



## Economic and Social Council

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### **Expert group on protection against trafficking in cultural property**

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Item 2 (b) of the provisional agenda\*

**Measures to strengthen crime prevention and criminal  
justice responses to protect cultural property, especially  
with regard to its trafficking: review of the model treaty  
for the prevention of crimes that infringe on the cultural  
heritage of peoples in the form of movable property**

### **Potential utility of and improvements to the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property**

#### **Report of the Secretariat\*\***

#### *Summary*

The present report was prepared pursuant to Economic and Social Council resolution 2011/42, in which the Council invited Member States to continue to submit, in writing, comments on the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property, including views on its potential utility and on whether any improvements to it should be considered, at the earliest possible date. On the basis of comments received, the Secretariat has prepared an analysis and a report to be presented to the open-ended intergovernmental expert group on protection against trafficking in cultural property at its next meeting, as well as to the Commission on Crime Prevention and Criminal Justice at its twenty-second session.

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\* UNODC/CCPCJ/EG.1/2012/1.

\*\* The report was submitted late owing to the late receipt of information.



## I. Introduction

1. The present report has been prepared pursuant to Economic and Social Council resolution 2011/42, entitled “Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking”. In that resolution, the Council invited Member States to continue to submit, in writing, comments on the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property, including views on its potential utility and on whether any improvements to it should be considered, at the earliest possible date, in order to assist the Secretariat in preparing an analysis and a report to be presented to the open-ended intergovernmental expert group on protection against trafficking in cultural property at its next meeting, as well as to the Commission on Crime Prevention and Criminal Justice at its twenty-second session.

2. The Secretariat circulated to Member States note verbale 2012/56 dated 21 March 2012 to which the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property was enclosed, requesting their views on the potential utility of and improvements to the model treaty.

3. The model treaty was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1990, and welcomed by the General Assembly in its resolution 45/121 of 14 December 1990.

4. By 30 April 2012, thirteen Member States — Algeria, Australia, Bulgaria, Croatia, Ecuador, France, Germany, Israel, Japan, Poland, Togo, United States of America and United Kingdom of Great Britain and Northern Ireland — had responded to the note verbale. Two<sup>1</sup> responding States did not provide any comments on the model treaty. The responses from States are summarized below.

## II. Potential utility of the model treaty

### Australia

5. On the issue of the potential utility of the model treaty, Australia noted that the use of the model treaty would require extensive consultation with key stakeholders before Australia could use it as a template for bilateral engagement.

### Croatia

6. Croatia expressed satisfaction with UNODC efforts to promote activities to prevent trafficking in cultural property and works of art which form part of the continued efforts of the United Nations to halt the problem. This is further manifested in the adoption of resolutions and continued encouragement to Member States to undertake necessary measures to prevent and combat this type of crime.

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<sup>1</sup> Algeria stated that it did not have any comments. Israel stated that it would take the opportunity at the meeting to make comments.

7. Croatia indicated that it was faced with the problem of theft of cultural property and works of art and the illicit trade in, and transfer of, cultural property from its territory. Croatia is therefore particularly interested in the promotion of international cooperation in the search for effective and common actions aimed at preventing illicit trade and returning illicitly exported cultural property to their countries of origin.

8. Croatia expressed its support for the model treaty and stated that together with the 1970 UNESCO Convention and the 1995 Unidroit Convention, the model treaty could provide an additional incentive for promoting cooperation and more effective activities of Member States and international organizations and institutions which work on the protection of cultural property.

## **Ecuador**

9. Ecuador reiterated the proposal it had made together with other States<sup>2</sup> at the fifth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime to draw up an additional protocol to the convention on the trafficking of cultural property.

10. Ecuador expressed the view that the model treaty should be completely revised and made more consistent with the spirit of resolution 5/7 adopted at the fifth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, with a view to developing new instruments that enable States parties to take effective action in the fight against organized crime not only in the field of cooperation, but also preventing, combating and punishing the trafficking of cultural property within the framework of the Convention. A revision of the model treaty is necessary because the model treaty was based entirely on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. That Convention does not effectively meet the objective of protecting the cultural heritage of peoples and ensuring the restitution of that heritage in the event of illicit export or theft, especially where the object was obtained from clandestine excavations. Ecuador discussed aspects of the Convention which it considered did not meet the present needs of protecting cultural property, including the restriction for making requests through diplomatic channels and the fact that trafficking in cultural property is not considered a serious offence under the Convention.<sup>3</sup>

## **France**

11. On the question of the potential utility of the Model Treaty, France expressed its preference of international conventions over bilateral agreements in matters concerning trafficking in cultural property.

