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

Vienna, 27-29 June 2012

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**

**Additional comments on the 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**

**Note by the Secretariat**

**I. Introduction**

1. On 21 March 2012, the Secretariat circulated a note verbale, requesting the views of Member States on the 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 was enclosed. The responses received by 30 April 2012 are contained in document UNODC/CCPCJ/EG.1/2012/2.
2. Furthermore, by 15 June 2012, responses were received from Algeria, China, Republic of Korea and Mexico. A summary of those responses is provided below.

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



## II. Potential utility of the model treaty

### China

3. China indicated that, in comparison with the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the UN model treaty placed special emphasis on the establishment of certain norms of prohibition from the perspective of prevention and penalization of the illicit activities of trafficking and trading of cultural property under protection, and therefore laid down certain valuable standards for activities relevant to criminal justice and administrative enforcement of law.

4. China noted that the model treaty included certain highly constructive and guiding recommendations in terms of the following three issues:

(i) The States parties are asked to adopt necessary measures to prohibit the import and export of cultural objects which were obtained through illegal means (see article 2, paragraph 1, item A). This recommendation places the importation of protected cultural property of other countries in the realm of activities prohibited by law. This helps wage a two-pronged fight against the illicit activities of trafficking of cultural objects by dealing with both export and import;

(ii) The States parties are asked to prosecute, as legal persons, the legal entities that engage in the illicit import or export of and trading in cultural property which are under protection, and to impose the necessary punishment on the institutions concerned and their responsible personnel (article 3). This recommendation is useful for the punishment of large-scale and organized illegal activities of trafficking in cultural objects and prevent and punish the activities of certain commercial and cultural entities that pursue economic gains through such illicit activities;

(iii) The States parties are asked to treat as dishonest acquisition the purchase of cultural objects which do not carry the export certificate issued by the other State party (article 2, paragraph 1 (g)). This recommendation is useful for scientifically and correctly defining and limiting the scope of “bona fide third party” in the effort to fight against illicit trafficking of cultural objects, and useful for facilitating and undertaking the recovery of cultural objects which have been trafficked illicitly.

### Republic of Korea

5. Republic of Korea expressed the view that the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property was designed to function as guidelines to provide a useful framework for negotiations and to set international standards for penal sanctions for states that wish to sign a bilateral treaty to combat against cultural property. Therefore, the parties are not necessarily bound by the model treaty, and may wish to agree on more strengthened penal sanctions where necessary.

6. Republic of Korea also noted that the model treaty adopted provisions on the definitions of “cultural property”, “procedures” and “expenses” from the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted on November 14th, 1970 (the “1970 UNESCO Convention”), making it of great relevance to the 1970 UNESCO Convention.

7. Republic of Korea further mentioned that Article 3 of the model treaty seemed to concretize penalties and administrative sanctions under Article 8 of the 1970 UNESCO Convention, and left the types of sanctions to be adopted to the discretion of each state party, however, it intends to secure the effectiveness of sanctions by specifying the actors to be subjected to the sanctions. In particular, article 3 prescribes that the persons who enter, with Mens Rea, into international criminal conspiracies relating to movable cultural property should be subjected to sanctions.

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

#### **Algeria**

8. Algeria suggested that the treaty be enriched with new legal articles based on the relevant conventions that have already been approved and ratified, including the Organized Crime Convention, in order to offer mutual legal assistance in the prevention of trafficking in movable cultural property on the widest possible scale, as a legal basis for international cooperation, in addition to: the Convention concerning the Protection of the World Cultural and Natural Heritage (UNESCO, 1972), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970), the UNIDROIT Convention on Stolen or Illegally exported Cultural objects (Rome, June 1995), the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999.

9. Algeria further proposed that the preamble of the treaty should be expanded to include the main principles and recommendations agreed upon, during the different sessions of the Commission on Crime Prevention and Criminal Justice of the United Nations Economic and Social Council. It mentioned, for example, the 19th session which stated as follows: “Considering the importance of cultural property to peoples, being a part of the common human heritage and a unique and important witness to the culture and identity of peoples, and the need for its protection, we stress the need for international cooperation through preventing and combating all aspects of trafficking in cultural property pursuant to the United Nations Organized Crime Convention and the United Nations Convention against Corruption”; and “Aiming at combating illegal transnational trafficking in movable cultural property whether stolen or not, and imposing adequate administrative and criminal penalties on those who commit crimes that infringe on the cultural heritage of people pursuant to what has been agreed in the United Nations Eighth conference on Crime Prevention (Havana 1990).

