Commission on Crime Prevention
and Criminal Justice
Twenty-second session
Vienna, 22-26 April 2013
Item 7 of the provisional agenda*
World crime trends and emerging issues and responses in
the field of crime prevention and criminal justice

Compendium of comments from Member States on the
draft specific guidelines on crime prevention and criminal
justice responses with respect to trafficking in cultural
property**

Summary

The present conference room paper contains the responses received from
Member States to the request for further comments on the draft specific guidelines
on crime prevention and criminal justice responses with respect to trafficking in cultural property.

At the second meeting of the expert group on protection against trafficking in
cultural property, held in Vienna from 27 to 29 June 2012, Member States reviewed,
inter alia, the draft specific guidelines on crime prevention and criminal justice
responses with respect to trafficking in cultural property. The Secretariat was also
requested to further work on the draft specific guidelines in close consultation with
Member States. In note verbale CU 2012/136, dated 6 August 2012, the Secretariat
invited Member States to provide comments on the draft specific guidelines. On
5 September 2012, eight Member States wrote to the Secretariat requesting, inter
alia, the Secretariat to circulate the conference room papers that were generated
during the meeting so as to provide Member States with a complete picture of the
state of progress on the development of the guidelines. The Secretariat then issued
note verbale CU2012/177, dated 9 October 2012, attaching the conference room
papers and extending the deadline for receipt of comments.

* E/CN.15/2013/1.
** The present document is reproduced in the form in which it was received.
The present conference room paper is submitted in response to the request by some Member States that a compendium of all the responses of Member States be circulated to all Member States. It contains all the responses received from Member States and the Group of 77, as well as the letter from the eight Member States and the response from the Secretariat, with the request that it be brought to the attention of the Commission on Crime Prevention and Criminal Justice at its twenty-second session.

The Secretariat has reported on progress made on the development of the draft specific guidelines in document E/CN.15/2013/14.
Compendium of comments from Member States on the draft specific guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property

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1. Algeria

[...]

N°627/2012/MP/UNODC

NOTE VERBALE

La Mission Permanente de la République Algérienne Démocratique et Populaire auprès de l'Office des Nations Unies et des Organisations Internationales, à Vienne, se référant à la note Circulaire CU 2012/136 invitant notre pays à faire de nouvelles observations au sujet des principes directeurs sur les mesures de prévention du crime et de justice pénale relatives au trafic de biens culturels, a l'honneur de lui faire connaître que la partie algérienne considère que le projet est très pertinent dans l'ensemble des principes proposés et, qui, une fois adopté, constituera un document très utile contre le trafic des biens culturels.

S'agissant du principe directeur 22 selon lequel « les États devraient envisager qu’il soit permis de déduire la connaissance de l’auteur d’une infraction lorsque le bien culturel meuble est enregistré dans une base de données accessible au public comme étant un bien qui fait l’objet d’un trafic, qui a été exporté ou importé illiciterement, qui a été volé ou pillé, qui provient de fouilles illicites, qui fait l’objet d’un commerce illicite ou qui a disparu », la partie algérienne estime que si ce dernier vise le reversement de la charge de la preuve il devrait être plus explicite et il devra prévoir la faculté du juge à apprécier les faits.

Vienne, le 3 octobre 2012

[...]

2. Canada

Canada’s Response to Note Verbale CU 2012/136 of 6 August 2012:

The Government of Canada’s comments on the April 24, 2012 version of the draft “Guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property”

Introduction

Canada welcomes the development of guidelines for Member States in this area, but has significant concerns about the methodology being employed to develop them. A meeting of the Intergovernmental Expert Group (IEG) was held on June 27-29, 2012, where the draft guidelines were discussed, and efforts made to reach consensus on specific changes to them. However, the mandate of the meeting was unclear, and while the Secretariat took note of the consensus reached on specific points, the text was not projected on-screen in the room, making it more likely that there would be confusion as to what was agreed, and increasing the amount of time needed to discuss individual sections of the text. The Secretariat has not distributed a new version of the document to states for comments – instead reverting back to the April 24 draft. As a result, the status of the changes agreed to remain unclear.

Among the points of consensus reached by the IEG was, for example, that the Content/Background/Rationale” section of the document has no formal status and
will not be part of any document that may eventually be approved and adopted. This remains Canada’s understanding and reflects concerns that in many places those texts diverge from, and go further than, the guidelines they purportedly support.

Canada takes note of the efforts of the IEG to reach consensus on the document, and feels strongly that such efforts must continue. Any final document forwarded for approval or adoption by the Commission on Crime Prevention and Criminal Justice (CCPCJ) must, in Canada’s view, be the product of consensus in order to ensure that it can be as useful as possible to as many Member States as possible.

To aid in taking the process forward in an efficient, transparent manner, Canada requests that:

- Following receipt of comments from Member States, the Secretariat produce and distribute an annotated version of the draft guidelines that includes a compendium of all comments received on each of the draft guidelines; and
- That this compendium document be the basis for a subsequent meeting of the Intergovernmental Expert Group, with a mandate to draft and approve a final version for forwarding to the CCPCJ.

Comments on draft guidelines

Canada offers the following comments on the draft guidelines. Where no comments are offered, Canada supports in principle the draft guideline, but this should not be construed as an indication that Canada would necessarily be prepared or able to implement them in every instance. Some of the comments offered below (marked with an asterisk *) were made, and led to changes in text, during the June IEG meeting.

Title

The title should reflect the exact wording of ECOSOC Resolution 2011/42: “Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property”*

Introduction

There was consensus by the IEG that an explanatory introduction is necessary to specify the genesis and intended use of the guidelines.*

Canada recommends the following text as an introduction:

The following Guidelines have been developed in recognition of the devastating consequences that illicit traffic in cultural property has for the heritage of the people of all nations. Pursuant to ECOSOC Resolution 2011/42 and UN General Assembly Resolution 66/180 of 30 March 2012, they were formulated by the UNODC Secretariat in consultation first with individual experts acting in their personal capacity and subsequently by an Intergovernmental Expert Group of representatives of Member States, constituted on the direction of the UN Commission on Crime Prevention and Criminal Justice.

These non-binding Guidelines are available to Member States for their consideration, as appropriate, in the development and strengthening of criminal justice policies, strategies and legislation.
to combat illicit traffic in cultural property. They acknowledge that many different types of actions, including the involvement of organized criminal groups, contribute to that traffic, and that a multifaceted response is required to combat this serious problem.

The Guidelines are intended to be used by states in concert with other relevant capacity-building tools developed by, and made available through, the efforts of other international governmental and non-governmental organizations such as UNESCO, UNIDROIT, Interpol, the World Customs organization (WCO) and the International Council of Museums (ICOM).

Guideline #

1. Grammatical error. The text should read: *States should consider establishing and developing inventories of relevant cultural properties.*

2. Grammatical error and inappropriate use of the term “missing”. Use of the term “missing” to describe cultural property is inappropriate (since “missing” does not automatically infer any criminal offence or trafficking) and should be removed wherever it appears in the draft guidelines.*

   Canada recommends the following revised text:

   *States should consider establishing and developing databases on trafficked, illicitly exported or imported, stolen, looted, or illicitly excavated, or illicitly dealt in missing cultural property.*

4. Reference to “protection of cultural property” is overly broad. Given the purpose of the guidelines, this guideline should be revised to refer specifically to illicit traffic in cultural property. It should also acknowledge that federal states may have to adapt this guideline accordingly.

   Canada recommends the following revised text:

   *States should consider establishing (and for federal states, whenever possible within the limits of their constitution) a Central National Authority or empowering an existing Authority (and/or enact other mechanisms) for the protection of cultural property from illicit traffic.*

5. This guideline should be made more specific to the acquisition of objects that have been subject to illicit traffic. “Codes of conduct” is less appropriate in this regard than “acquisition policies”.*
Canada recommends the following revised text:

*States should consider encouraging cultural institutions to adopt codes of conduct and acquisition policies designed to prevent the acquisition of cultural property that has been subject to illicit traffic, and to disseminate best practices in that regard.*

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6. Grammatical error. The text should read: *States should consider encouraging cultural institutions and the private sector to report suspected cases to law-enforcement agencies.*

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7. Grammatical error. The text should read: *States should consider promoting and supporting training on cultural property regulations for cultural institutions and the private sector.*

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9. The phrase “where possible” is inappropriate: there will be instances where introduction of such certificates is possible, but not appropriate.

Canada recommends the following revised text:

*States should consider introducing and implementing certificates for export and (where possible appropriate) import of cultural property.*

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10. The intent of this draft guideline, and what is meant by “monitoring programs”, is unclear.

Canada recommends that this guideline be re-drafted to provide a clearer indication of what is envisaged.

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12. Given the purpose of the guidelines, this should be made more specific.

Canada recommends the following revised text:

*States should consider supporting and promoting public campaigns, including through the media, to sensitize the public and encourage awareness about the detrimental effects of illicit traffic in cultural property, foster a culture of care for cultural heritage among the general public.*

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20. Given the purpose of the guidelines, this guideline should specify that the “other offences” in question are those connected with illicit traffic in cultural property.*
Canada recommends the following revised text:

*States should consider introducing in their criminal legislation other offences directly related to illicit traffic in movable cultural property.*

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22. This proposal appears to be suggesting that states introduce a strict liability offence whereby a person could be found guilty of a crime if they fail to exercise a specific form of due diligence. Failure to exercise due diligence should not be inferred as an indication of knowledge/criminal intent and differs from the more general duty to exercise reasonable care in ascertaining the status of cultural property. **Canada cannot support such a concept and strongly recommends removal of this guideline.**

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30. Grammatical error. An object can either be returned or restituted or repatriated, but cannot be more than one of those things at the same time.

Canada recommends the following revised text:

*States should consider introducing search, seizure and confiscation of cultural property which is the object of illicit trafficking or other related offences, and to ensure their return, restitution and or repatriation.*

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31. This constitutes a reversal of the burden of proof. Such a concept would be inconsistent with Article 14.2. of the UN International Covenant on Civil and Political Rights, which states that “Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.” **Canada cannot support the concept that this guideline appears to advocate and strongly recommends removal of this guideline.**

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38. Canada takes the position that jurisdiction on the basis of nationality of the victim is not practical or acceptable. With respect to extraterritorial jurisdiction (implied by the current draft text), with the exception of the certain provisions of the Second Protocol to the Hague Convention, extraterritorial jurisdiction over actions related to illicit traffic in cultural property is not required by any of the existing international conventions concerning illicit traffic (a set of non-binding guidelines should not advocate to extend principles not already accepted under relevant international treaties). Canada believes that where an offence is sufficiently grave to warrant international consensus that it should be the subject of extraterritorial or universal jurisdiction, the appropriate course of action is the adoption of an international legal instrument to that effect, and when this is done Canada fully implements such requirements.
Canada recommends the following revised text:

*States should consider establishing their jurisdiction over the aforementioned criminal offences when the offence is committed within their territory, or, where required by an international legal instrument, by or against one of their nationals, if committed outside their territory.*

39. Establishing jurisdiction over acts regardless of the location or the nationality of the perpetrator, but solely on the basis of where the object originated is impractical and unacceptable. It implies that the state retains an interest in cultural property originating within its borders even after it has been legally purchased and/or exported abroad. In general, regarding the extraterritorial use of the criminal law, Canada adheres to the basic principles of sovereignty and comity, which require that the jurisdiction to adjudicate and enforce criminal laws vest in the State with territorial jurisdiction over the location where an offence is committed. As stated above, Canada believes that where an offence is sufficiently grave to warrant international consensus that it should be the subject of extraterritorial or universal jurisdiction, the appropriate course of action is the adoption of an international legal instrument to that effect, and when this is done Canada fully implements such requirements. The concept of “enhanced protection’ referred to in the text of this draft guideline, unless defined otherwise, would appear to relate solely to a regime of protection under the Hague Second Protocol, and the jurisdiction described goes beyond the scope of that treaty. As such, it is inappropriate for a set of non-binding guidelines. **Canada cannot support the concept that this guideline advocates and strongly recommends removal of this guideline.**

44. The general reference in this guideline to “crimes against cultural property” is overly broad and beyond the purpose of this document. This draft guideline also appears inconsistent with the modern approach to making conduct extraditable based on the seriousness of the potential sentence rather than the name of the offence. It should follow that if states make cultural property crimes a suitably serious offence, this guideline (creation of a separate extraditable offence specific to cultural property in the absence of a treaty obligation to do so) is unnecessary. **Canada recommends removal of this guideline.**

45. See comments above (#44). **Canada recommends removal of this guideline.**
46. See comments on guideline #2 above concerning inappropriate use of the term “missing”.

Canada recommends the following revised text:

States should consider cooperating in identifying, tracing, seizing and confiscating trafficked, illicitly exported or imported, stolen, looted, as illicitly excavated, or illicitly dealt in or missing cultural property.

48. See comments on guideline #2 above concerning inappropriate use of the term “missing”.

Canada recommends the following revised text:

States should consider enhancing the exchange of information on offences against cultural property by sharing or interconnecting inventories of cultural property and databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, or illicitly dealt in or missing cultural property, and/or contributing to international ones.

49. This guidelines should reflect the fact that in certain instances, such cooperation may be subject to legal and discretionary limits in respect of privacy and other human rights and investigative security interests.

Canada recommends the following revised text:

States should consider, where appropriate, enhancing exchange of information on previous convictions and ongoing investigations of offences against cultural property.

54. Use of the phrase “all necessary measures” is too far-reaching and vague. Also, as noted in comments on #30 above, an object can either be returned or restituted or repatriated, but not more than one of those actions at once.

Canada recommends the following revised text:

States should consider undertaking all necessary appropriate measures to recover trafficked, illicitly exported or imported, stolen, looted, as illicitly excavated, or illicitly dealt in or missing cultural property for the purpose of return, restitution and or repatriation.
24 September 2012


Thank you for circulating, in response to the request made by Canada and other Member States, documents that were distributed at various stages during the June 27-29 meeting of the Intergovernmental Expert Group (IEG) on trafficking in cultural property and which seek to portray some of the revisions to the draft guidelines which were discussed. As the draft guidelines, and changes proposed to the text, were not projected in the meeting room, it is difficult to say how accurately these documents reflect the discussion that took place, and the specific revisions sought by certain states. Nevertheless, Canada is pleased to offer comments in addition to those already made in detail in response to Note Verbale CU 2012/136 of 6 August 2012, which referred to the April 24 version of the draft. The comments that follow herein should be read in concert with those already expressed views and recommendations.

As revisions to the text were cumulative over the three days of the meeting, Canada’s comments relate only to the third and final of the working documents, UNODC/CCPCJ/EG.1/2012/CRP.2/Rev.2 dated 29 June 2012. With respect to the text of the draft guidelines in that document, Canada supports the changes made therein, which either satisfy concerns already raised by Canada, or do not alter Canada’s support in principle for the draft guideline in question, with the exception of the following:

Draft Guideline 5: Canada reiterates its previous comment and recommendation.

This guideline should be made more specific to the acquisition of objects that have been subject to illicit traffic. “Codes of conduct” is less appropriate in this regard than “acquisition policies”.

Canada recommends the following revised text:

States should consider encouraging cultural institutions to adopt codes of conduct acquisition policies designed to prevent the acquisition of cultural property that has been subject to illicit traffic, and to disseminate best practices in that regard.

Draft Guideline 6: Canada accepts the change but reiterates its recommendation to correct a grammatical error (insert “the” before the phrase “private sector”).

Draft Guideline 7: Canada considers the change to alter and render less clear the meaning of the draft guideline, and recommends retaining the previous (April 24) text of this draft guideline, correcting the grammatical error (insert “the” before the phrase “private sector”).
Draft Guideline 9:  Canada considers the change to widen and make vague the draft guideline, and reiterates its previous comment and recommendation. The phrase “where possible” is inappropriate: there will be instances where introduction of such certificates is possible, but not appropriate.

Canada recommends the following revised text:

*States should consider introducing and implementing certificates for export and (where possible appropriate) import of cultural property.*

Draft Guideline 10:  The change in the text does not address Canada’s previous concern. Canada reiterates its previous comment and recommendation. The intent of this draft guideline, and what is meant by “monitoring programs”, is unclear.

Canada recommends that this guideline be re-drafted to provide a clearer indication of what is envisaged.

Draft Guideline 12:  Canada supports the revised text but recommends that the phrase “protect them” be changed to “protect it”, to emphasize that it is the cultural property, not the public, that is the focus of protection.

Draft Guideline 13:  Canada recommends retaining the previous (April 24) text of this draft guideline: the change has altered the meaning of the guideline, since “in accordance with” does not necessarily imply that the state in question has joined, and is implementing, the international instruments in question, but is rather simply acting in a manner consistent with them.

