stolen items and emerging trends in terms of modus operandi is invaluable. The expert group on the protection against trafficking in cultural property also highlighted the importance of gathering and sharing information and expertise and recommended that States establish or develop central authorities focused on the protection of cultural property and cooperate with each other, inter alia, with regard to checking the market for cultural property, including Internet auctions (E/CN.15/2010/5, para. 23).

49. Online databases offer an efficient and effective means of sharing information on stolen or trafficked cultural property, offering easy access to up-to-date information and pictures for facilitating the identification of objects. Consideration could be given to establishing a single online portal consolidating all national and international databases and registries relating to cultural property.

F. International cooperation in criminal matters

1. Importance of international investigations for the protection of cultural property

50. The Organized Crime Convention offers a broad framework for international cooperation in the prevention, investigation and prosecution of organized criminal activity. With 156 States parties, the Convention establishes a nearly universal basis on which States can facilitate criminal investigations on all sorts of serious crimes, including trafficking in cultural property.

51. International investigations offer multiple advantages, including access to data and information located abroad, which, in turn, allows the mapping of crimes and the criminals. Those involved in this specialized market often appear to be operating in various countries; this can lead to multiple, overlapping investigations and to the disclosure of broader trafficking networks. International investigations are also a demonstration of the will and the capacity of a State to protect its cultural property beyond its national borders. Experts have confirmed that the real turning point in the protection of cultural property was achieved in the 1990s, when investigations started to become international and States started to cooperate more. International investigations have also contributed to reducing the sense of impunity and

discouraged many purchases by large-scale buyers. In this sense, international investigations can sometimes be more effective than national ones.

2. Extradition

52. While extradition is most commonly conducted on the basis of bilateral treaties, the Organized Crime Convention establishes a supplementary framework to enable extradition for crimes covered by the Convention when the offence for which extradition is sought is punishable under the domestic law of both the requesting and transferring States (dual criminality) (art. 16). The Convention allows States parties that make extradition conditional on the existence of a treaty and who receive a request for extradition from a State party with which it has no extradition treaty to consider the Convention as the legal basis for extradition (art. 16, para. 4) or to seek to conclude treaties on extradition with other States parties in order to implement the Convention's article on extradition (art. 16, para. 5).

53. States parties shall consider all offences covered by the Convention to be extraditable in any extradition treaty existing between States parties (art. 16, para. 3). Several of the criminal activities and concealment practices used to launder cultural property could therefore become extraditable. In addition, the Convention provides for mandatory jurisdiction over offences in cases where a State refuses extradition on the ground of nationality (art. 16, para. 10). This provision ensures that no offender can enjoy immunity from the law and, consequently, that States can request the extradition of traffickers of cultural property and their accomplices for the offences to which the Convention applies.

3. Mutual legal assistance

54. Many States are party to bilateral and multilateral treaties that establish a framework for the provision of mutual legal assistance in order to enhance transnational law enforcement capacities. Sometimes such treaties are specific to crime, but only a few bilateral agreements and no international agreements are specific to crimes involving cultural property. Although the Organized Crime Convention is not specific to trafficking in cultural property either, it is a useful tool for coordinating transnational law enforcement efforts in this regard.

55. Pursuant to the Convention, States parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention (art. 18, para. 1), including other forms of serious crime. Mutual legal assistance may be requested for the following purposes: taking of evidence or statements; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents or records; identifying or tracing proceeds of crime; facilitating the voluntary appearance of persons in the requesting State party; and any other type of assistance not prohibited under domestic law (art. 18, para. 3). The Convention makes it possible to receive mutual legal assistance even in cases where the involvement of transnational organized crime is only suspected rather than established because, in many cases, the assistance of another State is sought precisely to determine whether the offences or groups involved are, in fact, transnational in nature.

56. Considering the transnational nature of the art market, it is not uncommon that evidence has to be gathered, witnesses heard or property located, seized or confiscated from abroad, and that bank accounts in another country have to be frozen. Often, the competent authorities will make a request to travel to the country where a stolen object has been intercepted or found to identify it and ensure its safe return. The dual criminality requirement for mutual legal assistance is more easily met when States adhere to agreed definitions, such as those in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which includes a definition of trafficking in cultural property. The Organized Crime Convention, however, encourages States to take a flexible approach to dual criminality and to consider the way in which a crime was carried out rather than its definition.

4. International cooperation for the purpose of confiscation and recovery of illicit assets

57. Article 13 of the Organized Crime Convention establishes a framework for international cooperation for confiscating the proceeds of crime, property, equipment or other instrumentalities obtained pursuant to or used in the commission of an offence covered by the Convention, when such assets are located in the territory of another State party. Upon receiving a request for confiscation, the requested State is to take the appropriate steps to have an order for confiscation issued by its competent authorities (art. 13, para. 1) and take measures to identify, trace, freeze or seize proceeds of crime, property, equipment or other instrumentalities for the purpose of eventual confiscation (art. 13, para. 2).

58. Requests for international cooperation for the purpose of confiscation or seizure are to conform to the requirements listed in article 18, paragraph 15, according to which a request for mutual legal assistance in a case of trafficking in cultural property would contain, inter alia, a description of the property sought, underlining the benefit that a detailed registry of stolen cultural property might provide in recovering assets. Since trafficking in cultural property generally involves the transfer of property from one State to another, tools that enable international cooperation for tracing and confiscating assets are particularly pertinent. When disposing of property confiscated pursuant to article 13, the confiscating State is to give priority consideration to returning the property to requesting States so that they may return the property to its legitimate owners (art. 14, para. 2).

G. Prevention of trafficking in cultural property

59. The Organized Crime Convention takes a broad approach to prevention, recognizing the need for a multi-pronged response to organized criminal activity that involves individuals and public and private institutions and in which law enforcement is but one element. Pursuant to article 31, paragraph 2, of the Convention, States parties are required to endeavour to reduce opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. In the provision it is suggested that those measures should focus, inter alia, on strengthening cooperation between law enforcement agencies and private entities (art. 31,

para. 2 (a)) and the promotion of the development of standards and procedures aimed at safeguarding public and private entities, as well as codes of conduct (art. 31, para. 2 (b)).

60. The above-mentioned expert group on protection against trafficking in cultural property recommended that States encourage institutions dealing with auctions to ascertain the true provenance of cultural objects to be auctioned and to provide information on the provenance of such cultural objects, as far as feasible (E/CN.15/2010/5, para. 13 (a)). The expert group also recommended that States increase regulation and supervision of dealers in antiquities and similar institutions (E/CN.15/2010/5, para. 13 (e)). Codes of conduct like the International Code of Ethics for Dealers in Cultural Property, which was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization in 1999, offer a strong basis for control and could be adopted and applied directly by States.

V. Conclusions

61. The Organized Crime Convention is a relevant and useful instrument to enhance the criminal justice response against trafficking in cultural property. Its criminalization provisions are directly related and applicable to the protection of cultural property. The Convention could also be applied to a wider range of offences, including trafficking in cultural property and other, related, offences. The Convention provides a broad framework for enhancing the incipient law enforcement and judicial cooperation in this field. Specialized multi-disciplinary pools of experts can significantly contribute to increasing the effectiveness of investigation and prosecution efforts.

62. States should consider ratifying and fully implementing all relevant instruments, in particular the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Convention on Stolen or Illegally Exported Cultural Objects and the Organized Crime Convention, in order to provide a harmonized and common framework for the prevention of and protection against trafficking in cultural property and related crimes.