10. With regard to Article I of the model treaty, Algeria further suggested that, given the abundance, diversity and size of every State's cultural heritage, annexes containing inventories of States parties' cultural heritage should be attached to the treaty with a view to facilitating the work of the International Criminal Police Organization (Interpol), especially since this organization plays an effective role in implementing international cooperation aimed at tracking those who commit crimes and their extradition to the requesting State. Moreover, the non-inclusion of the movable cultural heritage in a specific comprehensive list may result in the exclusion of cultural heritage that is unlisted, and thus indirectly contribute to criminals getting away with their crime (e.g. the inventory list included in Law number 04-98 dated 15 June 1998 concerning the protection of the Algerian cultural heritage).

11. With reference to Article 2 of the model treaty, Algeria proposed that it should be enriched with the inclusion of some of the cooperation measures between States aimed at protecting the movable cultural heritage of States, especially through measures to strengthen cooperation, such as: (i) Encouraging institutions involved with auctions, including auctions conducted via the Internet, to ascertain the true source of cultural property offered for sale through auctions, and to provide advance information, as far as possible, about the source of such intellectual property; (ii) reporting information on the loss of property pertaining to movable cultural heritage immediately, whenever possible, preferably to the International Criminal Police Organization (Interpol); and (iii) improving the control of the export of property pertaining to movable cultural heritage by using, when need be, the export certificate form prepared by UNESCO and the World Customs Organization.

12. Regarding Article 3 of the model treaty, Algeria suggested that, in addition to persons and institutions to be penalized, there should also be provision for the criminalization of the activity, for example: "each State party shall criminalize activities related to trafficking in movable cultural property through the criminalization of its illegal import, export or transport according to the national legislation of every State".

## **China**

13. Regarding the prevention of and fight against transnational trafficking of cultural property, China indicated that there was a special need for countries to engage in international cooperation, which should cover the apprehension and extradition of criminal suspects, mutual assistance in investigation and evidence collection, seizure of cultural property that has been illicitly trafficked, confiscation of illegal proceeds and gains, and the funding used for undertaking illegal trafficking, the recovery and return of the cultural relics that have been illicitly trafficked and the exchange of relevant intelligence, and to develop the appropriate rules for these international activities.

14. The model treaty failed to propose and include the above norms and proposals for international cooperation for the prevention and fight against illicit trafficking in cultural property, which is a major drawback. It is expected that the necessary improvements will be made in the relevant follow-up process.

15. Furthermore, with regard to the determination of the illegality, conviction and mode of punishment of those activities that damage the common interests of countries and the cultural property protected jointly by the international community, China suggested that a more suitable approach, and also a successful practice widely accepted by the international community, is to draw up a multilateral international convention or a multilateral legal instrument of any other type to harmonize the norms by which countries develop legislation and exercise justice. It may therefore be envisaged that a special multilateral international convention for the prevention of and fight against the crime of trafficking in cultural property might be developed when conditions are ready.

16. China noted that, before a convention of this kind is in place, it is worth considering discussing and producing a guideline document widely accepted by countries. The draft guidelines for crime prevention and a criminal justice responses with respect to trafficking in cultural property currently being discussed and developed by the United Nations Office on Drugs and Crime is a very good endeavour.

### **Republic of Korea**

17. Republic of Korea underlined that the Treaty clarified that its purpose was to heighten bilateral cooperation through: (i) the introduction of administrative measures for impeding illicit transnational trafficking in movable cultural property, (ii) the imposition of administrative and penal sanctions, and (iii) the provision of a means for restitution. However, it suggested that, like the 1995 UNIDROIT Convention, which distinguishes between restitution and return, the former for stolen cultural property, and the latter for illegally exported cultural property, the model treaty needed to use the two terms separately.

18. Republic of Korea further referred to the fact that Article 1 of the Treaty, adopting the definition of cultural property from Article 1 of the 1970 UNESCO Convention, demanded that movable cultural property should be specifically designated by a State Party, while noting that such a specific designation was unnecessary. Republic of Korea mentioned, for instance, the enumeration system, the categorization system, and the classification in the methods of protecting cultural property, and noted that only a limited number of states used the classification system. Besides, Republic of Korea observed that the 1995 UNIDROIT Convention, adopting Article 1 of the 1970 UNESCO Convention, did not demand that cultural property should be “specifically designated” by a State.

19. With regard to subparagraphs (a) and (b) of paragraph 1 of article 2 of the model treaty, Republic of Korea suggested that given that the aim of the model treaty was to provide guidelines for a bilateral agreement, the “necessary measures” described in the subparagraphs should be detailed.