Draft Guideline 16:  Canada supports merging draft guidelines 16-19, 21, 23 and 24 into a single guideline, but does not support addition of the phrase “to the greatest extent possible within their domestic legal systems” in the chapeau statement. Canada also does not support addition of the new concept contained in h) “handling and laundering of cultural property”.

Draft Guideline 20:  Canada cannot accept the revised text, as it incorporates a range of offences against cultural property, such as vandalism, that are not necessarily linked with illicit traffic (and are therefore beyond the scope of the guidelines), or actions that are not well-defined legal concepts, such as “negligent acquisition”.

E/CN.15/2013/CRP.7

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Canada reiterates its previous comment and recommendation. Given the purpose of the guidelines, this guideline should specify that the “other offences” in question are those connected with illicit traffic in cultural property. Canada recommends the following revised text:

*States should consider introducing in their criminal legislation other offences directly related to illicit traffic in movable cultural property.*

**Draft Guideline 22:** The revision to the text does not address Canada’s concern about this draft guideline. Canada reiterates its previous comment and recommendation.

This proposal appears to be suggesting that states introduce a strict liability offence whereby a person could be found guilty of a crime if they fail to exercise a specific form of due diligence. Failure to exercise due diligence should not be inferred as an indication of knowledge/criminal intent and differs from the more general duty to exercise reasonable care in ascertaining the status of cultural property. **Canada cannot support such a concept and strongly recommends removal of this guideline.**

**Draft Guideline 45:** The revision to the text does not address Canada’s concern about this draft guideline. Canada reiterates its previous comment and recommendation.

The general reference in this guideline to “crimes against cultural property” is overly broad and beyond the purpose of this document. This draft guideline also appears inconsistent with the modern approach to making conduct extraditable based on the seriousness of the potential sentence rather than the name of the offence. It should follow that if states make cultural property crimes a suitably serious offence, this guideline (creation of a separate extraditable offence specific to cultural property in the absence of a treaty obligation to do so) is unnecessary. **Canada recommends removal of this guideline.**

Aside from the above, in all instances where the April 24 version of the text has been revised in the June 29 document, Canada supports the revisions. In all instances where the text of the April 24 document remains unchanged in the June 29 document, Canada maintains the views and recommendations on the draft text made in its reply to Note Verbale CU 2012/136 of 6 August 2012.
3. China

PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS IN VIENNA

No.CPMV/UN/2013/001

The Permanent Mission of the People’s Republic of China to the United Nations and Other International Organizations in Vienna, with reference to Note Verbale CU/2012/136 dated 6 August 2012 and Note Verbale CU/2012/177 dated 9 October 2012, has the honour to inform that the Government of the People’s Republic of China now presents its comments on the Specific Guidelines on Crime Prevention and Criminal Justice Response with respect to Trafficking in Cultural Property, as attached herewith.

The Mission has further the honour to request the UNODC to include the comments into its documents which will be presented to the CCPCJ in April 2013.

[...]

Comments on the Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property

Cultural property is a physical carrier of human civilization. Protecting cultural property is the common obligation and responsibility of the whole international community. Facing the reality that cultural property trafficking is growing rampant and evolving into a transnational organized crime, it has become an urgent task of the international community to use various resources to more effectively combat trafficking in cultural property. In this context, UNODC, authorized by the UN Economic and Social Council, drafted the Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property (hereinafter referred to as “the Guidelines”), which is an absolutely necessary effort.

The Guidelines intends to combat trafficking in cultural property by using criminal instruments, and in accordance with existing international legal instruments and national legislative practices, define criminal regulations, encourage the establishment of bilateral or multilateral cooperation mechanisms and develop international criminal cooperation frameworks and guidelines combating trafficking in cultural property, from such diverse perspectives as crime prevention, crime identification and criminal justice cooperation. The UNESCO Convention 1970 and the UNIDROIT Convention 1995 have defined an international mechanism prohibiting and preventing illegal transfer of cultural property in the field of civil justice. And this Guidelines not only prohibits and prevents trafficking in cultural property from the prospective of criminal justice, but also takes a strong stance against such crimes, helping to cut off the chain of crime in cultural property trafficking. When the Guidelines is enacted, it will, along with the 1970 Convention and the 1995 Convention, form a complete international legal system to more effectively protect cultural property from trafficking.

It is the consensus of the international community to combat cultural property trafficking through international cooperation in criminal justice. And it has been proven by several relevant resolutions passed by the UN Economic and Social
As a guiding document, the Guidelines is not legally binding and thus not compulsory. But it can provide a legal justice cooperation framework for the international community and lay a foundation for countries across the world to collaborate with each other in combating trafficking in cultural property, when legally binding international treaties or international practices have yet to be formulated or developed. If it is passed, the Guidelines will witness successful efforts of the international community and help improve capabilities of countries across the world in combating trafficking in cultural property.

In conclusion, the Chinese Government notes that every country has obligations to take a more practical attitude and facilitate the enactment of the Draft Guidelines as soon as possible. Only by doing so can the power of the international community be mobilized to more effectively combat trafficking in cultural property and protect the common accomplishments of human civilization.

4. Egypt

EMBASSY OF THE ARAB REPUBLIC OF EGYPT
PERMANENT MISSION TO THE UNITED NATIONS ORGANIZATIONS
VIENNA

20/12/2012
UN/297/12

NOTE VERBALE

The permanent mission of the Arab Republic of Egypt, with reference to Note Verbal CU 2012/136 dated 6 August 2012, has the honour to state the following comments:

Egypt fully associated itself to the Note Verbal of the Group of 77 and China dated 11th of December 2012 and the substantial comments mentioned therein and would like to submit the following additional comments in its own national capacity:

Egypt is in support of the draft Guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property that were developed by the Secretariat as a product of the discussions that took place in the informal expert group meeting, held in Vienna from 21 to 23 November 2011, in which Egypt had participated with two experts. In this context, Egypt calls for the quick adoption of the draft Guidelines.

Furthermore, while Egypt is in support of the three chapters of the advanced unedited version of the Guidelines, Egypt is particularly interested in the provisions provided in Chapter 3 especially with regards to the Guidelines pertaining to issues of criminalization and further calls for maintaining clear language vis-à-vis this matter and its legal provisions, as well as the clarity of the proposed sanctions in the Guidelines that may be impaired for the offences against Cultural Property.

[...]
5. **El Salvador**

**Embajada de El Salvador en Austria**

Misión Permanente ante las Naciones Unidas y los Organismos Internacionales

NV-MPSAL-VIENA-11-12-057

La Misión Permanente de El Salvador ante las Naciones Unidas y los Organismos Internacionales con sede en Viena tiene el agrado de remitir adjunto los comentarios del **Gobierno de El Salvador** sobre el proyecto de directrices específicas sobre las respuestas en materia de prevención del delito y justicia penal al tráfico de bienes culturales, los cuales han sido proporcionados por la Secretaría de la Cultura de la Presidencia de la República de El Salvador.

Viena, 05 de noviembre de 2012.

[...]

**Proyecto de directrices específicas sobre las respuestas en materia de prevención del delito y justicia penal al tráfico de bienes culturales**

**COMENTARIOS DE EL SALVADOR**

“La Secretaría de la Cultura de la Presidencia de la República de El Salvador considera que las medidas y propuestas contenidas en el Proyecto de directrices específicas sobre las respuestas en materia de prevención del delito y justicia penal al tráfico de bienes culturales son las adecuadas en el mejor de los casos y es a lo que los Estados deben aspirar.

En el caso de El Salvador, en lo relativo a la creación de bases de datos para recopilar información de los bienes culturales, todavía está en niveles incipientes y se tiene la dificultad de contar con sistemas y programas obsoletos utilizados para ello.

En tal sentido, se consideran viables las medidas propuestas siempre y cuando éstas se acompañen de iniciativas de Cooperación Internacional apoyando el desarrollo de recursos tecnológicos y de capacitación de personal en los países que no cuenten con ellos o que su sistema es obsoleto, como es nuestro caso, favoreciendo aquellos proyectos que se desarrollen a nivel regional.

En virtud de lo anterior, la Secretaría de Cultura expresa su acuerdo con el documento referido y no tiene observaciones sobre el mismo”. 


6. France

REPRESENTATION PERMANENTE DE LA FRANCE AUPRES DE L’OFFICE DES NATIONS UNIES ET DES ORGANISATIONS INTERNATIONALES

N° 292/NV

Vienne, le 19 octobre 2012


[...]

Annexe: Observations de la France concernant les principes directeurs sur les mesures de prévention du crime et de justice pénale relatives au trafic de biens culturels

D’une façon générale, il conviendrait, dans un souci d’efficacité que ces Lignes directrices restent concises et claires: le texte comporte des redondances et certains articles devraient être fusionnés. Par ailleurs, les commentaires (“Content/Background/Rationale”) devraient uniquement servir à alimenter les débats et les réflexions et donc ne pas être intégrés au corps du texte final.

Il conviendrait de rappeler dans une brève introduction le périmètre du mandat confié à l’ONUDC en matière de trafic illicite de biens culturels dans le cadre de la lutte contre le crime transnational organisé. L’action de l’ONUDC dans ce domaine, en raison notamment de ses compétences en matière de police et de justice, a vocation à s’articuler avec celle d’autres organisations qui traitent du trafic illicite de biens culturels. Le premier chapitre du projet, consacré aux stratégies de prévention, aborde notamment des questions d’inventaire, de normalisation, de formation des responsables culturels et de sensibilisation des publics auxquels des réflexions et des moyens sont déjà consacrés dans d’autres enceintes. Il est certes nécessaire de mentionner la prévention dans ce cadre, mais il serait plus clair et efficace de renvoyer à chaque fois explicitement sur ces points aux organisations et aux dispositifs qui ont légitimité en la matière en les citant. Il serait également judicieux d’encourager les Etats membres qui ne l’ont pas encore fait à ratifier les instruments normatifs internationaux existants (notamment la Convention UNESCO de 1970).
Les remarques suivantes ne sauraient constituer une analyse exhaustive de ce projet de texte qui demande encore un travail de fond à mener lors d’une prochaine réunion du groupe d’experts intergouvernemental, ainsi que cela a été mentionné lors de la réunion des 27-29 juin 2012.

**Ligne directrice 2**: la mention de « biens culturels qui ont disparu », qui revient dans plusieurs lignes directrices, ne peut être retenue; elle est trop vague, n’a pas d’assise juridique et peut donner lieu à des dérives.

**Ligne directrice 13**: l’énoncé de cette ligne directrice ne reflète pas le contenu - plus nuancé - de sa motivation quant à l’applicabilité de la Convention de Palerme. Cet instrument ne trouve en effet à s’appliquer aux infractions visant les biens culturels que lorsque ces infractions satisfont aux critères énoncés par cette Convention, ainsi que le précise le paragraphe 85 de la motivation de cette ligne directrice.

**Ligne directrice 14**: il semble prématuré à ce Stade d’encourager les Etats membres à faire usage d’un Traité-type dont le texte n’est pas finalisé et alors que le principe même n’a pas encore été acté et ne fait pas l’unanimité.

La France pour sa part ne s’engage pas dans des accords bilatéraux spécifiques de ce type, considérant que la ratification des instruments normatifs internationaux constitue un engagement suffisant en la matière.

**Lignes directrices 16 à 19**: l’articulation du principe contenu dans la ligne directrice 16 avec les lignes directrices 17, 18 et 19 est peu claire. La ligne directrice 16 invite les Etats à incriminer le trafic de biens culturels au sens large. Force est toutefois de constater que certains des actes constitutifs de cette infraction, décrits au paragraphe 100 de la motivation, sont clairement redondants avec les infractions décrites aux lignes directrices suivantes. Ce chevauchement ne paraît pas compatible avec le principe de légalité - qui a valeur constitutionnelle en France et dans de nombreux Etats dont découle une double exigence de clarté et de précision des incriminations créées par la loi pénale.

**Ligne directrice 20**: le terme « autres infractions » est trop vague; il conviendrait de spécifier « en relation avec le trafic illicite ».

**Ligne directrice 22**: le principe contenu dans cette ligne directrice pose une présomption de mauvaise foi peu compatible avec les exigences du droit pénal qui suppose que la preuve de l’ensemble des éléments constitutifs - et donc de l’intention coupable de l’auteur - soit rapportée. Il convient, par ailleurs, d’observer une grande prudence en ce qui concerne l’utilisation des bases de données pour appuyer l’établissement d’une infraction. La seule base fiable à ce jour est celle d’Interpol, qui est cependant loin d’être exhaustive. Par ailleurs il conviendrait de clarifier ce que l’on entend par « accessible au public ». Il n’est pas forcément judicieux d’ouvrir ce type de bases de données au grand public, mais la traçabilité des recherches effectuées est par contre essentielle. Cet article ne nous semble pas pouvoir être conservé sous la formulation actuelle.

**Ligne directrice 23**: cette recommandation n’est pas compatible avec tous les systèmes juridiques. En France par exemple cette obligation ne s’applique qu’aux fonctionnaires.
Ligne directrice 31: cette recommandation n’est pas acceptable car elle introduit l’inversion de la charge de la preuve.

Ligne directrice 36: la mention de techniques d’enquêtes spéciales est trop vague.

Ligne directrice 39: la formulation de cette ligne directrice est trop vague, tant sur la notion de bien culturel appartenant au patrimoine culturel de l’État qui exerce sa compétence que de bien culturel faisant l’objet d’une « protection renforcée ». Cette recommandation ne paraît dès lors pas acceptable, en l’absence de définition précise et unanimement acceptée de ces notions.

Ligne directrice 44: il conviendrait de préciser de quel type d’infractions il est question: cette formulation trop vague n’envisage pas de gradation dans la gravité de l’infraction. Il conviendrait à tout le moins de parler d’infractions graves, ce qui est cependant encore très vague, mais surtout de préciser “en lien avec/relevant de la criminalité transnationale organisée”, puisque c’est à ce titre que mandat a été confié à l’ONUDC de se pencher sur le sujet du trafic illicite de biens culturels.

La même remarque vaut pour la Ligne directrice 45.

Ligne directrice 48: les remarques sur la Ligne directrice 22 valent également pour cette recommandation. L’échange d’informations est certes essentiel à la coopération mais, dans un souci de fiabilité, de sécurité et d’efficacité, les modalités demandent à en être clarifiées et encadrées.

Ligne directrice 54: cette ligne directrice devrait être supprimée car elle n’entre pas dans le mandat de l’ONUDC, si ce n’est à la suite de saisie ou confiscation de biens culturels ayant fait l’objet d’un trafic illicite (cf. Ligne directrice 30).

7. Germany

Permanent Mission of the Federal Republic of Germany
to the Office of the United Nations and
to other International Organizations, Vienna

[...]

United Nations Commission on Crime Prevention and Criminal Justice:
Open-ended Intergovernmental Expert Group on protection against trafficking
in cultural property, draft guidelines

Ref. No. (in reply please refer to): Pol-S1-383.37 VVK

Vienna, 2 October 2012

[...]

With reference to the Secretary-General’s Note CU 2012/136 of 6 August 2012 inviting member states to provide comments on the draft guidelines on crime prevention and criminal justice with respect to trafficking in cultural property, I have the honour to submit enclosed the response by the Federal Republic of Germany.
It would be highly appreciated if the Secretariat could circulate a compendium of all written responses received from Member States, as stipulated in the letter of 5 September 2012 addressed to you by the Permanent Missions of Austria, Canada, France, Germany, Israel, Japan, the United Kingdom and the United States.

Hoping that the response by the Federal Republic of Germany will be helpful for your work and thanking you for your attention to this matter I remain [...] 27 October 2012

Comments by Germany on the Draft Guidelines as requested by the UNODC Secretariat (note verbal of 6 August 2012)

Draft Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property

I. General Remarks

The necessity, purpose and function of the guidelines are not sufficiently clear and should be laid out in the general introduction. A reference to the existing international legal framework (UNESCO, UNIDROIT) should be given. If the guidelines are supposed to be of practical value for national authorities, legislative bodies and practitioners, they should be shorter, more structured and more precise. Redundancy must be avoided. Thus, several of the 54 guidelines can be merged as discussed during the expert meeting on 27-29 June 2012 and as outlined below (section II).

The title of the guidelines should be in line with the mandate given by ECOSOC in Resolution 2011/42 to “further explore the development of specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property.”

Therefore, the guidelines should specifically focus on prevention and criminal justice in order to be within the mandate of UNODC. The sections “rationale”, “background” and “content” should be shortened and specified. The “content” of several guidelines goes in its wording much further than the guideline itself (e.g. guideline 4: “should consider establishing” versus “should establish”). Within the entire document the term “missing object” should be avoided since it is not a legal term.