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<sup>2</sup> Ecuador, China, Egypt, Venezuela (Bolivarian Republic of), Iran (Islamic Republic of), Dominican Republic and others.

<sup>3</sup> Articles 7 (a) and (b), 13, of the UNESCO Convention.

## Germany

12. Germany stated that the model treaty had already been exhaustively discussed at the first meeting of the expert group in November 2009, which concluded that while some countries use bilateral agreements to implement the 1970 UNESCO Convention, the model treaty was not taken into account and it was therefore not applied in any country.

13. Germany, which ratified the 1970 UNESCO Convention and implemented the European Union Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a member State, did not have the need to apply the model treaty. This is due partly to the fact that EU law governs Germany's relationship with other EU member States and partly to the fact that Germany decided to grant the same level of protection to all States parties to the 1970 UNESCO Convention. Therefore having bilateral relations such as envisaged by the model treaty would undermine this multilateral protection mechanism and benefit individual countries.

14. Germany expressed the view that there was no scope for the application of the model treaty, since there was already an international acceptance of the 1970 UNESCO Convention with 121 States parties, the EU Directive 93/7/EEC, and the 1995 Unidroit Convention which had been adopted as an additional multilateral instrument.

## Japan

15. Japan was of the opinion that it was up to countries to conclude bilateral treaties drawing upon the model treaty. However, Member States already used the 1970 UNESCO Convention, and have taken measures under the multilateral framework of the Convention to protect cultural properties from illegal import, export and transport. Therefore, in order to address the problem of trafficking in cultural property, it is most important that States parties effectively implement their obligations under the Convention. There was thus no need for the model treaty which appeared to create another separate framework from the Convention and would complicate matters.

## Togo

16. Togo stated that all cultural property carried the testimony of a historical fact, a way of life, a form of social organization, technical mastery or a belief. All of these elements point to the cultural diversity that human beings have developed in their distinct settings. The cultural identity of a community is forged through the objects it creates and it is this identity that must be preserved and carried for future generations. Moreover, cultural property holds an "exceptional universal value". Therefore, activities that involve risk of squandering the assets must be prevented and punished and the property returned. The model treaty responds to this need and is consistent with the concerns of developing countries in which growing poverty, globalization and urbanization has given rise to thefts, pillaging and plundering of

cultural property for the benefit of developed countries and their nationals who have the financial means to acquire such items.

### **United Kingdom of Great Britain and Northern Ireland**

17. The United Kingdom expressed the view that the model treaty departed from, and was broader than, the 1970 UNESCO Convention, making it more difficult to be utilized. It was also noted that another difficulty was created by article 2, paragraph 2, which implied the introduction of new legislation rather than reliance on existing laws.

### **United States of America**

18. The United States of America considered that the model treaty was an outdated resource for countries seeking to protect their cultural property from looting, pillaging or other loss. The requirement in article 4 of the model treaty to provide the date of illicit export made the treaty particularly ineffective in situations involving the illicit trafficking of looted cultural property taken from the ground or cultural heritage sites.

19. The United States expressed the opinion that since the development of the model treaty, there had been a lot of multilateral and bilateral actions that have taken into account the issues considered in the model treaty, with the result that the model treaty had been overtaken by time and events. In particular, the United States mentioned that the model treaty has been superseded by (a) subsequent international instruments relevant to enhanced protection of cultural property (including but not limited to instruments adopted by UNESCO, Unidroit and the Commission on Crime Prevention and Criminal Justice; (b) widespread law enforcement cooperation and focus on cultural property issues; (c) broader dissemination of international tools and knowledge on combating illicit trafficking in cultural property; and (d) an international regime of multilateral coordination that has largely replaced bilateral collaboration on many cultural property issues.

20. The United States proposed that “instead of seeking to adopt or amend this bilateral model treaty, States should be encouraged to join and then robustly implement the existing international instruments that are already seeking to protect cultural property”. The model treaty was no longer a useful tool for international cooperation on cultural property crime prevention. It was noted for example, that since the development of the model treaty, the United States has concluded many bilateral treaties on protection of cultural property without reference to the model treaty as a basis for negotiations and to its knowledge, none of the negotiating parties were guided by the model treaty.

21. The United States stated that it considered that the model treaty did not address the root of the problem which is the looting of cultural property, in particular the pillage and unauthorized removal of such property from underground cultural sites, on the surface and underwater. This problem was addressed by the 1970 UNESCO Convention and 1995 Unidroit Convention.