20. Republic of Korea also referred to Article 2, paragraph 1, subparagraph (e), which stipulates that each State Party should take the measures necessary to ensure that the purchaser of stolen movable cultural property listed on the international database is not considered to be a purchaser who has acquired such property in good faith. Republic of Korea indicated that this provision went beyond the scope of the

1970 UNESCO Convention and the 1995 UNIDROIT Convention, and that, therefore, it required further review.

21. Republic of Korea noted that Article 4 of the model treaty adopted articles 7 and 16 of the 1970 UNESCO Convention and that the model treaty prescribed “fair compensation” to any person or institution that in good faith acquired or was in legal possession of cultural property. However, to avoid confusion, Republic of Korea suggested that fair compensation be replaced by “just compensation”, as described in the 1970 UNESCO Convention.

## **Mexico**

22. Mexico referred to article 1, paragraph 1 (c), which provides that the cultural property coming under the scope of application of the model treaty includes the products of archaeological excavations or discoveries, including clandestine excavations or discoveries, whether on land or under water. However, the very fact that they were clandestine means that it was not possible to locate such activities precisely in time or space, much less to document them, until the State affected becomes aware through other channels of the plundering that has occurred. Therefore, Mexico concluded that article 1, paragraph 1 (c) was not consistent with the provisions of article 4.

23. With regard to article 4 of the model treaty, Mexico stated that although States concerned would be required to act in accordance with this obligation, the model treaty, as it stands, does not itself prohibit the import of cultural property. Such a prohibition would therefore have legal force in the territory of each of the Parties, only if they adopted all the necessary domestic measures, and thus not directly as a result of the entry into force of the treaty itself. In the light of the above, consideration should be given to the possibility of amending the model treaty, so that it could itself constitute the legal source of the prohibition in question.

24. Mexico suggested that paragraph 2 of article 2 could be amended in order to make it also explicitly permissible for the relevant authorities to proceed to the implementation of the treaty; that is, the treaty itself could form the basis for putting such powers into effect, which would make it unnecessary for States to introduce new legislation, for example, to achieve the requisite effect.

25. With reference to article 2, paragraph 1 (g), Mexico underlined that, according to the treaty, such a purchaser was not in possession of cultural property legally or in good faith, so not only would payment of compensation be inappropriate, but a legal situation that existed prior to the entry into force of the treaty would be involved.

26. Regarding paragraph 1 of article 4 of the model treaty, Mexico noted that it restricted to diplomatic channels the transmission of requests for recovery and return. Therefore, Mexico suggested that the model treaty include the possibility of transmitting the relevant claims through the mutual legal assistance system, in view of the fact that, for some countries, this mechanism might be more efficient in handling any request that needs to be formulated.

27. With regard to the fact that paragraph 1 of article 4 of the model treaty provides that the requesting State party shall furnish the evidence, including the date

of export of the property requested, Mexico highlighted that in the majority of cases, it will be impossible to provide the proof for such a request, in view of the fact that these are unlawful acts, carried out secretly, which make it impossible to specify the date on which the property left the country of origin.

28. Mexico pointed out that, with regard to paragraph 2 of article 4, some legal systems barred national authorities from making payments of any kind to individuals who were in possession of objects forming part of the country's cultural heritage. That is the case in Mexico, in accordance with the provisions of article 4 of the General National Property Act and article 27 of the Federal Archaeological, Artistic and Historic Monuments and Areas Act.

29. Mexico indicated that, in the course of various bilateral negotiating sessions on instruments relating to the return of cultural property, both the National Council for Culture and the Arts and the National Institute of Anthropology and History had stated that, to date, there has been no case in which the Mexican State has paid compensation of any kind to recover objects unlawfully removed from Mexican territory, least of all in the case of archaeological property, while historic artefacts dating back before the twenty-first century and those that are relevant to the history of Mexico are national property under the current law.

30. Mexico proposed that the model treaty should include the following:

- (i) A provision governing the exchange of information on persons presumed to be linked to the theft, illicit import or export of cultural property, in order to facilitate the identification, arrest and subsequent prosecution of such persons;
- (ii) A mechanism whereby customs authorities and border police share information on property illegally taken out of the country with a view to helping identify and intercept it in a timely fashion and, where necessary, taking the appropriate precautionary measures;
- (iii) An article on the resolution of disputes, in order to establish clearly the procedure that the Parties should follow in resolving disputes concerning the interpretation or implementation of the treaty, as noted in footnote 14 to the text contained in the Compendium of United Nations standards and norms in crime prevention and criminal justice.