II. Remarks on specific sections of the draft guidelines

The following remarks are not exclusive but focus on major aspects that should be considered in the further work on the guidelines. That further work is needed has been stated by the expert group in its meeting on 27-29 June 2012 (See Report on the meeting, UNODC/CCPCJ/EG.1/2012/4, section D).

Especially in chapters II and III, the number of guidelines should be limited to the essential; the guidelines should focus on serious criminal acts instead of making detailed suggestions on rather marginal criminal acts. Generally, the guidelines should not go beyond the scope of the existing framework of mutual legal assistance in criminal matters.
Guideline 1: The guideline should be specified as follows: “States should consider establishing and developing inventories of relevant cultural property for the purpose of protection against trafficking in cultural property.” An Object-ID for cultural property is needed in order to prove provenance.

Guideline 2 should be merged with guidelines 3, 37 and 53 to avoid duplication. The duplication of databases should be avoided as well. The existing databases, such as the one of Interpol, should be strengthened.

Guideline 4: Several States have a federal system. Thus, the guideline should read: “States should consider, as appropriate, establishing a central national authority”.

Guideline 6: This guideline would require a general “whistle-blowing” that is not in line with the general rule of law.

Guideline 7 should not be restricted to cultural institutions and the private section but should include customs, police, judges and public prosecutors.

Guideline 8 should be merged with guideline 5.

Guideline 13 and 41 should be merged and should read: “States should, if not having done so, consider adopting legislation criminalizing trafficking in cultural property in accordance with international instruments.” The term “cultural heritage protection” should be replaced by “trafficking in cultural property”.

Guideline 15, 16, 17, 18, 19, 20 and 21 should be merged.

Guideline 22 should speak of “due diligence” instead of “knowledge”. N° 136 and 137 (content) should use the language used in the guideline itself: “States should consider introducing […]” instead of “States could introduce” (N° 136) and “It is also advisable” (N° 137).

Guideline 23 (and 6) is too vague and not in conformity with the rule of law.

Guideline 27 should read: “States should consider adopting bans and disqualification as criminal or administrative sanctions whenever possible.” The wording within the guideline should be adjusted accordingly.

Guideline 28: A corporate liability for any offence against cultural property which is committed on behalf of a cooperation or legal person should be limited to offences committed by chair-persons that are legally entitled to act on behalf of the corporation.

Guideline 30 should read: “States should consider introducing search, seizure and confiscation of cultural property which is the object of illicit trafficking or other related offences in order to return cultural property whenever possible.” N° 175: Making confiscation as a sanction per se is not in line with general principles of German criminal law. The respective sentence in n° 175 should be deleted.

Guideline 31 should be merged with guideline 22.

Guideline 39 is not in line with international law and should therefore be deleted. This guideline exceed by far the provisions of the “European Convention on Offences relating to Cultural Property” and the “Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict” – in both instruments, jurisdiction depends on the fact, that the offender is found in the territory of the respective State.
Guideline 40 states a general principle of criminal law. Thus, mentioning the “ne bis in idem principle” as a guideline is not necessary.

Guideline 42 should be amended insofar, as all international conventions or multi-/bilateral treaties on mutual legal assistance in criminal matters are generally applicable to the investigation and prosecution of criminal offences against cultural property although cultural property is not explicitly mentioned, as long as the national laws of the involved states contain provisions criminalizing acts against cultural property.

Therefore, guideline 42 should read: “States should consider providing each other on the basis of the existing instruments on mutual legal assistance in criminal matters where applicable with the widest possible mutual legal assistance in...”.

Germany is of the opinion that there is no need for special proceedings concerning mutual legal assistance in criminal matters in relation to offences against cultural property (n° 214, 218, 219) and no need for new central authorities (n° 215).

N° 216 should be deleted – the existing means of mutual legal assistance in criminal matters are sufficient. Germany will not provide for legal assistance in criminal matters without a prior request as general principle, especially not if the transmitted information should be used as evidence before a judicial authority.

N° 217 should be deleted. Specifically, Germany will not render mutual legal assistance in criminal matters without the condition of dual criminality, which is a general principle of all bi- or multilateral instruments on mutual legal assistance in criminal matters. Germany

Guideline 44: A general link between the extradition of an alleged offender with the return of cultural property involved is not in line with existing international instruments on extradition.

Guideline 45 should not foresee the principle of “extradite or prosecute”, see the comment on n° 217 – Germany will extradite only on the basis of the condition of dual criminality. Therefore, guideline 45 should read: “States should consider enhancing the effectiveness and speed of extradition for offences against cultural property.” N° 229 should be deleted.

Guideline 46: The wording of the content of n° 232 has to be in line with the text of the guideline itself. Therefore, n° 232 should read: “Each state should consider adopting...”.

Guideline 48, 49, 50, 51 and 52 should be merged. Germany will exchange personal data/information only in the context of a particular case and only with the States affected by the particular case on the basis of the relevant national laws. None of the existing instruments of mutual legal assistance in criminal matters calls upon States to exchange personal data/information outside a particular case with other “interested” States. There is no need to change this tried and tested rule for the investigation and prosecution of offences against cultural property. Additionally, the exchange of information proposed under these guidelines is with no effect on the necessity of a formal request for legal assistance in order to use information as evidence in a criminal proceeding. Both points should be clarified in the wording of the merged guidelines.
Guidelines 54: This guideline should be deleted since the question of restitution and return is not a question of crime prevention or mutual legal assistance in criminal matters and thus outside of the scope of the guidelines and the given mandate.

At its current state the guidelines need further discussion among Member States. Member States will need to reach full consensus before any endorsement of the draft guidelines.

8. Greece

Permanent mission of Greece
To the UN and Other International Organizations in Vienna

No. : F.3272/AS 856

VERBAL NOTE

The Permanent Mission of Greece to the UN and Other International Organizations in Vienna, with reference to Note Verbale CU 2012/136/6.8.2012, has the honour to forward, attached hereby, comments on the guidelines on crime prevention and criminal justice with respect to trafficking in cultural property by the Greek Ministry of Culture.

Vienna, 2.10.2012

[...]

Subject: Guidelines on crime prevention and criminal justice with respect to trafficking in cultural property.

REF: Note verbale of UNOOC dated 6-8-2012, which was received by our Directorate on 28-9-2012.

We would like to inform you that we consider the text of the Guidelines on Crime Prevention and Criminal Justice with respect to trafficking in cultural property an excellent tool for States and Institutions involved in the protection of cultural heritage. In that sense, though the Hellenic Republic has already created effective structures based on many of the Guidelines mentioned we believe that this text consists of very helpful initiatives for the improvement of policies adopted in order to combat illicit trafficking of cultural goods.

Additionally, there are some points which we would like to make comments on.

[page 8: Background] The creation of databases is one of the most important factors to prevent illicit traffic of cultural goods. This is why Greece supports all initiatives related to such practice. Yet, we are not sure that it is correct to equate Art Loss Register firm with the Interpol database or the States’ databases as the background of the specific Guideline.
Page 8, paragraph 9: We agree that apart from the photographic representation of an illicitly removed cultural object, any other information should be included in a database. Such information is very important in cases when an object is unregistered.

Page 16, paragraph 37: It would be a good idea to be more specific as far as “effective rules for auctioneers” are concerned. We all know that there are hundreds of auctions dealing with cultural goods every day and such initiative would be very constructive only if there were specific rules imposed to define the duty to report suspected cases of illicit cultural property or cultural property which a State has the suspicion of being illicitly excavated and exported out of its country of origin.

Page 23, Guideline 10: Monitoring the market of cultural property is very important. Yet, it would be very helpful to explain thoroughly the way by which a State could claim the restitution of unregistered cultural goods originating by clandestine excavations since the burden of such documentation falls with the claimant and not the owner/holder. Yet, we believe that Guideline 31 is a first step towards an effective way to start dealing with this kind of problems.

On the whole we welcome the text of the Guidelines and we hope that it will become a widely used text of reference.

[...]

9. **Iran, Islamic Republic of**

Verbal Note No: 2250/322-1/3756

The Permanent Mission of the Islamic Republic of Iran to the United Nations and other International Organizations in Vienna, with reference to Notes Verbales CU 2012/177/DTA/OCB/CSS of 9 October 2012 and CU 2012/136 of 6 August 2012, has the honour to submit the attached comments regarding Specific guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property.

Vienna, 13 December 2012

[...]

**IN THE NAME OF GOD**

Comments of the Islamic Republic of Iran regarding the specific guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property

The theft of and trafficking in archaeological and cultural objects has reached to an alarming level in recent years. The involvement of transnational criminal groups in this highly flourishing business would have devastating effect on common cultural heritage of mankind. Therefore, righting this unlawful business should be set as a priority. In this regard, involvement of the Commission on Crime Prevention and
Criminal Justice and the efforts of United Nations Office on Drugs and Crime to address crime prevention and criminal justice responses are very much welcomed.

Regarding the guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property, as they were presented to the second meeting of the Expert Group in June 2012 (hereinafter “the guidelines”), the Islamic Republic of Iran commends the secretariat for the work accomplished on this issue and would be ready to support the guidelines, including their rationale and annotations. This Work could further be improved especially with regard to the regulation and supervision of market as well as return of proceeds of crime to the countries of origin. However, the need for finalizing the guidelines, as soon as possible, obliged us to refrain from proposals for new guidelines or improvements to the existing text.

It could also be recalled that during the deliberations of the Expert Group, the representative of the Islamic Republic of Iran as well as many other Member States supported the guidelines, including their rationale and annotations, as originally presented.

Regarding the secretariat’s Note Verbal of 9th October 2012, it should be recalled that the agreement of the Islamic Republic of Iran for the development of the distributed non-papers was based on some conditions which were not met at the meeting. The sole fact that their existence was not reflected in the report of the meeting shows how critical the issue was. Accordingly, those documents do not provide the picture of the state of progress on the development of guidelines and may not be considered as a basis for further work unless some common understanding about their utility and purpose is realized.

To review the framework for development of the guidelines, two resolutions are of relevance:

- ECOSOC in Paragraph 16 of the Resolution 2010/19 “Requests the United Nations Office on Drugs and Crime, in accordance with its mandate and in close cooperation with the United Nations Educational, Scientific and Cultural Organization and other competent international organizations, to further explore the development of specific guidelines for Crime prevention with respect to trafficking in cultural property”;
- General Assembly in Paragraph 9 of the Resolution A/RES/66/180 “Requests the United Nations Office on Drugs and Crime, within its mandate, in consultation with Member States and in close cooperation, as appropriate, with the United Nations Educational, Scientific and Cultural Organization, the International Criminal Police Organization (INTERPOL) and other competent international organizations: (a) To further explore the development of specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property.”

In both resolutions, the reference to convening of another expert group meeting is aiming at submitting to the Commission on Crime Prevention and Criminal Justice at its twenty-second session, practical proposals for implementing, Where appropriate, the recommendations made by the expert group at its meeting held in Vienna in November 2009, with due attention to aspects of criminalization, international cooperation and mutual legal assistance. This was highlighted to draw
a line between the mandates of the expert group and those for the development of guidelines.

In conclusion, it could be recommended to proceed with presentation of final version of the guidelines to Member States, as soon as possible and in accordance with the given mandates, so their actual implementation could be expedited.

10. Israel

State of Israel
Ministry of Justice
The Department for International Agreements and International Litigation

Date: Heshvan 14, 5773
October 30, 2012

[...] Re: Comments by Israel to the Draft Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property

The following are our main concerns with regard to the above Draft Guidelines:

General Observations:
1. As detailed in the joint letter to the Secretariat dated September 5, 2012, Israel regrets the fact that the great amount of work done in the June 27-29th second meeting of the open-ended intergovernmental expert group on protection against trafficking in cultural property (the June Meeting) was not presented to the State Parties.

2. Our position remains, as expressed in the June Meeting, that the relevant part of the Draft Guidelines is the guidelines themselves, and that the “Background,” “Rationale,” and “Content” sections of the draft guidelines would serve as an internal working document only, as no consensus was reached regarding these parts of the Draft Guidelines, and it was evident that attaining such consensus will not be feasible at this point, and attempting to reach consensus on these parts may further delay the conclusion of the Guidelines.

3. As raised by many experts during the June Meeting, in order to enable better use of the Draft Guidelines, they must be more accurate and concise, and reduced to a smaller number of guidelines, including through the merger of similar and redundant guidelines.

4. Several suggested guidelines relate to areas that go well beyond the CCPCJ mandate of crime prevention and criminal justice, and these should be removed from the Draft Guidelines, that should focus on the matter at hand – prevention and criminal response to the trafficking in cultural property.
5. The use of the term “cultural heritage” also goes beyond the mandate given in this regard, as is the general issue of cultural property. The Draft Guideline should focus on the relevant criminal aspects, that is - trafficking in cultural property.

6. The term “missing”, used throughout the Draft Guideline should be deleted, as it is not a legal term, nor does it correspond with any criminal offence or trafficking in cultural property.

Specific Comments:

1. **Title** - The agreed title during the June Meeting was: “Draft guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property”, in line with the mandate given by ECOSOC in Resolution 2011/42 to “further explore the development of specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property.” and we ask that the title be amended accordingly.

2. **Draft guideline 1** – All inventories should focus on trafficking in cultural property, rather than general inventories.

3. **Draft guideline 2** – as discussed in the June meeting, this draft guideline should be merged with draft guidelines 3, 37 and 53 to avoid duplication.

4. **Draft guideline 7** - this draft guideline should be merged with draft guidelines 34, and 51 to avoid duplication, and call for the widest training, targeting both private and public sector, including law enforcement bodies.

5. **Draft guideline 15-21** – as discussed in the June Meeting, these draft guidelines should be merged for clarification, and a more comprehensive relevant legislation. Also, in accordance with the mandate, they should be limited to combating trafficking in cultural property.

6. **Draft guideline 23** – a criminal offence based on the lack of reporting goes well beyond the legal norm in this area.

7. **Draft guideline 22** – it is our understanding that this draft guideline infers criminal liability in a manner that deviates from most legal systems, including the Israeli criminal system, and should be removed.

8. **Draft guideline 28** – in the Israeli legal system, holding a corporate liable for offences committed on its behalf is limited to those offences committed by persons legally entitled to act on its behalf, as is the case in most legal systems. The draft guideline should be amended accordingly.

9. **Draft guideline 39** – applying jurisdiction abroad in such cases deviated from the concept of jurisdiction in the Israeli criminal law, as is the case in most legal systems; this draft guideline should therefore be amended in accordance with the practice of the presence of the offender in the prosecuting state. Also, the wording in the appended Rationale and Content goes well beyond the relevant mandate.
9. **Draft guideline 42** – the accompanying Rationale and Content, and specifically sections 217, are not in accordance with general principles of criminal law and should be deleted, as the waiver of dual criminality is reserved in the Israeli legal system, as is the case in most legal systems, to the gravest of offences.

10. **Draft guideline 44** – extradition and mutual legal assistance are two separate routes and thus should be addressed separately.

11. **Draft guideline 45** – see text regarding draft guideline 42.

12. **Draft guidelines 48-51** – these draft guidelines should be merged to avoid duplication, and limited to mutual legal assistance proceedings and specific cases, as in most legal systems.

Respectfully

[...]

**11. Italy**

The Permanent Mission of Italy to the International Organizations in Vienna

Prot. 32/2013

[...]

With reference to Notes n. CU 2012/136 and n. CU 2012/177, I have the pleasure to forward the Italian contribution in view of the elaboration of the “Specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property”.

We reaffirm our full support to UNODC in order to guarantee a pragmatic and fruitful outcome of this exercise.

[...]

Ministero per i Beni e le Attività Culturali
Comando Carabinieri Tutela Patrimonio Culturale
- Ufficio Comando – Sezione Operazioni –


SUBJECT: - UNODC - II Expert Meeting on Cultural Heritage Trafficking. -
1. During the expert meeting held last June in Vienna divergent opinions emerged with consequent criticalities, mostly referred to the multiplicity of the guidelines proposed and their redundancy. It is therefore to be considered, in tune with other experts suggestions, to reduce the number of guidelines by merging the topics in order to enhance their incisiveness.

2. As of specific competence in the field of preventing and combating transnational criminal phenomena, it would be advisable to:

   (a) Establish specialized unit for the safeguarding of cultural heritage within national police forces also with the task of training law enforcement personnel and prosecutors, a principle which moreover has been stated already in the 1970 UNESCO Convention. This would allow information exchange, sharing of best practices in legal and investigative matters, with competence, quickly and directly, encouraging the creation of standardized solutions;

   (b) Adopt special investigative techniques, such as tracking, shadowing and cross-border surveillance, controlled deliveries, infiltration with fictitious identity of officials of the requesting State in the territory of the requested State, and in special cases the Competent authorities concerned may establish joint investigative bodies;

   (c) Include in the serious list of crimes: illegal digging, illicit exportation and importation of cultural goods, because they are considered destructive acts of Nations' cultural heritage.