22. The United States expressed the opinion that despite its title, the model treaty did not contain any crime prevention strategies.

23. Another shortfall of the model treaty noted by the United States relates to the manner of return of cultural property. The return of cultural property through diplomatic channels referred to in the model treaty provides only one possibility for return, whereas there may be others, for example through the use of criminal statutes and civil actions to recover and reconstitute trafficked cultural property.

## **Possible improvements to the model treaty**

### **Australia**

24. Australia suggested the option of converting the model treaty into an “opt out” model, which would require States parties to identify exclusion from certain provisions, if legally possible in accordance with international law. This would remove the need for exchange of letters.

25. Australia also noted that if INTERPOL should host the database envisaged in article 4, paragraph 4 (d), of the model treaty, it would be restricted to matters purely of a criminal nature as INTERPOL cannot be engaged in civil penalty provisions. Also relevant was whether there were costs involved for owners to register their stolen cultural property as is the case for the Art Loss Register. In relation to article 2, paragraph 4 (e), Australia noted that under its law, no special protection is provided to the good-faith purchaser. Australia considered that article 2, paragraph 4 (g), will be complex, expensive and resource-intensive to administer. Customs and border protection officers will have difficulty determining whether an object fell under this requirement. The issue of awareness-raising as required under article 2, paragraph 4 (h), raises questions of costs which was a current issue for Australia.

### **Bulgaria**

26. In its response, Bulgaria provided a number of specific amendments to the model treaty, as follows:

(a) The title is changed to read: “Agreement for Prevention of Crimes Infringing on the Movable Cultural Heritage of Peoples”;

(b) Article 1, paragraph 1: the word “ethnography” should be added after “history” in the chapeau, and the word “pre-history” be deleted;

(c) Article 1, paragraph 1 (b): the word “education” should be added after the word “science”;

(d) Article 1, paragraph 1 (d): the word “monument” should be replaced by “immovable cultural valuables”;

(e) Article 2, paragraph 4 (f) and (g): the words “export certificate” should be replaced by the words “export permit or analogical document” (issued under the conditions of Regulation 116/2009);

(f) Article 3, paragraph b: the word “knowingly” should be deleted;

(g) Article 4: the phrase “requests for restoration and return” should be replaced by “requests for confiscation and return” in order to ensure compliance with article 7 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

## **Ecuador**

27. Ecuador suggested numerous revisions that may be made to the model treaty.
28. It proposed that the model treaty should take into account new and sophisticated forms of trafficking in cultural property which have surpassed the old practices of collecting and are currently related to organized crime, money-laundering and drug trafficking.
29. The model treaty should focus on innovative forms of trading in cultural property using information technology which are not yet penalized or controlled due to a lack of an adequate legal basis.
30. Offences against cultural property should be characterized as transnational and imprescriptible and included in the category of “emerging” crimes. This is fundamental to preventing the violation of the human right of all peoples of the world to culture and identity. There should be provision for raid and confiscation procedures (among others) to be jointly developed at an operational level. This should help restitution of stolen property to its rightful owners, the people.
31. Consideration should be given to the establishment of an international court to try such cases.
32. There should be a provision for the elimination of a time limit for the prosecution of offences against cultural property, in line with article 28 of the 1969 Vienna Convention on the Law of Treaties of establishing non-retroactivity in the application of international treaties.
33. Ecuador further suggested that an additional paragraph relating to culture as a human right be incorporated into the preamble, stipulating that culture must be protected and guaranteed by all States, since the cultural property of peoples must not be damaged to the detriment of the population and the world. Another paragraph should be added to the preamble, stating that when a State’s cultural heritage is damaged or trafficked, the national identity of that State is undermined.
34. Regarding the scope of application and definition, Ecuador proposed that the model treaty should apply from the moment that a requesting State becomes aware that its property was located outside the country of origin.
35. It also proposed that the term “import” should be changed to “entry” in order to be consistent with trade and customs legislation.
36. The article on general principles contains the phrase “the purchaser of stolen movable cultural property which is listed on the international database”, but stolen items should not be restricted to those on the database. They should include items acquired as a result of clandestine terrestrial and underwater excavations and items requested by States parties.

37. The article relating to sanctions should address the real situation of States whose cultural property had been plundered and for whom the establishment of minimum penalties was not acceptable.