31. Mexico proposed further specific amendments to the model treaty that are annexed to this conference room paper.

## Annex: Proposed amendments from Mexico

### *Article 2* *General principles*

**1. This Treaty prohibits the import and export of movable cultural property (i) which has been stolen in the other State Party or (ii) which has been illicitly exported from the other State Party.**

~~(1-)~~ 2. Each State Party undertakes:

~~(a) To take the necessary measures to prohibit the import and export of movable cultural property (i) which has been stolen in the other State Party or (ii) which has been illicitly exported from the other State Party;~~

~~(b)~~ (a) To take the necessary measures to prohibit the acquisition of movable cultural property which has been imported contrary to the prohibitions resulting from the implementation of subparagraph (a) above and trafficking in such goods;

~~(c)~~ (b) To legislate in order to ... .

~~(2-)~~ 3. Each State Party undertakes to take the necessary measures to recover and return, at the request of the other State Party, any movable cultural property which is covered by **paragraph 1 above. This Treaty empowers the relevant authorities of each State Party to take the appropriate implementation measures.**

By way of reference, it may be pointed out that this proposal is based on articles 1 and 4 of the Agreement on the protection and restitution of cultural property recently signed between Mexico and Chile (the Agreement has not yet entered into force), which read as follows:

#### “Article 1

The aim of this agreement is to prohibit the entry into the territories of the Parties of any protected palaeontological, archaeological, artistic or historic cultural object (hereinafter “cultural object”) originating in the other Party that has been stolen, acquired or trafficked illicitly and to establish the necessary procedures for its restitution.

#### “Article 4

...

The Central Authorities shall be entitled to take the measures necessary to bring about the restitution of cultural objects.”

#### **Article 4 of the model treaty**

Consideration should also be given to whether it might not be appropriate to expand article 4 of the model treaty in line with article 4 of the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or

Illegally Exported Cultural Objects (an explanatory report on the Convention prepared by the UNIDROIT Secretariat is annexed), by adding:

(i) Provisions relating to the possession of cultural objects by inheritance or otherwise gratuitously;

(ii) Verifiable criteria or parameters (i.e., containing a factual reference) to determine whether a person acquiring a cultural object really acted “in good faith”;

(iii) Provisions under which a person who transfers a stolen or illicitly exported cultural object shall be the one, in principle, to pay the appropriate compensation to a possessor in good faith and also provisions under which a requested State should adopt measures to that end (i.e., that a requested State should undertake greater commitments to a requesting State);

(iv) Provisions under which a requesting State has the right to claim compensation against a person who transfers a stolen or illicitly exported cultural object with a view to receiving reimbursement of any compensation paid to a possessor in good faith and under which a requested State should adopt measures to that end (i.e., that a requested State should undertake greater commitments to a requesting State);

The above could be expressed in the form of the following proposed provisions, for example:

*Article 4*  
*Procedures*

...

2. All expenses incidental to the return and delivery of the movable cultural property shall be borne by the requesting State Party, and no person or institution shall be entitled to claim any form of compensation from the State Party returning the property claimed. Neither shall the requesting State Party be required to compensate in any way such persons or institutions as may have participated in illegally sending abroad the property in question, although it must pay fair compensation to any person or institution ~~that in good faith acquired or that was in legal possession of the property~~ **by inheritance or otherwise gratuitously. Such person or institutions shall not be in a more favourable position than the person from whom it acquired the cultural property.**

**A person or institution that acquires movable cultural property stolen or illicitly exported from the requesting State Party shall be entitled to fair compensation in restitution, provided that the possessor neither knew nor ought reasonably to have known that the property was stolen or illicitly exported and can prove that it exercised due diligence when acquiring the property.**

**In determining whether a person or institution acquiring property exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the question of whether it consulted the authorities of the requesting and the requested State Party or national or international organizations and/or entities to which it could have had access, the nature of the persons or institutions involved, the price paid, whether the possessor**

consulted any reasonably accessible register of stolen cultural property and any other relevant information and documentation that it could reasonably have obtained, and whether it took any other step that a third party would have reasonably taken in the circumstances.

Without prejudice to the right of a person or institution that acquires stolen or illicitly exported movable cultural property to appropriate compensation, the requested State Party shall use the legal resources available to it to ensure that the person who transferred the property, or any other previous transferrer, is the one who shall pay such compensation.

Where applicable, payment of fair compensation by the requesting State Party shall be without prejudice to that Party's right to recover its payment made to a person who transferred cultural property or to any other previous transferrer. The requested State Party shall take all the measures at its disposal to provide the requesting State Party with any legal assistance or advice that it may request to that end.