[...]

“TRAFFICKING IN CULTURAL PROPERTY”

Draft specific guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property

Comments and proposals by Italy

December 2012

General remarks

Italy expresses its full support to the elaboration of “Specific Guidelines for crime prevention and criminal justice responses in relation with trafficking and other illicit behaviours in cultural property”, as a very concrete instrument that will facilitate our common efforts in countering the illicit trafficking of cultural property. In order to contribute to the definition of the Guidelines, we wish to share with the Secretariat and with Member States some general remarks and some specific amendment proposals on the basis of the current version on the Guidelines
Whilst commending the Secretariat for the work carried out for the development of the Guidelines, we call on the Secretariat and on all Member States in order to continue the process in a pragmatic and constructive manner, with the ultimate aim of adopting the Guidelines as soon as there is agreement on the text by all Member States.

Italy expresses appreciation for the Report 16 February 2012 of the Secretary General on “Crime prevention and criminal Justice responses to protect cultural property, especially with regard to its trafficking”. Italy fully supports the recommendations proposed by the Report, with special reference to the invitation to Member States to use the specific Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property as developed so far.

Italy considers that the above mentioned Guidelines are a precious tool - if abided by in their spirit - to fight the trafficking in cultural goods. We recall that the draft Guidelines have been produced pursuant to the Economic and Social Council resolution 2011/42 “Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking”. In that resolution, the Council requested the United Nations Office on Drugs and Crime to further explore the development of specific Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property. The Guidelines should in fact be a very concrete and useful tool in order to assist Member States in identifying crime prevention and criminal justice responses to trafficking in cultural property and implementing such responses at the national and international level.

Pursuant to this mandate, the United Nations Office on Drugs and Crime commissioned extensive research and analysis leading to the preparation of the Guidelines on crime prevention and criminal justice responses to trafficking in cultural property. We appreciate that an analysis of all major relevant international legal instruments was carried out during the preparation of the Guidelines; nonetheless, the current version of the Guidelines does not consider some recent developments in investigative and judicial cooperation, especially at regional level, such as:

- the European Framework Decisions on seizure and confiscation orders;
- the Council of the European Union Framework Decision 2006/783/JHA of 24 November 2006 on mutual recognition of confiscation orders;
- the Council of the European Union Decision 2007/845/JHA of 18 December 2007 on the exchange of information and cooperation between Asset Recovery Offices; and

These Guidelines incorporate almost all the recommendations elaborated by the expert group on protection against trafficking in cultural property at its meeting held in Vienna from 24 to 26 November 2009; those recommendations have been broadly upheld by Member States which, therefore, should promote the active implementation of the principles contained in the Guidelines. Together with the
Guidelines, Member States should also implement as soon as possible the recommendations elaborated by the expert group on protection against trafficking in cultural property (held in Vienna from 24 to 26 November 2009) and the recommendations of the above mentioned 16 February 2012 Report of the Secretary General.

All the recommendations should be implemented concurrently and in their spirit, not forgetting that investigations in cultural sector are very peculiar and connected to larger criminal issues within communities. In this regard, the targets of the investigations and their final outcomes are often connected to the collection of evidence used to defeat criminal organizations; at the same time, investigations in the cultural field have a wider spectrum, as ordinary police activities must take into account other contradictory and conflicting aspects. Therefore, the recovery of cultural goods could sometime hinder the efforts to defeat and punish criminals, when, for instance, they make reprisals on cultural items to obtain impunity.

The current situation in many regions of the world demonstrates the need for Member States to protect the cultural heritage existing within their territory, especially against the dangers of theft, clandestine excavation and illicit export operations. In order to avert these dangers, it is essential for each single State to abide by the obligation to respect its own cultural heritage and that of all nations. The protection of cultural heritage can be effective only if it is organized in an effective and structured manner, both at the national and the international level.

In order to properly fight against illicit trafficking in cultural property every State should view criminal conducts against cultural heritage in a homogenous way, establish standard punishment and set up homogeneous procedures for search, seizure, confiscation, return, restitution and repatriation of cultural property, as well as for seizing and confiscating all related criminal assets. Member States should therefore strengthen domestic criminal law responses in combating trafficking in cultural property and related offences, introducing in their criminal legislation as “serious crimes” at least the offences of illicit export and illicit import of movable cultural property; this would entail that the absence of a valid export certificate accompanying an imported cultural object would be considered as a criminal offence and/or as the basis for mandatory reporting the cultural property as suspicious to competent authorities in the State of origin.

The United Nations Convention against Transnational Organized Crime should be used in a more proactive and effective manner in this framework. In this regard, Italy appreciates the two reports that the Secretariat presented to the sixth session of the Conference of the Parties, both including very useful and concrete references to the use of the Palermo Convention in the fight against trafficking in cultural property: “The notion of serious crime in the UNOTC” (CTOC/COP/2012/CRP.4) and “Technical assistance provided to States in the application of the UNTOC to new forms and dimensions of transnational organized crime” (CTOC/COP/2012/7). Italy also wishes to recall in this regard that the recently published “Digest of organized crime cases” includes some concrete examples of the application of the UNTOC in this sector (in particular, chapter V D). We encourage the Secretariat to keep working on these issues in close coordination with Member States.
Specific remarks on the text

Italy expresses its full appreciation for the content of the Guidelines, which have substantially reached their target, also focusing on the most current and problematic issues in the art market. Italy also appreciates that, based on appropriate research, the Guidelines treasure the current practices and initiatives by several Member States in tackling the problem of trafficking in cultural property. The Guidelines also examine available examples of best practices and actual cases, drawing on practical examples and other information provided by Member States. We hope that national policy makers and legislators will use these Guidelines in order to elaborate and implement policies and laws aimed at protecting cultural property from trafficking and other forms of illicit activity, at the national, regional and international level.

The Guidelines are indeed a very complex and ponderous instrument; nonetheless, we believe that the language could be further improved in some parts, as the current version includes some overlapping of themes and shortcomings. There are some duplications as the Guideline should analyse some specific themes from different angles, taking into account problems related to prevention, criminal justice responses and cooperation. Although it would be preferable to avoid duplication of topics, we should be careful not to dilute the content of the Guidelines whilst eliminating some overlapping themes. The simplification of the language in some of the Guidelines may be acceptable and even desirable, on the condition that it does not alter all the elements aimed at the protection of the cultural heritage.

Italy suggests deleting some of these Guidelines, in particular Guidelines number 3, 4, 5, 7, 12, 14, 15, 16, 20, 27, 28, 33, 43, 47, 49, and 51. These Guidelines are indeed important, but either they are not essential for the protection of cultural heritage, or the issues they tackle are included in a more effective manner in other Guidelines or they could be solved differently by each Member State. Whilst proposing to simplify and merge some specific text, we believe that the Guidelines should not be reduced further. Italy proposes to amend as indicated in the Annex those Guidelines which cannot and must not be disregarded; the content and the rationale of the Guidelines that are not included in the Annex should be safeguarded, as they often integrate the rules contained in other Guidelines.

Furthermore, we wish to share the following comments:

1. We suggest to replace expressions such as “may consider” with “should consider”. We should be less cautious in using more cogent forms (such as “should”) as we know that the Guidelines could be diluted in the implementation phase by Member States;

2. Member States should consider defining as “suspicious” (therefore requiring compulsory reporting to the competent National Authority of the State of origin) those transactions of archaeological goods lacking a known provenance and/or scientific studies;

3. Taking into account the Economic and Social Council Resolutions concerning civil aspects, Member States should seek greater transparency and reduced contentiousness in claims handling by calling on museums and private individual collectors to reach “just and fair” solutions to art restitution claims. In this respect, there should be also concern about the
evidential standard to be adopted and the level of proof required, as the benefit of the doubt should go to the claimant;

4. States should consider returning movable cultural goods of illicit provenance and of difficult attribution with respect to its geographical origin to that Country to which the majority of the patrimony refers. This would do away with those grey areas of the market which have often favoured criminals. This principle has been adopted by the UNESCO Convention on the protection of the underwater cultural heritage of 2 November 2001;

5. Taking into consideration the Economic and Social Council Resolutions, the criteria of due diligence when acquiring a cultural object should be completely developed and illustrated through specific Guidelines or codes of conduct. Thus, States should promote the adoption of codes of conduct for all the professionals working in the cultural field (including experts and restorers), requiring at least that they must have a positive evidence of clear, genuine and licit provenance of the cultural good in order to vaunt good faith and going on in their dealings or expertises;

6. States should extend to all the players in the cultural field the obligation to consult existing databases for goods with a pre-sale estimate of 10,000 euro or less if their provenance is uncertain. Otherwise, bad faith is to be legally inferred by the judge (see former Guidelines 2 and 22);

7. The Model Treaty (see former Guideline 14, that we suggest deleting) should be modified in order to meet the Guidelines for crime prevention with respect to trafficking in cultural property, as well as all the other UNESCO Conventions, Recommendations and U.N. Resolutions. Moreover, States should use the Model Treaty as the basis for establishing multilateral relations in respect to the protection of moveable cultural property, especially strengthening the cooperation between market/transit States and the States of origin;

8. States should consider introducing or improving statistics related to both civil and penal cases as well as to their provisional and/or final decisions;

9. The current language in Guideline 15 (that we suggest deleting) does not seem appropriate; we propose to amend it as follows: “States should consider improving the definition of the concept of “movable cultural property for the purpose of criminal law”;

10. Guidelines (in particular former Guideline 16, that we suggest deleting) make reference to the offence of “trafficking in movable cultural property”, probably indicated to facilitate the application of the most recent Conventions. But the reference seems to be to a phenomenon rather than to a single event or single conduct or offence, and all this is susceptible of encompassing different formulations that could lead to a lack of reciprocity in applications for international assistance. In addition, when the Guidelines try to give content to the phenomenon of trafficking, they do not include a reference to the crime of laundering of the cultural object itself;

11. States should match the conducts and penalties with regard to pillaging and/or looting with those related to theft in its aggravated form (see, former Guideline 18 and 19);
12. States should consider as serious crime looting activities at archaeological sites and all the activities of archaeological research being carried out without authorization or in contravention to it. In fact, the greatest injury to the interests that are to be protected lies in such conducts, and a different discipline would create unjustified mitigation of punishment;

13. States should consider as “serious crime” the handling or receiving and the laundering of a cultural object as long as it is of illicit provenance, with the broader possible spectrum as far as the predicate offenses are concerned;

14. States should consider imposing a general obligation to report the discovery of objects of cultural interest, without any specification of their value. Otherwise, the private citizen or sector would improperly be charged with the evaluation of the importance of the object. Moreover, this obligation should be imposed on the discoverer of the object as well as on any holder (see former Guideline 24);

15. States should consider as “serious crimes” the illicit exportation and importation of movable cultural property, and these offenses should be punishable by a maximum deprivation of liberty of at least four years or a more serious. States should also consider, when appropriate, the absence of a valid export certificate accompanying an imported cultural object as a criminal offence and/or as the basis for mandatory reporting the cultural property as suspicious to competent authorities in the State of origin (see former Guideline 17 and 26);

16. States should consider seizing and forfeiting the proceeds of crimes as well as all the property, equipment or other instrumentalities used in or destined for use in art offences (see former Guideline 32);

17. States should encourage persons (at least, in mitigating their punishment) to supply any information that could be useful to reinsert in its context the movable cultural item that has been the object of their illicit conduct (see former Guideline 36);

18. States should consider, to the largest extent possible, identifying, tracing and seizing cultural properties spontaneously (i.e. without any previous request) when these properties are of suspicious provenance and when they believe that such activities could help another State Party in preserving and recovering cultural property;

19. In former Guideline 46 there is no reference to the reasons that could justify a refusal by a State to implement a request for search, seizure and forfeiture. Bilateral or multilateral agreements for a model for search, electronic surveillance or involving the use of special investigative techniques, for seizure, for confiscation, as well as for rogatory letters should also be encouraged, in order to harmonize national laws on these themes. Obviously, the possibility of using a procedure that is completely distinct from the domestic proceedings, and purposely designed for international mutual assistance, increases the chances of the foreign request being granted. Currently, instead, in order for the above mentioned procedures to be successful the following prerequisites are essential: knowledge of the national legal systems of partner Countries, preparatory bilateral works
before issuing a request and propensity to practical arrangements on a case-by-case basis. In this respect, these Guidelines have not considered the recent developments in investigative and judicial cooperation, as those, for instance, contained in some of the recent initiatives at regional level such as the European Framework Decisions on seizure and confiscation orders. Furthermore, the evidence gathered by the requesting Country during the investigative and/or the trial phases should be fully evaluated by the requested authorities, to the extent possible, especially when considering repatriation, return and/or restitution claims of movable cultural goods;

20. According to Art. 27 of the Palermo Convention, States should reach bilateral and/or multilateral agreements for exchanging of general and/or specific intelligence on illicit trafficking of movable cultural goods, especially with bordering Countries. States should also promote, through bilateral and/or multilateral agreements, cross-border police and prosecution cooperation even for joint investigations and/or joint investigative teams (see former Guidelines 35 and 50);

21. States should give effective protection to informants and/or witnesses (see former Guideline 36) even through bilateral and/or multilateral agreements, considering that criminal organizations active in the cultural field exploit the strong sense of belonging which is usually deeply rooted into a given community; therefore, the “omertà” (“code of silence”) increases its involvement in these areas of criminal activity.

ANNEX

Italian amendment proposals to some specific Guidelines

Chapter I: Prevention strategies

GUIDELINE 1 - Information and data collection.

States should consider establishing and developing national, regional and international databases inventorying cultural property. These databases will also register trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property and related offences.

States should also consider enhancing exchange of information on offences against cultural property by sharing or interconnecting inventories of cultural property and databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property, and/or contributing to international ones.

States should also consider introducing or improving statistics on import and export of cultural property, as well as on administrative and criminal offences against cultural property, exchanging information on previous convictions and ongoing investigations of offences against cultural property. States should consider cooperating to international data collection on trafficking in cultural property and related offences through the UNODC Crime Trend Survey.
Guidelines 1, 2, 3, 37, 48, 49 and 53 would be merged. There are however changes, being mentioned the opportunity to have national, regional and international databases which could be profitably used in inventorying cultural property.

The importance of databases is well illustrated in the Guidelines content and rationale. It is very important to develop international database systems that are to be used not only by police forces and/or Government departments, but by the art market for due diligence checks, obviously taking into account the necessity to have the secret part of the systems not within the reach of the public at large. The use of the current databases has certainly improved the effectiveness of recovery of illegal traded cultural items, even if there are still weaknesses. For example, there is no legal obligation on any participant in the market to use such databases or any clear sanction for failing to do so. On the contrary, it would be important to extend to all the players in the cultural field the same requirements: i.e. good or bad faith is to be legally inferred by the judge if databases will be or not consulted (see, in this respect, Guideline 4).

Moreover, there is great variability and inconsistency in the use of such databases within the market. For instance, some auction houses consult the existing databases for lots with a low pre-sale estimate of about 750 euro, but certain antiquities dealers search only for items with a value of more than 15,000 euro, as they consider that items below this value are less likely to be individually identified. Another weakness is that most of the databases concentrate on stolen property; databases for illegally exported material are at a much earlier stage of development and illegally excavated material is, by definition, unlikely to be identified in such databases. Some ongoing projects are aimed at covering the large portion of the art market that, for instance, the International Foundation for Art Research (IFAR) and the Art Loss Register (ALR) do not register: i.e. the antiquities coming from archaeological sites, as for instance cultural goods either in the hands of dealers and collectors; or spotted thanks to scientific studies and/or penal investigations. All these cultural items could be reported in a comprehensive database, so that any archaeological object not registered will be, by default, considered to have been recently looted. Finally, the multiplicity of databases presents a problem for those seeking to perform for due diligence, and often these databases are held locally, leading to a “fractured system”. So it would be a very effective initiative to connect at the international level all the databases or at least the national and/or the most important ones.

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GUIDELINE 2 - The role of cultural institutions and private sector.

States should consider, as appropriate, establishing a Central National Authority or empowering an existing Authority (and/or enact other mechanism) for coordinating the protection of cultural property against trafficking and related offences.

States should consider promoting training and disseminating best practices on policies of acquisitions of cultural property for cultural institutions and private sector, encouraging the adoption of code of conducts for all the professionals in the cultural field (including experts and restorers), requiring that they must have
a positive evidence of clear, genuine and licit provenance of the cultural good in order to vaunt good faith and going on in their dealings or expertises.