38. The model treaty should provide for judicial bodies of requesting States parties to work together.

39. Ecuador observed that the article relating to procedures reinforces its views on the inapplicability of the 1970 UNESCO Convention. It proposed that instead of the requirement to provide proof, a technical and scientific report providing identification and cultural affiliation, issued by the competent authority in the requesting State, should suffice. Also, the requirement to provide the exact date on which the cultural object was stolen or removed through clandestine excavation should be removed, since it was impossible to prove that an item was exported illicitly on a given date, still less that it was stolen on a specified date.

40. Ecuador proposed that alternative legal methods of providing evidence to establish the ownership of a State of cultural property should be examined, such as using existing scientific research on a given culture or carrying out studies of the item concerned by experts on culture or the item's origins and history. To this end, a provision should be added, requiring the State party in which the cultural property of the requesting State is illegally located to provide technical experts who can help with the identification of the property at issue.

41. The provision relating to the payment of compensation to the purchaser of a cultural item in good faith should be deleted from the model treaty since, when items of cultural property belonging to a State party are acquired, it may be assumed that the purchaser was aware of their provenance, cultural affiliation and historical value, given that they usually fetch high prices, since it is understood that they are unique and sumptuary items.

42. Consideration should be given to the sharing of expenses involved in returning the property by the requesting and requested States parties.

43. Agreements could be made with global Internet providers on supporting the monitoring of trafficking in cultural property.

44. There should be a requirement to establish a central authority to facilitate the restitution of cultural property.

45. Finally, Ecuador proposed that in order to improve the process of restitution and return of cultural property, the provisions of Economic and Social Council resolution 2008/23, adopted at the forty-second substantive session of the Council on 24 July 2008, should be incorporated, in particular paragraph 4, in which the Council "Encourages Member States asserting State ownership of cultural property to consider means of issuing statements of such ownership with a view to facilitating the enforcement of property claims in other States".

## **France**

46. France pointed out that paragraphs e and g of article 2 of the Model Treaty are too vague. The fact that a purchaser of cultural property listed on the international database should not be considered to be a purchaser who has acquired such property



in good faith might create a problem, especially if the access to the international database is restricted. Furthermore, France underlined that the procedure to obtain export certificates as required in paragraph g of article 2 of the Model Treaty is onerous, especially where the purchaser is not an expert. The presumption of bad faith which leads to the restitution of the property without any compensation would violate the constitutional right to property. France expressed concern about the impact that such rules would have on the art market.

## Japan

47. In terms of possible amendments to the model treaty, Japan responded that, with regard to the criminalization of trafficking in cultural properties and related conduct, the legal systems of countries around the world differ, and while it does not foresee any possible international agreement on the issue, it does not think it is useful, as a matter of efficiency, to consider modifying the model treaty.

## Togo

48. Togo in its response proposed that the model treaty be amended in a number of areas:

(a) The title of the model treaty should be amended to read as follows: “Model Treaty on Crimes against Movable Cultural Property Belonging to the Cultural Heritage of Peoples and the Return of Such Property”;

(b) A paragraph should be included in the model treaty which allows for the establishment of a rebuttable presumption that cultural objects which are not accompanied by documentary proof of origin are prima facie illegal, thereby reversing the burden of proof and placing it on the possessor of the object to prove its legitimate provenance;

(c) In respect of article 4, paragraph 4, in order to preserve privacy, words to this effect should be appended to the beginning of the sentence: “Subject to national laws, particularly those concerning access to information and respect for privacy”.

49. Togo also noted that the model treaty does not provide a procedure for settling disputes. Such a procedure is essential to enhance the applicability of the proposed text. Therefore it suggests that article 5 be amended accordingly.

50. Togo endorsed the comments of the intergovernmental group of experts that the model treaty should better address the problem of transit States which play a role in the issuance of export certificates and concealing the provenance of cultural objects.

51. Togo expressed the opinion that the purpose of the text of the model treaty is more consistent with a text that goes beyond two contracting States. Therefore the intergovernmental expert group should consider a possible amendment of the model treaty “to create a multilateral instrument that allows for the control of the movement of cultural property between Member States and which expressly provides that States (a) will not import cultural property illicitly exported and

(b) will not issue an export permit for cultural property imported into their territory without appropriate export licence.”

### **United States of America**

52. In considering possible amendments to the model treaty, the United States stated that the word “illicit” in the introductory paragraph of the model treaty should be defined.

53. The United States viewed as problematic the definition of “movable cultural property” in article 1, paragraph 1, which includes within its scope items not protected under its laws as cultural property, for example, “objects of paleontological interest”.

54. The United States observed that article 2, paragraph 1 (a), referring to the prohibition of import and export of cultural property “(ii) which has been illicitly exported from the other State Party” was already covered by the 1970 UNESCO Convention. The United States encouraged States to ratify and implement that Convention instead.