States should consider encouraging cultural institutions and the private sector to report suspected trafficking in cultural property cases to law-enforcement agencies.

States may consider introducing in their legislation an offence for the violation of the obligation to report suspected cases of trafficking and related offences against cultural property.

States may also consider introducing in their legislation an offence for the violation of the obligation to report the discovery of archaeological sites, archaeological finds or other cultural object. States should consider making the absence of a known provenance and of scientific studies accompanying an archaeological good a suspicious transaction requiring compulsory reporting to the National competent Authority of the State of origin.

States should encourage internet providers and web based auctioneers to cooperate in preventing trafficking in cultural objects through the adoption of specific codes of conduct. States should also consider creating and implementing monitoring measures for the market of cultural property, including on the internet.

Guidelines 4, 5, 6, 7, 8, 10, 23 and 24 would be merged. The proposed amendment does not mention the reference to the relevant cultural interest, as it was in the former Guideline 24; in this respect, see point 14 of the abovementioned remarks.

The importance of preventative cooperation is well illustrated in the Guidelines content and rationale. But preventative cooperation is until today rarely initiated. On the contrary, it would lead to continual vigilance by the Authorities of those Countries which have ratified one of the many conventions in this sector, since, albeit not expressly, these conventions ultimately impose the obligation of coming forward with spontaneous information without necessarily waiting for information and input from the investigative authorities of another Country. The exportation Country would obviously have more information at its disposal and, what is more, the market of artistic goods would come under the required scrutiny in foreign territories. Thus, not only clandestine trafficking would be discouraged, but honest dealers would be rewarded and would no longer be exposed to unfair competition nor to actions of vindication by previous private owners, perhaps after several years. If preventative cooperation were to begin, many behaviours/situations that are seriously prejudicial to the cultural patrimony would disappear. At the same time, those areas of privilege which in the past, and still today, represent places in which trading in artefacts of illicit provenance was and still is flourishing (e.g. free-ports, auction houses, etc.) would be limited. Therefore, it does not seem punitive to call responsibilities on those States which do not prevent with appropriate measures the illicit trafficking in cultural goods, notwithstanding they have ratified conventions imposing such obligation. Coming back to the preventative cooperation, specific working groups (composed of jurists and experts) should be organized in each Member State, having their competence on controlling the internal market of artistic goods and coming forward with spontaneous information, and at the same time giving legal advice to the Country of origin. These working groups may consider to enact and implement a “cultural heritage hotline” to grant the swift and discreet
reception of suspected cases reports. These groups could also be supportive of a permanent forum in developing policies specifically referring to repatriation claims, which require expert advice and assistance to assess them, their political, juridical, social and moral issues and the consequent complex negotiations or procedures.

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GUIDELINE 3 - Civil claims and repatriation of cultural goods.
States should seek greater transparency and reduced contentiousness in claims handling by calling on museums and private individual collectors to reach “just and fair” solutions to art restitution claims.

In this respect, there should be also concern about the evidential standard to be adopted and the level of proof required, as the benefit of the doubt should go to the claimant Country of origin. States should consider returning movable cultural goods illicitly dealt and of difficult attribution with respect to its geographical origin to that nation to which the majority of the patrimony refers.

States should also consider, to the extent possible, identifying, tracing and seizing cultural properties spontaneously (i.e. without any previous request) when this properties are of suspicious provenance and when they believe that such activities could assist another State Party in preserving and recovering cultural property.

This Guideline is completely new and takes into consideration specific remarks that Italy wishes to underline, recalling also the Economic and Social Council Resolutions concerning civil aspects.

Chapter II: Criminal Justice Policies

GUIDELINE 4 - Criminal offences.
States should consider introducing in their legislation:

(a) A criminal offence of conspiracy or participation in an organized criminal group for trafficking in cultural property and related offences;

(b) A criminal offence of looting of archaeological and cultural sites, and/or a criminal offence of illicit excavation. In order to fight these illicit conducts, States should also consider creating and implementing programs of research, mapping and surveillance of archeological sites;

(c) A criminal offence of illicit export and illicit import of movable cultural property.

In this respect, States should consider introducing and implementing appropriate import export procedures including certificates for export and, where possible, import of cultural property, and, as appropriate, sanctioning the absence of a valid export certificate accompanying an imported cultural object as a criminal offence and/or as the basis for mandatory reporting the cultural property as suspicious to competent authorities in the State of origin.

States should consider introducing proportionate, effective and dissuasive sanctions for the criminal offences mentioned sub b and c, so as to meet the
standard required by article 2 (b) of the Convention against Transnational Organized Crime for “serious crimes”.

States should also consider introducing (or extending) liability (criminal, administrative or civil in its nature) of corporations or legal persons to the aforementioned offences against cultural property, introducing proportionate, effective and dissuasive sanctions, including fines and bans or disqualifications, where possible.

Guidelines 9, 11, 17, 19, 21, 25, 26, 27, 28 and 29 would be merged.

The importance of seriously punishing those crimes is well illustrated in the Guidelines content and rationale. Here it is sufficient to remark that both conspiracy and/or organized crime is a frequent phenomenon in the art market, highly specialized and in need of different abilities and/or expertise, from the “tombaroli”1 or thieves, to the intermediaries, shippers and drivers, customs officials, dealers, experts, restores and action’s house employees, etc. All people often working together with divided tasks, in a transnational and international dimension. In the art sector these criminal groups are often operating through flexible networks rather than only through traditional hierarchical structures. These criminals are often organized in a pyramidal structure when operating in their Country of origin, where the “tombaroli”, thieves and the first level middleman intercept the material to be sent abroad. On the contrary, in foreign territory and especially in market Countries, the international dealers and their intermediaries and accomplices (restores, experts, etc.) are usually organized in web-type structures.

However, either in a net or in a pyramidal connection, trans-national organized crime in the cultural field is an increasingly articulated phenomenon, from the illegal acquisitions of cultural goods, their illicit exportations from the Country of origin, their expertises in order to raise the price, their laundering activities in order to give to the items themselves a licit provenance. And through all these intermediaries the cultural goods fetch back an inflated evaluation that -in turn-fuels other looting activities or thefts. Companies play an important role in art crimes: these are often materially committed through them or under their cover. In this regard, companies may result particularly useful to art offenders as means to launder cultural goods and to hide clients and transactions and to preserve the ownership or possession of the cultural item and of other proceeds from crime. In fact, generally speaking, mere shell companies are not only more difficult to be traced, prosecuted and judged liable, but also hardly conceivable as entities subjected to penalties or confiscation. Indeed, felony against cultural heritage is no longer as before a characteristic of petty delinquents, peasants or poor city dwellers, that fate has placed close to fabulous sites, or of smaller merchants, who collected the results of the plunders or thefts committed by the first, to sell to collectors, museums or big local or foreign dealers.

The generalised aggression against cultural heritage we are facing today comes, as said, from trans-border organized crime, and organization of criminals with a powerful structure, vast material and logistical means and sometimes enjoying the complicity and support of administrative and political institutions within the States.

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1 The Italian expression “tombarolo” literally means grave-robber, from the word “tomba” (tomb); it indicates those thieves that are specialized in looting archaeological sites.
The risk of being involved in trafficking cultural goods is significantly low for criminals, given that

(a) Penalties in the vast majority of Countries are less severe if compared with those applicable to other serious crimes and

(b) Law enforcement authorities tend not to consider this sort of crime as a top priority for action.

Thus, illegal trading which is both highly profitable and presents low levels of risk is certainly appealing to organized crime. Illegal dealing in cultural items is also an important instrumental tool for the criminal groups to easily launder proceeds from other crimes, moreover giving high status to their bosses.

In this respect, the United Nations General Assembly Resolutions on the “Return and Restitution of Cultural Property”\(^2\) require that crimes which infringe on cultural goods should be considered as serious crimes. In these Resolutions the U.N. General Assembly “alarmed at the growing involvement of organized criminal groups in all forms and aspects of trafficking in cultural property and related offences, and observing that cultural property is increasingly being sold through markets, including in auctions, in particular over the Internet, and that such property is being unlawfully excavated and illicitly exported or imported, with the facilitation of modern and sophisticated technologies” urges Member States to:

(a) “Protect cultural property and prevent trafficking in such property by introducing appropriate legislation, including, in particular, procedures for its seizure, recovery and return”;

(b) “Strengthen crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, within the framework of relevant United Nations conventions and resolutions, for the purpose of providing the widest possible international cooperation to address such crimes, including for extradition, mutual legal assistance and the confiscation and return of stolen cultural property to its rightful owner”;

(c) “Combat all forms and aspects of trafficking in cultural property and related offences, such as the theft, looting, damage, removal, pillage and destruction of cultural property, and to facilitate the recovery and return of stolen cultural property”

(d) Criminalize “activities related to all forms and aspects of trafficking in cultural property and related offences by using a broad definition that can be applied to all stolen, looted, unlawfully excavated and illicitly exported or imported cultural property, and invites them to make trafficking in cultural property, including stealing and looting at archaeological and other cultural sites, a serious crime, as defined in article 2 of the United Nations Convention against Transnational Organized Crime, with a view to fully utilizing that Convention”;

(e) “Take all appropriate steps and effective measures to strengthen legislative and administrative measures aimed at countering trade in stolen, looted and illicitly exported or imported cultural property, including appropriate domestic

measures to maximize the transparency of activities of traders in cultural property in the market, in particular through effective regulations and supervision of dealers in antiquities, intermediaries and similar institutions”.

Indeed, in order to counter these phenomena, States should consider and prosecute as serious crimes all the above mentioned offences, and in particular the offences of illegal export and import of a cultural goods which are not only a frequent phenomenon, but should be countered at the international level and seriously punished, being a way to contain other criminal or illegal conducts much more difficult to prove. In fact, while it is often impossible, especially for developing Countries, to fully police national borders and prevent the exit of cultural goods, and while clandestine excavation or wrongful alienation may be difficult to prove or may not be enforced in foreign jurisdictions, illegal export and import may be relatively easy to establish and often to prosecute. States should consider, when appropriate, the absence of a valid export certificate accompanying an imported cultural object as a criminal offence and/or as the basis for mandatory reporting of the cultural property as suspicious to the competent authorities in the State of origin.

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GUIDELINE 5 - Mens rea or intent.

States should consider making it possible to infer perpetrator’s knowledge:

(a) When the cultural property is registered as trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing in a publicly accessible database, and

(b) When the perpetrator purposefully remains ignorant of either the facts or the law in order to escape the penal consequences.

States may consider the possibility of requiring that the alleged offender, the owner or the holder (if different), demonstrates the lawful origin of suspicious cultural property which is the object of seizure or confiscation.

Guidelines 22 and 31 would be merged; there is a change, as the so-called conscious avoidance doctrine is mentioned.

The importance to shift the onus probandi (at least for civil measures, even if they have a penal character) is well illustrated in the Guidelines content and rationale. The absence of studies as to a certain cultural good should alarm the diligent dealers and/or professionals, who on the basis of their ethic should not only refuse the purchase and/or to hold the object, but also report the suspicious offer they received. The globalization of knowledge and interests beyond scientific circles allows any stakeholder to assume that a noteworthy cultural object, if acquired in a legitimate manner, will have been included in a publication after having been examined through specific comparative studies. In the absence of such scientific certification and information, it is evident that the acquisition of illicitly owned archeological artifacts, that were the outcome of recent illegal discoveries, should be sanctioned by the international and national norms which have been obligatory for several decades. Therefore, the acquisition of a cultural item is highly suspicious if the dealer and/or professional knows very little about its provenance, place of origin, context and dating, i.e. the so called “clean bill of health” for cultural items.
To confute that a cultural object without scientific studies and a detailed context of origin is an illegal traded item demonstrates distinct insensitivity towards the problem of illicit trafficking. It means not taking into account the norms which regulate this matter, nor their finalities. But, above all, it requires some kind of probatio diabolica which is much more severe compared to dozens of other situations in which the so-called fanciful probabilities are quite beside the point. Therefore, we should agree that every time cultural objects of unknown provenance and acquisition appear on international or national markets, the transactions regarding the objects are and must be regarded as illegitimate, because of their infringement of the public national and/or international order. The very uncertainty of a cultural object’s provenance appears to be one of the indicators which points towards its illegal or clandestine nature. This is because the typologies and comparative references have been codified, and nothing which is culturally significant would appear to have been overlooked, to the point of not even recognizing its dating and origin. The same result could be reached taking into account the specific code of conducts for professional in cultural sector, and it should be then easy to reverse that presumption of good faith which is often in favour of the object holder. This person, vice versa, is generally well equipped at concealing his/her bad faith or negligence, being moreover in a Country where he/she is accustomed to operate. But, if cultural goods features will be fully considered, the prove to be discharged by the claimant victim will be any more a probatio diabolica. Therefore, after proving property and provenance - through, for instance, laws vesting ownership in the origin Country and through expertise - there should be no further issue to be solved for the origin Country, and the onus probandi should be discharged by the opponent for any other aspect. Indeed, it is clear that a peculiar public order is established in the cultural field. The UNESCO Conventions and Recommendations, and/or the U.N. Resolutions have created a system of rules and principles calling on the decision makers to evaluate differently good-bad faith, intent, due diligence etc. in the cultural sector. These concepts are today coming under close scrutiny precisely because the normative and jurisprudential inputs concerning cultural goods are changing in many legal systems, thanks to the pressures of international opinion, particularly sensitive to these issues. The public opinion, the international normative system and the jurisprudence are changing in the cultural field, being all oriented at promoting harmonization in the protection of cultural goods; the first step in this direction is the full respect of imperative rules of the origin Country.

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GUIDELINE 6 - Seizure and confiscation.

States should consider introducing search, seizure and confiscation of cultural property which is the object of illicit trafficking or other related offences, in order to ensure their return, restitution and repatriation. States should consider introducing confiscation of the proceeds of the offence, or of property of equivalent value to such proceeds.

States should also consider cooperating - undertaking all necessary measures- in identifying, tracing, seizing and confiscating trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property for the purpose of return, restitution and repatriation.
Guidelines 30, 32, 46 and 54 would be merged.

The importance of taking away illicit gains from criminals is well illustrated in the Guidelines content and rationale. The main motive for art crimes is financial gain. In this regard, the Palermo Convention offers an incomparable basis for international cooperation for international confiscation also in the cultural sector and presents in this regard a yet to be explored potential. Indeed, search, seizure and forfeiture of cultural goods, of proceeds and instrumentalities of crime are not at all an ancillary activity in cultural sector. Rather, search, seizure and confiscation orders are to be considered a fundamental step for recovering illegal traded cultural items either fruit of clandestine excavations and/or illicit exportation, and for avoiding that criminals can continue to think of gaining all those economic advantages that today accompany their trafficking of cultural goods. Advantages that obviously encourage further illegal acquisitions; illicit activities, which - as statistics demonstrate - increase the appetites not only of those who traffic in authentic works of art, but also of those criminals who, because of the elevated demand, produce ever-more abundant and perfect fakes. An important component of the criminal justice response to crimes in cultural goods trafficking is the enforcement and/or the execution of forfeiture orders. In this respect, it is important to underline that international norms do not impose a single model of confiscation. They often prescribe a short set of substantive principles and a very limited number of procedural rules: the law enforcement and judicial machinery to attain confiscation, and the provisions governing substantive limits and requirements, are more or less left to the legal traditions or to the autonomous legislative initiatives of individual States or regions. The seizing and confiscating of the proceeds from crime is made difficult, inter alia, as a result of differences between national legislation in these areas. Thus, national provisions governing seizures and confiscation of the proceeds from crime must be improved and approximated where necessary, taking into account the rights of third parties in bona fide. With due respect for fundamental legal principles, State should introduce in their legislation the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence; States may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation (see, in this respect, Guideline 4).

To facilitate international mutual assistance in the execution of foreign orders of search, seizure and confiscation, specific procedures should be studied, detached from the domestic proceedings. Obviously, the possibility of using a procedure completely distinct from the domestic procedures for searching, seizing and confiscating, and purposely designed for international mutual assistance, increases the probabilities of the foreign request being granted, because the possible discrepancies between the two national systems of search, seizure and confiscation not necessarily work anymore as obstacles and the threshold of the reasons to refuse the assistance is raised at an higher level. In this respect, these Guidelines have not considered the recent developments in investigative and judicial cooperation, as those, for instance, contained in some of the recent initiatives at regional level such as the European Framework Decisions on seizure and confiscation orders.

We therefore suggest to make use of these recent initiatives to promote a certain measure of harmonisation between the different laws, when search, seizure and
forfeiture procedures and orders in cultural sector are concerned. At present, harmonization can be found in this matter, by assimilating different legal systems, by honouring the imperative norms of the Country of origin, and by a “progressive” attitude towards more favourable standards. In fact, the procedures for search, seizure and confiscation should apply the imperative legislation of the origin Country to the extent that the latter legislation is not contrary to fundamental principles or basic rules of the legal system of the requested State.

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GUIDELINE 7 - Investigations.

States should encourage persons (at least, in mitigating their punishment) to supply information useful to investigations and prosecutions, as well as to reinsert in its context the cultural property. States should consider giving effective protection to informants and/or witnesses.

States should consider creating specialized law enforcement bodies or units for offences against cultural property, as well as providing specialized training for them.

States should consider enhancing coordination and establishing privileged channels of communication between law enforcement agencies in order to increase the probability of discovering and successfully investigating offences against cultural property.

States may consider allowing the use of special investigative techniques in the investigation of offences against cultural property, especially if related to organized crime. States may consider concluding bilateral or multilateral agreements or arrangements in order to establish joint investigative teams for crimes against cultural property.

States may also consider becoming parties to bilateral and/or multilateral agreements for exchanging of general and/or specific intelligence on illicit trafficking of movable cultural goods, especially with border countries.

Guidelines 34, 35, 36, 50 and 52 would be merged.

The importance of having centralized units is well illustrated in the Guidelines content and rationale. And there is no doubt that the investigations of units specialized in protection of cultural property and in recovering illegally removed items can lead to positive developments even beyond national borders. The intensification of investigations at the international level which will very likely lead to the limitation of illegal purchases - especially with reference to those known as the “major purchasers” - will be carefully assessed by the dealers; it will also be a deterrent to those who will in response reduce their demands in proportion to the investigative capacity of the public institutions of police and of prosecutors. The responses to the requests for international assistance will also enable internal controls to be tightened up and made more incisive, thanks to the data obtained abroad. Eventually, it would be useful to elaborate a typology, a net diagram or a map of crime and criminals in this sector, tracing the flow of illicit trafficking in cultural property. In this regard, one consistent characteristic of the criminals involved in trafficking cultural items is that the individual involved (at least at a
Certain level) are usually the same people: they are highly specialized and possess economic resources.

Specialized units employed in fighting cultural items trafficking should pursue one or more of the following functions and/or purposes:

(1) Facilitation of gathering, management and effective use of knowledge on the criminal phenomena of concern;

(2) Development of specific expertise in criminal policies and related methods;

(3) Creation of a higher capability in the application of specialized investigative and prosecutorial legal tools;

(4) Coordination or unification of investigations and prosecutions, so to avoid possible clashing of initiatives and maximize the results of prosecutorial efforts against single criminal groups or networks.

For all these targets it would be necessary to set up:

(a) A national pool of magistrates with an operative and investigative capacity as well as guidance capacities. The Public Prosecutor’s Office should manage an autonomous archive of data and information, separate from but coordinated with that of the police;

(b) A pool of experts at national level, with the creation of a fully functioning data gathering and documentation system and individuals with experience in addressing criminal trials and the relevant depositions or declarations (technical-juridical preparation of the expert);

(c) A centralized, autonomous pool of trained investigators (responsible for managing a database) with full authority to conduct police investigation.

The importance of special investigative techniques is well illustrated in the Guidelines content and rationale. The investigations in cultural sector crimes are indeed very peculiar and connected to larger criminal issues within communities. And the transnational nature of organized crime offences against cultural goods seems requiring -at least in the most complex cases- a quite new concept of co-management of investigation and prosecution: the so called “prolonged coordination”, the only one able to dismantle entirely a criminal organization. Such international law enforcement system should be organized at least between bordering Countries or between Countries having a common cultural heritage/area; and should be based on the continuous and expanded exchange of intelligence and prolonged coordination or co-sharing of investigative activities. It is crucial to create permanent structures, both at the bilateral and multilateral level, to assist in specific investigations and, at the same time, to assure a permanent channel of communication, that is very useful for the exchange of information on operative modalities, on persons involved, on the trends of the trafficking, etc.

Moreover, in order to better fight these phenomena, full application to Article 19 of the Palermo Convention should be guaranteed; States Parties should consider concluding general agreements to establish joint investigative teams (JITs). However, Article 19 of the Palermo Convention, in the title and when dealing with case-by-case agreements, refers to joint investigations, not to joint teams; it could therefore be interpreted as an encouragement to the Parties to set up a new entity.
only on the basis of specific agreements, and, instead, to resort to the more flexible measures of coordinated investigations where those agreements do not exist. In various phases, Member States operators could create de facto mixed units, sharing common knowledge originating from particularly delicate activities. In fact, there would be an added value in carrying out criminal prosecutions and proceedings through joint investigation models or in parallel; the same results cannot be reached by assembling the prosecutions in a single Country and then using mutual legal assistance mechanisms.

A similar *modus operandi* could be envisaged in regional areas, especially when Countries in the region face similar problems in fighting illicit cultural goods trafficking. Regional Countries could set up the co-management of the entire investigative and prosecutorial process – especially in the case of bordering Countries - in order to counter trans-national offences in the cultural goods sector. Other investigative measures could be employed, for example, verifying simulated acquisitions or sales; considering the possibility of covert investigations, and delaying the police intervention even in the face of crimes that have already been committed; allowing cross border observations and interceptions. For all these activities joint investigations are a privileged channel, and they should be fully considered whenever there is ongoing and cross-border trafficking.

As cultural items trafficking is mainly developed in foreign territories, it is necessary to put in place coordinated international efforts to fight this phenomenon; our common goals can be better achieved through the elaboration of various cooperation models and through special investigative techniques. Concrete results in the fight against cultural illicit trafficking can be achieved especially through the creation of common databases and shared knowledge of the techniques adopted by criminals in the sector. Joint investigation can be much more effective in order to highlight:

(a) People and companies involved in cultural goods trafficking;
(b) *Modus operandi*, programmes and routes of criminals;
(c) The provenance and context of cultural items, especially through the expertise of origin Country experts.

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Chapter III: Jurisdiction and Cooperation

**GUIDELINE 8 - Jurisdiction.**

*States should consider establishing their jurisdiction over the aforementioned criminal offences when the offence is committed within their territory, or by or against one of their nationals.*

*States should also consider establishing their jurisdiction over the aforementioned criminal offences, if committed abroad, when they impinge on a cultural property that belongs to their cultural heritage or is subject to enhanced protection. However, States should consider adopting all necessary measures to ensure the respect of ne bis in idem principle.*

Guidelines 38, 39 and 40 would be merged.
The need for universal cultural goods protection is well illustrated in the Guidelines content and rationale. In this regard, the 1966 UNESCO Declaration of the Principles of International Cultural Cooperation proclaims that: “In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind”. This statement stresses also the inseparability of the defence of cultural diversity from human rights and proclaims cultural heritage as the wellspring of creativity. By doing so, it has removed cultural heritage from the exclusive control of national sovereignty. Similar values are considered by the Paris UNESCO Convention of 14 January 1970 and the following principles are central to this Convention:

(a) Cultural heritage constitutes one of the basic elements of civilization and national culture, and its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting;

(b) It is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations;

(c) The protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close cooperation.

In addition, the 1970 UNESCO Convention has created the basis for a universal conception of the protection of cultural property, particularly by introducing the idea of a common cultural heritage of mankind. In this regard, the Paris UNESCO Declaration of 17th October 2003, not only called for cooperation amongst States, but it also established a sort of universal jurisdiction against acts of intentional destruction of cultural patrimonies of great importance to mankind. These are actions for which the States themselves are directly responsible, according to international legislation for not having taken appropriate measures for the interdiction, prevention, cessation, and sanctioning of any intentional destruction of such patrimonies. Under appropriate circumstances, cultural heritage in the territory of any State may be considered an element of the general interest of the international community, and, as such, it must be protected even against the wishes of the territorial State. This new form of protection entails that, today, States are bound to tolerate scrutiny and intervention, especially by competent international organizations, when they wilfully engage in, or intentionally fail to prevent the destruction of, or serious damage to, cultural heritage of significant value for humanity.

Similarly, the UNESCO Recommendation adopted on 16 November, 1972 in Paris states that “the cultural and natural heritage represents wealth, the protection, conservation and presentation of which, impose responsibilities on the States in whose territory it is situated, both vis-à-vis their own nationals and vis-à-vis the international community as whole: Member States should take such action as may be necessary to meet these responsibilities. The cultural or natural heritage should be considered in its entirety as a homogeneous whole, comprising not only works of great intrinsic value, but also more modest items that have, with the passage of time, acquired cultural or natural value. None of these works and none of these items should, as general rule, be dissociated from its environment”.

The classification of Countries in “importers” and “exporters” of cultural goods, is no longer satisfactory, neither from an ideological point of view, nor with regards to concrete experience. Cultural goods are now considered universal values which
belong to all of mankind, and their de-contextualization damages everyone and not just the Country of origin. In the light of this, the Country of destination of cultural goods belonging to another Country is at the same time the victim of the exportation of its own cultural patrimony.

Fully considering the above mentioned principles and experiences, there should be no objection to requiring the universal protection of cultural goods.

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GUIDELINE 9 - Cooperation.

States should consider providing each other with the widest possible mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences against cultural property, and in order to enhance the effectiveness and speed of the procedures.

States should consider making crimes against cultural property extraditable offences, and link, whenever possible, the extradition of the alleged offender with the recovery and restitution of the cultural property involved. States should also consider enhancing the effectiveness and speed of extradition for offences against cultural property, and provide for the principle of “extradite or prosecute”.

States should consider becoming parties to bilateral or multilateral agreements for a model for search, electronic surveillance or involving the use of special investigative techniques, for seizure, for confiscation, as well as for rogatory letters.

Guidelines 42, 44 and 45 would be merged.

The importance of regional and inter-regional and/or international cooperation is well illustrated in the Guidelines content and rationale. Despite the recent interest in establishing regional cooperation networks, there are still wide regions without such a network, particularly in Africa and Asia. Currently those regions are the most threatened by the illicit trafficking in cultural items. Furthermore, the increasing globalization of crimes that infringes on cultural heritage implies the need for a stronger and more systematic interregional cooperation. Cooperation and restitution agreements in the cultural field could be ratified not only at a regional level, but also at the inter-regional level, especially when relevant regions face homogenous problems in fighting illicit trafficking.

Countries belonging to the same region could promote the co-management of entire investigative and prosecutorial processes - at least if they are border Countries or if they are interested by ongoing trafficking - in order to counter trans-national offences. Through such agreements, Countries from a specific region could better exercise and coordinate juridical options and targets; they could also consider putting in place diplomatic, cultural or political forms of pressure on other Countries, if they refuse to return objects tainted by illegal dealings. A sound knowledge and wide experience of both regional and inter-regional contexts are an essential factor in order:

(1) To ensure and promote the widest degree of mutual assistance between all relevant authorities;
(2) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of art crimes.

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GUIDELINE 10 - International instruments.

States, that have not yet done so, should consider becoming parties to the existing international instruments (in particular, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, the UNESCO Convention on the Protection of the Underwater Cultural Heritage, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols 1 and 2, and the United Nations Convention against Transnational Organized Crime), and use them as a basis for international cooperation in relation with cultural heritage protection.

Guidelines 13 and 41 would be merged.

The importance of these international tools is well illustrated in the Guidelines content and rationale. The 2000 United Nations Convention against Transnational Organized Crime has not received so far sufficient attention in the field of cultural property: besides offering a legal basis for cooperation in those situations where no other basis is available, and besides providing procedures that in some circumstances facilitate the cooperation more than those of other existing agreements, the UNTOC may also represent a tool to promote globally more uniform cooperation practices. Moreover, there are often evident difficulties between infra-regional cooperation and, when considering worldwide cooperation, there are still reasons to believe that Countries may take advantage, at global level, of the Convention against Transnational Organized Crime, at least, as much as single Countries have done with their regional instruments.

12. Japan

I. General Comment

In order to tackle the issues of trafficking in cultural property, Japan is of the view that each Member States should fully utilize and strengthen the implementation of existing international legal frameworks such as the UNESCO 1970 Convention and UNTOC. In this regard, we should bear in mind that there is an ongoing process under UNESCO to strengthen the implementation of 1970 Convention, and trafficking in cultural property is one of the important issues that has been taken up in such context. Under such circumstances, Japan is concerned that the development of guideline in the UNODC forum may duplicate the work that needs to be undertaken by UNESCO (which is the primary forum that deals with cultural property issues), and would complicate or even create confusion among the international legal framework to deal with the issue. Such complication or confusion would ultimately slow down or tie up the Member States’ efforts to tackle the issue of trafficking in cultural property, and therefore we need to take cautious steps.
Moreover, we should also bear in mind of the difference and diversity of the criminal justice system around the world. Criminalization of specific conducts or sanction against certain conduct must be consistent with the overall criminal justice system as well as cultural property protection policy of each Member States. Therefore, we believe that the criminalization or definition of offences should not be dealt with in a single uniform manner. Japan is in fact reluctant to develop a guideline that aims towards uniformity, or intends to set uniform standards on criminalization.

Instead, if we are going to develop a guideline, we must reach full consensus on the substance that it would provide realistic and practical guidance for the practitioners while fully respecting the difference and diversity of the criminal justice system as well as the policy towards protection of cultural property of the Member States.

II. Comment on the Commentaries ([RATIONALE], [BACKGROUND] and [CONTENT]) of the Draft Guideline

As it was pointed out by several delegations at the June Expert Group Meeting, Japan is concerned about the inconsistencies between some of the Guidelines and the Commentaries, particularly where the Guidelines use non-mandatory language such as “States should consider…” and the Commentaries use mandatory language such as “States should …” (Such inconsistencies are found in various paragraphs and for example in paras. 7, 8, 13, 15, 24 among others.)

Therefore, Japan reaffirms the initial agreement of the Meeting that the [RATIONALE], [BACKGROUND] and [CONTENT] would only serve as an internal working document for the Expert Group Meeting, and would not form any part of the final outcome of the Guideline.

III. Comment on Paragraphs of the GUIDELINE

In the following paragraphs, comments are made on the [GUIDELINE] section of the Advanced Unedited Version of the draft guideline dated April 24 2012. NON-PAPER refers to the NON-PAPER that was distributed by the Secretariat during the June IEGM.

(TITLE)

We support the amendment of the title as “Draft Specific Guidelines for Crime Prevention and Criminal Justice Responses with respect to Trafficking in Cultural Property”.

(GL2, 3, 37 and 52)

Japan would support the merging of GL2, 3, 37 and 52, as initially agreed at the IEGM. However, we are concerned that the definition of terms such as “trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property” are not clear enough to provide a practical guidance for the Member States to develop a comprehensive statistics or databases.
We can go along with the initially agreed language at the IEGM as it stands in GL4 of the NON-PAPER.

We do not object to the necessity of regulating internet auctioneers. However, the necessity to regulate the internet providers needs to be carefully examined.

Japan supports the amendment suggested at the IEGM as it stands in GL10 of the NON-PAPER.

Japan supports the amendment suggested at the IEGM as it stands in GL13 of the NON-PAPER.

It is our understanding that it was agreed to delete GL15 at the IEGM.

Our domestic law has a unified definition and interpretation under the civil law of movable and immovable property that would apply to both criminal law and cultural property related laws. We do not see the necessity to even consider defining a new concept of “movable cultural property” that might even create confusion.

(1) Japan supports the idea of merging the original GL16, 17, 18, 19, 21, 23 and 24. However, we cannot agree to list these offences as some sort of “minimum” standard. Instead, we urge to have a clear indication that the listed offences are options to be considered by the Member States, taking into consideration the difference and diversity of the criminal justice system.

(2) It is also our understanding that the current language of the GL16 (NON-PAPER), the introductory part, stands as follows (and we can go along with such wording):

GUIDELINE 16 (NON-PAPER)

States should consider penalizing acts such as the following as serious offences, to the extent possible within their domestic legal systems:

(2) Regarding the suggestions made by delegations on the subparagraphs (a) to (g), there were some ideas introduced by the Italian delegation such as adding “handling and laundering of cultural properties” to the list of offences. These ideas may be interesting, but they are quite vague, broad and unclear, and without clear understanding or commonly agreed definition of such offences, we cannot accept such offences to be included in the list. We are also concerned about the subparagraph (f) and (g) “violation of obligation to report …” First, we would like to point out that the content or the scope of such “reporting obligations” are not defined in the draft guideline. Secondly, penalizing the violation of such obligation
appears to be overly broad, and whether such obligation and violation can be precisely defined is questionable. We therefore propose to delete the two subparagraphs (f) and (g). Japan imposes reporting obligation of suspected stolen objects to pawn brokers, but the violation of the obligation is not penalized.