55. The United States pointed out the difficulty of implementing the provisions of article 2, paragraph 1 (c), of the model treaty because such legislation would not be constitutional in the United States which can only take reasonable steps, consistent with its Constitution and other applicable laws, to punish persons who engage in such conspiracies when they violate United States law.

56. In respect of article 2, paragraph 1 (d), and article 4, paragraph 4, there was already an international database currently managed by INTERPOL, which was a key tool in combating cultural property trafficking available to all INTERPOL members. The database was brought online in the early 2000s, after the adoption of the model treaty, and it highlights one of the ways in which the Treaty had been largely overtaken by events. INTERPOL is a multilateral organization, and provides for a much broader international communication and analysis framework for movable cultural property than would a series of narrower, bilateral agreements.

57. Moreover, these provisions were syntactically complicated and unclear with regard to the treatment of a purchaser in good faith. For “good faith” purchasers, the 1995 Unidroit Convention (especially article 4 of that Convention) provides a more comprehensive framework of protections and responsibilities. Countries that are prepared to do so should consider ratifying and implementing the 1995 Unidroit Convention, which entered into force after the adoption of the 1990 model treaty and whose provisions logically supersede the model treaty.

58. In respect of article 2, paragraph 1 (f), the United States expressed concern that it could not under its laws regulate the exportation of cultural property, and therefore could not provide export permits for cultural property leaving its territory. Additionally, United States law did not allow the enforcement of other countries’ export laws (including evaluating export permits) except in specific cases enabled by current United States law.

59. As regards article 3, the United States expressed the view that States should be encouraged to undertake these efforts whether there was a bilateral agreement in

place or not. The creation and enforcement of sanctions was an internal matter to a State, independent of a given bilateral relationship.

60. Regarding article 4, paragraph 1, law enforcement channels, rather than diplomatic channels, often provide the most expeditious and effective recourse for recovery of illicitly trafficked property. Moreover, existing bilateral agreements, such as mutual legal assistance treaties (MLATs) (of which the United States had entered into at least 50 with different countries) and customs mutual assistance agreements (CMAAs), were an existing and useful means of providing for bilateral legal cooperation, including for cultural property issues. Although article 4 prescribes use of diplomatic channels for the “recovery and return” of cultural property, the model treaty did not otherwise set forth any substantive duty requesting States to effectuate the recovery and return of such property which had been stolen in the other State party or illicitly exported from that party. It was an article limited to “procedures” and not substantive expectations. Additionally, countries of origin will always find it extremely difficult, if not impossible, to provide evidence of a “date of export” for an illicitly exported looted object. A requirement for this type of evidence only benefits market countries and will make the model treaty virtually ineffective in assisting claims from losing countries involving illicit trafficking in looted objects.

61. In respect of article 4, paragraph 4, the United States further considered that there are now many sources of information available to States, some of which were not available or envisioned in 1990. This includes information-sharing in bilateral (e.g. MLATs and CMAAs) and multilateral (e.g. INTERPOL) channels.

62. In respect of the requirement of paragraph 5, the United States stated that UNESCO maintained a database of national laws concerning cultural property that is available to all Member States and any other interested parties.

## **Concluding remarks**

63. Responding Member States have different views as to the utility of the model treaty.

64. Some States see positive potential for the utility of the model treaty. Togo even suggested that the intergovernmental expert group meeting consider proposing that the model treaty be elevated (with amendments) to the status of a multilateral instrument.

65. On the other hand some responding States were of the opinion that the model treaty did not have any potential utility, considering the already existing international instruments on the same issue, namely the 1970 UNESCO Convention and the 1995 Unidroit Convention, and for members of the European Union, the EU Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State.

66. Responding States on either side of the spectrum pointed to the weaknesses of the model treaty. However, while some saw this as an opportunity to make it stronger, others point to this as a reason why the Model Treaty was not useful.

67. Some States have highlighted problem issues with certain paragraphs of the model treaty which made it difficult to utilize it at the bilateral level or implement it at the national level.

68. Many responding States have provided specific proposals on improving the model treaty, which they intend that the intergovernmental expert group will consider.

69. The protection of cultural property from trafficking and other criminal acts remained an issue that was of concern for responding States. The conclusions and recommendations of the intergovernmental expert group on this issue will need to reconcile the diverging views of Member States with a view to reaching consensus on how to proceed with the model treaty and make proposals to the Commission on Crime Prevention and Criminal Justice at its twenty-second session.

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