(GL 20)

“Other offences related to trafficking in cultural property” is overly broad and unclear. We already have the list of offences in (GL16) and therefore, this paragraph should be deleted.

(GL 22)

We cannot endorse such specific rule or guidelines on how to infer a person’s state of mind. This paragraph should be deleted.

(GL 27)

Taking into account of the different legal systems, sanctions should not be limited to “criminal” sanctions. Therefore, the title of the chapter should be amended as “Criminal or Administrative Sanctions” and GL27 should be amended as following:

GUIDELINE 27

States should consider adopting criminal or administrative sanctions such as bans and disqualification

(GL 30)

We propose the following amendment.

GUIDELINE 30

States should consider introducing search, seizure and confiscation of cultural property, which is identified as the object of illicit trafficking or other related offences, and to ensure their return to their rightful victim or owner.

(GL 31)

This paragraph should be deleted. The prosecutors owe the burden of proof, and we do not think that reversing the burden of proof only for confiscation (or seizure) of stolen cultural property is necessary or justifiable.

(GL 38, 39)

These paragraphs should be deleted. These paragraphs do not address the issue of conflict of jurisdiction (or conflict of laws), and going into such detailed or technical issues would not be helpful for this Guideline to be “practical”.

(GL 42)

We can accept the paragraph as long as the scope of the paragraph is within the framework of MLAs in general.
We are concerned that such procedure may complicate and unnecessarily delay the extradition procedure, and therefore, propose the deletion of this paragraph.

We propose the following amendment.

GUIDE LINE 45

States should consider enhancing the effectiveness and speed of extradition for offence including the offences against cultural property, and also to consider to provide for the principle of “extradite or prosecute”.

In order to clarify what is meant by “all necessary measures”, Japan would propose the following language for GL54:

GUIDE LINE 54

States who have not yet done so should consider concluding relevant international conventions such as the UNESCO Convention and UNIDROIT Convention, and undertake all necessary measures under such conventions to recover cultural properties that are identified as trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property.

13. Mexico

MISIÓN PERMANENTE DE MEXICO

La Misión Permanente de México ante los Organismos Internacionales con sede en Viena tiene el honor de hacer referencia a la Nota No. CU 2012/136, del 6 de agosto de 2012, con la que la Oficina de las Naciones Unidas contra la Droga y el Delito solicitó a los Estados Miembros, de ser el caso, observaciones o comentarios sobre el proyecto de “Directrices sobre las respuestas en materia de prevención del delito y justicia penal con respecto al tráfico de bienes culturales”, que fue considerado durante la sesión del grupo intergubernamental de expertos, que sesionó en Viena del 27 al 29 de junio de 2012.

Sobre el particular, la Misión Permanente tiene el agrado de compartir con la Oficina una propuesta para incluir una directriz nueva, relativa a extracción de bienes culturales propiedad de los Estados y a la cooperación internacional al respecto, tal y como fue propuesto por la Delegación de México durante la referida sesión del grupo intergubernamental de expertos. Se anexa el documento que contiene la propuesta, incluyendo su justificación y descripción correspondiente.

Viena, 25 de septiembre de 2012.

[...]
Draft Guidelines for crime prevention and criminal justice responses in relation with trafficking and other illicit behaviours in cultural property

New draft guideline concerning cooperation proposed by Mexico

Guideline __

“The unlawful removal of the concerned cultural property from a State that has enacted laws on national or State ownership should be internationally regarded as theft of public property.

To facilitate the restitution of public cultural property, Requested States should procedurally ponder, as appropriate, the requiring State’s provisions on national or State ownership when processing restitution requests”.

1. [RATIONALE:] Trafficking on cultural property, especially on archaeological artifacts and historical objects, constitutes an offense against the cultural heritage of humanity. By causing said artifacts and objects to be removed from their place of provenance without a legitimate and proper research objective and without following a rigorous protocol, trafficking is responsible for the irretrievable loss of valuable information and thus precludes the integration and dissemination of knowledge of universal interest.

2. Moreover, due to the use of destructive methods, trafficking on archaeological artifacts and historical objects causes irreparable damage that thwarts the preservation of cultural sites and property for present and future generations.

3. According to their duty to protect the cultural heritage of humanity, several States have enacted unambiguous laws on national or State ownership of certain cultural property, for example archaeological artifacts and historical objects, regardless of prior exercise of physical control over it and thus including when it remains officially undiscovered or otherwise uncatalogued.

4. Taking into consideration the unique and irreplaceable nature of cultural property, as well as the highly symbolic meaning it may hold for certain peoples, comprehensive national or State ownership laws are intended to grant it special protection. Thus, in the general interest of universal culture, national or State ownership laws constitute the first barrier against looting and should obstruct the local and international trade in undocumented cultural property as well as the laundering of stolen cultural property.

5. However, national or State ownership laws cannot fulfil their protective purpose or facilitate the return of stolen cultural property if the illegal removal of the concerned property from the territory of provenance is not internationally regarded as theft of public property and if said laws are not, at least, pondered procedurally as appropriate when processing restitution requests.

[BACKGROUND:] Relevant conventional and model provisions include:

a. article 2 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³ states that international cooperation constitutes one of the most efficient means of protecting

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each country’s cultural property against all the dangers resulting from the illicit import, export and transfer of ownership of cultural property. Moreover, article 13 of the Convention codifies the sovereign and indefeasible right of States to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported. Therefore, States Parties to the Convention undertook to facilitate recovery of such property by the requiring State in cases where it has been exported;

b. article 3 of the Convention on Stolen or Illegally Exported Cultural Objects states that, for the purposes of the Convention and when consistent with the law of the State where the excavation took place, a cultural object shall be considered stolen whenever unlawfully excavated or lawfully excavated but unlawfully retained;

c. the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects, the general purpose of which is to contribute to the protection of cultural property by facilitating the application of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, refer -inter alia- to: the general duty of States to take all necessary and appropriate measures to protect undiscovered cultural objects and to preserve them for present and future generations (Provision 1); State ownership of undiscovered cultural objects (Provision 3); deeming cultural objects excavated contrary to the relevant provisions or licitly excavated but illicitly retained as stolen (Provision 4); nullity and invalidity of the transfer of ownership of a stolen cultural object (Provision 5); and ensuring the return or restitution to the owner State of cultural objects excavated contrary to its relevant provisions or licitly excavated but illicitly retained by deeming them as stolen (Provision 6).

[CONTENT:]

6. When a State enacts ownership of certain cultural property, the removal of said cultural property from its territory in contravention of the relevant provisions should be internationally regarded as theft of public property.

7. When a State dispossessed of cultural property seeks its restitution, requested States should resort and exhaust all the means at their disposal to provide the fullest cooperation.

In order to expeditiously grant requests for the restitution of public property, said cooperation shall include pondering, as appropriate, the requiring State’s national or State ownership laws.

8. While providing the fullest cooperation, requested States shall take into consideration that laws on national or State ownership vest ownership regardless of prior exercise of physical control and thus including when the concerned cultural property remains officially undiscovered or otherwise uncatalogued by the owner State.

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5 Adopted by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its 16th and 17th sessions; www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/restitution-of-cultural-property/standards-forownership/#c317252
9. Moreover, due to the clandestine nature of the looting of cultural property, requested States shall take into consideration that it may be materially impossible for dispossessed States to offer concrete data concerning thefts of State-owned cultural property.

14. Nigeria
Office of the Attorney General of the Federation and Ministry of Justice

[...] HAGF/UNODC/2013/Vol.1/1
10th January 2013
[...]

DRAFT GUIDELINES FOR CRIME PREVENTION AND CRIMINAL JUSTICE RESPONSES WITH RESPECT TO TRAFFICKING IN CULTURAL PROPERTY

1. I write on the instructions of the Honourable Attorney General of the Federation and Minister of Justice of the federal Republic of Nigeria (HAGF) to acknowledge receipt of your Note Verbale CU 2012/177/DTA/OCB/CSS of 9 October 2012 on the above subject.

2. I am to inform you that having reviewed the attached draft Guidelines, HAGF finds that they are in general terms quite comprehensive and adequate for the purpose of fashioning a national criminal justice response legislative scheme with respect to the trafficking in cultural property.

3. Towards this end therefore the draft guidelines have been forwarded to the Honourable Minister for Culture and Tourism with a view to promoting the adoption of model legislation at the federal and state levels on the criminalization of trafficking cultural property.

[...]

15. Sweden
Ministry of Justice Sweden
Division for Criminal Cases and International Judicial Co-operation
Ju2012/193/BIRS
9 November 2012

Sweden’s comments on the Draft specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property - CU 2012/177
Sweden has no objection to an adoption of guidelines for the application of UNTOC regarding trafficking in cultural property. However, Sweden wants to stress that the combating of trafficking in cultural property can be dealt with within UNTOC in a satisfactory way. Therefore Sweden does not find a need to establish a separate instrument for the particular crimes mentioned.

[...]
The United States appreciates the intensive Work and thoughtful response of the Secretariat’s 27 September letter. Once the documents from the experts group meeting have been distributed as agreed, the United States will provide detailed comments in response to both the 6 August 2012 Note Verbale and the second Note Verbale to be distributed by the Secretariat.

As an initial comment, the United States remains generally supportive of the production of meaningful, concise guidelines on crime prevention and criminal justice with respect to trafficking in cultural property. The United States is concerned, however, about the duplication and redundancy of multiple guidelines; the inapplicability of the “rationale,” “background,” and “content” sections of each numbered guideline; and the overall focus of the document if it is to be useful to member states in combating trafficking in cultural property. As noted above, the United States will provide detailed comments on these and other issues following receipt of the additional documents referenced in the Secretariat’s letter of 27 September 2012.

[...]

October 31, 2012

Comments by the United States of America on the “Draft specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property” October 31, 2012

The United States of America appreciates the opportunity to respond to the Note Verbale (CU 2012/136) from the UNODC Secretariat dated 6 August 2012, which requested comments by member states on the Draft specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property and the Note Verbale (CU 2012/177/DTA/OCB/CSS) from the UNODC Secretariat dated 9 October 2012 that provided additional background documents on the Draft Guidelines and requested comments from member states. As outlined in the Note Verbale of 6 August, an advanced unedited version of the Draft Guidelines was developed by the UNODC Secretariat in consultation with experts acting in their individual capacity and relevant international organizations in November 2011. The advanced unedited version was then distributed to member states to be discussed at the open-ended intergovernmental expert group meeting on protection against trafficking in cultural property held in Vienna from June 27 to 29, 2012, which included a mix of experts in trafficking in cultural property and Vienna-based diplomats. The expert group meeting was the first opportunity for experts and Vienna-based delegates acting in their official capacity to discuss the Draft Guidelines. The expert group dedicated a significant portion of its meeting to discussion of the Draft Guidelines, and worked on revisions item-by-item. Following the expert group meeting, the Secretariat requested member state comments on the advanced unedited version (Note Verbale, August 6) and conference room paper versions (Note Verbale, October 9) of the Draft Guidelines.

The United States understands the sensitivity of the issue of cultural property among member states at UNODC. The United States plays an active role in combating the international problem of trafficking in cultural property and is dedicated to continuing to working with the international community to fight this problem.
General Comments

The United States is generally supportive of the production of meaningful, concise guidelines on crime prevention and criminal justice with respect to trafficking in cultural property. The United States views the Draft Guidelines as a discretionary reference document that does not purport to be, and is not, binding. The United States does not view the Draft Guidelines as an agenda for future action by the UNODC or international community, but as a reference tool to assist countries in combating trafficking in cultural property pursuant to existing international instruments. The United States understands that the final Specific Guidelines will be endorsed only after full consensus by member states.

The United States is concerned, however, about: 1) the inapplicability of the “rationale”, “background” and “content” sections of each numbered item; 2) the overall focus of the document if it is to be useful to member states in combating trafficking in cultural property; and, 3) the duplication and redundancy of multiple items with the Draft Guidelines.

First, the United States does not accept the content of the “rationale”, “background” and “content” sections that follow each item. These sections contain flawed arguments; include aspirational goals that are not currently supported by existing international instruments; separate items in existing international instruments from their broader context; and, in some cases, run counter to the objective of the item itself. During the expert group meeting, the United States and other delegations argued that these sections did not share general acceptance by those present and therefore should not be included in the Draft Guidelines. The Conference Room Papers (CRPs) subsequently distributed by the Secretariat reflected this understanding; the CRPs do not include these sections. Some information in these sections is helpful, but it is taken out of context. Suggestions on how to retain some of this information in the Draft Guidelines without decontextualizing it are included below in Recommendations.

Second, the United States views the Draft Guidelines as overly broad and unlikely to be useful to law enforcement entities in its current format. Specifically, the Draft Guidelines should be limited to the criminal aspects of trafficking in cultural property, which is within the mandate of the UNODC. The United States views the work of other international organizations as vital to the protection of cultural heritage, and notes that there are numerous items that are within the mandate of UNESCO. The United States encourages close cooperation between UNODC and other international organizations, within their respective mandates, in order to eliminate duplication of effort.

Third, the United States finds a number of items in the Draft Guidelines to be repetitive. Comments on individual items follow, based on Conference Room Paper UNODC/CCPCJ/EG.1/2012/CRP.2/Rev.2, which the United States believes reflects the substantial discussions of the expert group. This CRP eliminated the rationale, background, and content sections and combined a number of redundant items. The specific comments by the United States are generally intended to streamline and shorten the text by combining similar items. For those items for which no comment is provided, the United States is in general agreement with the content. Section headings and sub-headings would need to be revised once a shortened, streamlined text is agreed.
Specific Comments (on UNODC/CCPCJ/EG.1/2012/CRP.2/Rev.2)

Title. The United States supports the revised title in CRP.2/Rev.2.

Guideline 2. The United States supports the consolidation of items 3, 37, and 53. A streamlined text is:

States should consider introducing or improving statistics on import/export and criminal offences related to cultural property, establishing a national database with such information, and reporting it to international bodies such as the UNODC Crime Trends Survey, INTERPOL, and the World Customs Organization.

Guideline 5. The United States suggests merging this item with Guidelines 6, 7, and 8:

States should consider encouraging cultural institutions and the private sector, including internet providers and web-based auctioneers, to adopt codes of ethical conduct, disseminate best practices, and report instances of suspected trafficking in cultural property cases to law enforcement.


Guideline 9. The United States suggests the following revised text:

States should consider introducing and implementing appropriate import and export control procedures, including certificates for export and import of cultural property.

Guideline 10. The United States believes that states should monitor the market for trafficked cultural property. A suggested text is:

States should consider creating and implementing measures to monitor the market for trafficked cultural property.

Guideline 16. The United States supports the consolidation of guidelines 16, 17, 19, 21 and 23-24 and recommends the following revised text:

States should consider criminalizing, as serious offences, to the greatest extent possible within their domestic legal frameworks, looting of archaeological and cultural sites and trafficking in cultural property, including related offences such as illicit import/export, theft, and conspiracy.

Guideline 20. The United States suggests a revision of the text:

States should consider criminalizing, to the extent allowed under their domestic legal framework, other offences related to trafficking in cultural property, such as: dealing in stolen or trafficked cultural property, forgery of cultural property, and damaging or vandalizing cultural property.

Guideline 22. Multiple principles are conflated in this guideline, including exercise of due diligence and knowledge of wrongdoing/criminal intent. Due diligence is addressed in a more robust manner in the 1995 UNIDROIT Convention. The United States does not support this Guideline and suggests its deletion.

Guideline 25. The United States suggests combining this item with Guidelines 26 and 27. A streamlined text is:
States should consider providing proportionate, effective, and dissuasive criminal sanctions for the aforementioned criminal offences, including bans and disqualifications, as well as custodial sanctions to meet the “serious crimes” standard in Article 2(b) of the Convention against Transnational Organized Crime.


Guideline 30. The grammar in the item is unclear. A suggested text is:

States should consider introducing search, seizure, and confiscation of cultural property that has been trafficked in order to ensure its return, restitution, or repatriation.

Guideline 31. The United States does not support the concept of a reverse burden of proof and such concept would not be consistent with U.S. domestic law and practice. The United States strongly recommends the deletion of this guideline.

Guideline 32. The United States suggests combining this item with Guidelines 33 and 47. A suggested text is:

States should consider introducing confiscation of economic assets of the offence and consider using confiscated economic assets for financing expenses for combating trafficking in cultural property and related offences.

Guideline 33. Combine with 32.

Guideline 34. The United States suggests combining this item with Guidelines 36 and 51. A suggested text is:

States should consider allowing the use of special investigative techniques and creating specially trained law enforcement bodies or units for the investigation of criminal offences related to trafficking in cultural property, and consider assisting other States in planning and implementing these specialized programs.

Guideline 36. Combine with Guideline 34.

Guideline 38. The concept of extraterritorial jurisdiction for cultural property cases has not been accepted in current, relevant international instruments. The United States does not support and strongly recommends deletion of this Guideline.

Guideline 39. The concept of extraterritorial jurisdiction for cultural property cases has not been accepted in current, relevant international instruments. The United States does not support and strongly recommends deletion of this Guideline.

Guideline 43. The United States strongly supports the existing UNESCO national laws database as a tool for combating trafficking in cultural property. The United States recommends that this Guideline should either be merged with Guideline 2 or placed immediately after Guideline 2.

Guideline 44. As noted in Guidelines 16 and 25, the document recommends that States treat trafficking in cultural property as a serious crime, as defined in the Convention against Transnational Organized Crime. Such as designation then allows for extradition, as outlined in the Convention. The United States recommends the following text:

States may pursue, wherever possible, the extradition of an alleged offender of trafficking in cultural property and related offences with the recovery and
Guideline 47. Combine with 32.

Guideline 48. The United States suggests combining this item with Guidelines 49 and 52. A suggested text is:

States should consider enhancing exchange of information on trafficking in cultural property and related offences by sharing or interconnecting inventories and databases of trafficked cultural property, contributing to international databases, exchanging information on previous convictions and ongoing investigations, and enhancing or establishing privileged channels of communications between law enforcement agencies.


Guideline 54. The term “all necessary measures” is vague. The United States recommends the following text in order to clarify the meaning of the item:

States who have not yet done so should consider concluding relevant international conventions such as the UNESCO Convention and the UNIDROIT Convention, undertake all necessary measures under such conventions to recover cultural property that is identified as trafficked, illicitly exported or imported, stolen, looted, or illicitly excavated, illicitly dealt in or missing cultural property.

Recommendations

The United States views the development of the Draft Guidelines as an opportunity to provide useful information to member states that are working to combat trafficking in cultural property. As noted above, the United States finds the context/background/rationale sections of each item problematic, and these sections are unlikely to find consensus among the government experts. In order to improve the Draft Guidelines, the United States recommends the elimination of the context/background/rationale sections but the inclusion of the following three sections that would include the key information in a more contextualized and useful manner:

A. A list of international legal instruments used to combat trafficking in cultural property, with a brief synopsis of the function of the instrument. The synopsis should be written by the international body responsible for the instrument. For example, UNESCO could provide a synopsis of the 1970 UNESCO Convention and UNIDROIT could provide a synopsis of the 1995 UNIDROIT Convention. Additionally, international organizations or states parties could briefly summarize how the relevant instruments are implemented.

B. A section on relevant law enforcement tools, with a brief description of the tool and how to use/access the tool. The descriptions should be provided by the entity responsible for the tool. For example, INTERPOL could describe its cultural property program, including its database and alert system; UNESCO could describe its database of national cultural heritage laws. The Draft Guidelines could include internet links to the relevant tools.
C. Practical examples of successful law enforcement techniques or programs, included as a separate section or interspersed in the text where relevant. Including practical examples would provide a stronger educational tool for the users of the Draft Guidelines, while reinforcing the efficacy of existing international instruments and tools. The United States would be happy to provide examples of successful, practical implementation of existing international tools. […]

The Group of 77

THE GROUP OF 77
Vienna
Office of the Chairman

The Group of G-77 Vienna Chapter has the honour to refer to Note Verbal CU 2012/136 from Friday August 6th.

In this regard, the G-77 wishes to reiterate its support regarding the Draft Specific Guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property, as they were presented to the Second Session of the Expert Group on Protection against Trafficking in Cultural Property, which took place from the 27th to the 29th of June 2012.

As expressed in its statement (annexed to this Note Verbal), the Group considers that the Guidelines, including their rationale and annotations, constitutes a useful tool for prevention, prosecution, and punishing of offences against cultural heritage as well as for international cooperation, mutual legal assistance and identification of technical assistance needs, and has, at this stage, no further observations.

Furthermore, the Group would like to commend to the Secretariat for finalizing the specific guidelines according to the mandate given by General Assembly resolution 66/180 and resolutions 2010/19 and 2011/42 of the Economic and Social Council (ECOSOC), as well as resolution 5/7, entitled “Combating transnational organized crime against cultural property”, adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC) at its fifth session.

Vienna, 14 December 2012

Final draft as adopted by silent procedure on 26/6/2012
STATEMENT OF THE GROUP OF 77 AND CHINA ON THE OCCASION OF THE SECOND SESSION OF THE EXPERT GROUP ON PROTECTION AGAINST TRAFFICKING IN CULTURAL PROPERTY. 27 – 29 JUNE 2012, DELIVERED BY MS. JULIA VILLATORO, PERMANENT MISSION OF EL SALVADOR ON BEHALF OF H.E. AMBASSADOR ANTONIO GARCÍA, PERMANENT REPRESENTATIVE OF PERU

Mr. Chairman,

1. I have the honour to speak on behalf of the Group of 77 and China. The Group is pleased to see you chairing this session. I assure you the full support of the Group in the task ahead.

2. We also extend our thanks to the Secretariat for the preparation of the documents available and the organization of the meeting.

Mr. Chairman,

3. The Group highly welcomes the convening of this expert group meeting, emphasizing the importance for States of protecting and preserving their cultural heritage. Therefore, the Group supports all efforts addressed to prevent, combat and criminalize all aspects of trafficking in cultural property, including the transfer of cultural property which was illegally removed from its countries of origin.

4. The Group expresses its strong support to General Assembly resolution 66/180 and resolutions 2010/19 and 2011/42 of the Economic and Social Council (ECOSOC), as well as resolution 5/7, entitled “Combating transnational organized crime against cultural property”, adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC) at its fifth session. These resolutions are helpful points of departure for our discussions and deliberations.

5. In this context, we are confident that within its mandate, this expert group can act upon these illicit activities and submit to the Commission on Crime Prevention and Criminal Justice (CCPCJ) practical proposals for implementing the recommendations made in 2009, with due attention to aspects of criminalization and international cooperation. The Group continues to hold the view that the Commission shall play an indispensable role in formulating a robust crime prevention and criminal justice response to all aspects of trafficking in cultural property.

6. The Group urges Member States to use the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property in addressing the issue, and invites them to continue submitting their written comments. Moreover, the Group recommends considering appropriate improvements to the model treaty in order to make it more consistent with the letter and the spirit of above mentioned resolutions, with a view to developing appropriate instruments that enable Member States for preventing, combating and punishing all aspects of offences against cultural heritage.

7. The Group expresses its grave concern for different aspects of crimes against cultural heritage including unlawful excavations, involvement of transnational organized criminal group in trafficking in cultural property, impunity of its
perpetrators, use of new evolving means like auctions and internet displays, and illicit acquisition of cultural property in the market.

8. In this regard, the Group urges Member States to consider, among other effective measures within the framework of their national legislation, criminalizing activities related to all forms and aspects of trafficking in cultural property and related offences by using a broad definition that can be applied to all stolen, looted, unlawfully excavated and illicitly exported or imported cultural property, and invites them to make trafficking in cultural property, including stealing and looting at archaeological and other cultural sites, a serious crime, as defined in article 2 of the United Nations Convention against Transnational Organized Crime, with a view to fully utilizing that Convention for the purpose of extensive international cooperation in fighting all forms and aspects of trafficking in cultural property and related offences.

9. Furthermore, the Group would like to call upon Member States to regulate and implement monitoring programs for the market of cultural property especially in auctions, as well as promoting the criteria of due diligence while acquiring a cultural property.

10. The Group would like to commend to the Informal Expert Group and UNODC for finalizing specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property. It constitutes a useful tool for prevention, prosecution, and punishing of offences against cultural heritage as well as for international cooperation, mutual legal assistance and identification of technical assistance needs.

11. Finally our Group encourages all participants to do their best, recalling the significance of cultural property, which is indeed, an essential element of the common heritage of mankind, as well as a unique and important testimony of the culture and identity our nations.

12. Let’s start our work! Thank you, Mr. Chairman.

[...]

Letter from Permanent Missions of Austria, Canada, France, Germany, Israel, Japan, United Kingdom, United States of America

Vienna, September 5, 2012

[...]

We, the undersigned Member States, are writing in regard to the note verbale circulated by the Secretariat on 6 August 2012 (Reference: CU 2012/136) (Note Verbale) related to the issue of trafficking in cultural property as discussed at the second meeting of the open-ended intergovernmental expert group on protection against trafficking in cultural property, established within the framework of the Commission on Crime Prevention and Criminal Justice (CCPCJ) and held in Vienna from 27-29 June 2012 (June Expert Group or June meeting).

We are concerned about discrepancies between the Note Verbale—and the documents referred to therein—and the outcome of the June meeting with respect to two agenda items: (1) the draft guidelines on crime prevention and criminal justice
responses with respect to trafficking in cultural property (draft guidelines) (agenda item 2(a)) and (2) the report of the meeting (agenda item 5). We ask that the Secretariat take steps to move forward in a manner consistent with the June Expert Group’s discussions and conclusions.

1. Draft of Specific Guidelines on Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property

The Note Verbale circulated by the Secretariat fails to reflect and build upon the substantial work accomplished by the June Expert Group in revising the draft guidelines. In fact, the Note Verbale’s request for States to comment on the draft guidelines developed by the Secretariat with an informal group of experts participating in their personal capacities following the meeting in November 2011 (April Draft) (www.unodc.org/documents/organizedcrime).

UNODC_CCPCJ_EG.1_2012/Draft_Guidelines_24_April_2012.pdf could have been circulated prior to the June Expert Group meeting given that it does not incorporate any of the June Expert Group’s revisions. For example, in addition to revisions to specific guidelines, the June Expert Group agreed that the “Background,” “Rationale,” and “Content” sections of the draft guidelines would serve as an internal working document only.

Although the June Expert Group engaged in only an initial discussion of the draft guidelines, the revisions made by the June Expert Group should be circulated to all Member States in order to provide States with a more complete picture of the draft guidelines’ current status, including the title as reflected in the document circulated by the Secretariat at the June meeting (UNODC/CCPCJ/EG.1/2012/CRP.2).

In light of the hard work and significant resources that went into the June meeting, we request that the Secretariat:

(a) Distribute the documents that served as the basis for initial discussions by the June Expert Group and the most up-to-date version of the revised draft guidelines. Specifically, (1) document UNODC/CCPCJ/EG.1/2012/CRP.2; (2) the non-paper produced by the Secretariat during the meeting (dated 28 June 2012); and (3) the non-paper reflecting revisions made on 29 June 2012 (hereinafter “the Revised Draft Guidelines”);

(b) Supplement the Note Verbale by requesting comments from Member States on the Revised Draft Guidelines instead of on the April Draft where a specific guideline was modified in June, as reflected in the Revised Draft Guidelines;

(c) Invite Member States to express views on the best way for the Secretariat to proceed on this matter;

(d) Once comments and views have been received, produce and circulate a compendium of all the written responses received from Member States; and

(e) Specify that Member States will need to reach full consensus before any endorsement of draft guidelines.

We note that the draft guidelines are still in the process of being developed and that Member States have not yet assented to any of the specific guidelines, including those in the Revised Draft Guidelines.
2. Report on the Meeting of the Expert Group on Protection against Trafficking in Cultural Property held in Vienna from 27 to 29 June 2012

The Secretariat’s report on the June Expert Group meeting (UNODC/CCPCJ/EG.1/2012/4) does not accurately reflect Member States’ consensus. We request that the Secretariat revise the report with respect to two specific points that were thoroughly debated. First, the expert group agreed that the draft guidelines would be referred to as “Draft guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property” (II.A.). Second, the expert group agreed that the final sentence of II.A.4 should read: The Secretariat took note of the comments with a view to further work on the matter in consultation with Member States. That is, the word “conducting” should be deleted. We request that the Secretariat also circulated the corrected report to Member States and make it available online.

Thank you in advance for your prompt attention to these matters. We look forward to the next opportunity to discuss the draft guidelines in another open-ended intergovernmental expert group meeting and hope to move forward with the Secretariat in a constructive manner in accordance with the outcome of the June Expert Group.

Sincerely,

[...]

UNODC response to above letter:

27 September 2012

[...]

I refer to your letter of 5 September 2012 regarding UNODC’s Note Verbale (ref: CU 2012/136) which requested Member States to provide comments on the draft guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property.

Please accept my apologies for not responding earlier. However, given the importance of this matter, I considered it appropriate to consult with colleagues in-house and also with the Chairperson of the intergovernmental expert group meeting on the protection against trafficking in cultural property, held in June 2012, during which the guidelines were discussed. I also listened to the audio recordings of the discussions on the subjects raised in the letter, to ensure the accuracy of my response.

I take note of all the concerns raised in the letter and apologise for any confusion that may have resulted from the Note Verbale and the Report of the Meeting. Please be assured that any perceived discrepancy was not deliberate.

I will now address your concerns individually, as raised in the letter:

1. Paragraph 1 of the letter raises a number of issues, one of which is that the Note Verbale “fails to reflect and build upon the substantial work accomplished by the June Expert Group in revising the draft guidelines”.

The Secretariat would like to clarify that in referring to the April draft of the guidelines, it was not signalling that the work of the expert group meeting in June
on the guidelines would be ignored. As recommended during the June meeting, the Secretariat would take into account all revisions, comments and suggestions made at the meeting, as well as all written comments received from Member States in response to the Note Verbale.

The Secretariat circulated the April draft of the guidelines before the June meeting. The document was posted on the UNODC website and referred to as one of the documents of the meeting in the annotated agenda for the meeting. The fact that the April draft of the guidelines was developed by the Secretariat with the assistance of an informal group of experts participating in their individual capacity was fully acknowledged at the June meeting. Member States who expressed concern over this matter had the opportunity to comment extensively on the draft and the Secretariat took attentive note of statements.

The letter raises another issue in paragraph 1 and states ‘that the June meeting agreed that the “Background”, “Rationale” and “Content” sections of the draft guidelines would serve as an internal working document only’.

The Secretariat notes that the Chair originally proposed that if the meeting could agree on the Conference Room Paper document reference UNODC/CCPCJ/EG.1/2012/CRP.2 (the CRP), then the latter could have been attached to the Report, and the meeting could have recommended the guidelines contained therein for adoption by the CCPCJ. Thus, the original guidelines, with the background and rationale and content, could have been considered merely as an internal working document. However, this proved not to be the case due to lack of consensus and the Chair was forced to abandon this proposal. Moreover, the Secretariat reminds that after one and a half days of intensive work delegates did not succeed in discussing and making clear recommendations on all of the guidelines, including the commentary (i.e., background, rationale and content). The Secretariat notes that some delegates expressed general concern on the commentary, but did not clearly articulated these concerns during the meeting. In this regard, some delegates voiced general concern about the commentary, others did not like some of the language used, while others had issues about the principles advanced. In addition, some delegates expressed the view that the commentary was important and should remain an integral part of the document, albeit with some fine-tuning. The Note Verbale, in the Secretariat’s view, provided Member States with the opportunity to clearly state their views on what they would like to see included in and/or excluded from the draft guidelines.

The Secretariat recalls that the CRP was circulated at the meeting by the Chair to facilitate discussion on the guidelines. Secondly, the meeting did not conclude discussions on the CRP, which was, therefore, withdrawn by the Chair, when consensus could not be reached. The records show that when the distinguished delegate from Canada enquired about the status of the CRP, the Chair responded, it “…was for progressing the discussions. There isn’t an advanced version, no CRP”.

Another request under paragraph 1 is for the Secretariat to circulate the various versions of the CRP to all Member States in order to provide a more complete picture of the draft guidelines. The Chair has been consulted on this matter and is of the view that the Secretariat may send the drafts to all Member States, with the caveat, however, that they do not constitute “revised draft guidelines” as regretfully consensus was never reached, and that they should be seen as a
complement to the original document that was made available prior to the June meeting (the April draft).

On the specific requests made in sub-paragraphs (a) to (e) of paragraph 1, the Secretariat’s responses are as follows:

The three versions of document number UNODC/CCPCJ/EG.1/2012/CRP.2 bearing the following dates: 27 June, 28 June and 29 June, will be distributed to all Member States including all track changes as discussed at the June meeting.

The Secretariat will send out a supplementary Note Verbale to convey the document referenced above. However, the Secretariat does not think it appropriate to limit comments from Member States to only the CRP, as this was not the recommendation of the meeting. The records show that the idea of a Note Verbale was suggested by the representative of Chile who proposed that “a note verbale be sent to Member States asking for comments and on the basis of comments received and what has been heard in the room, there could be a revised paper for the Commission. This would allow us to have a text before the Commission”. There was no opposition to this proposal. These instructions were reiterated by the Chair in his summing up.

The Secretariat also recalls that the CRP was a working document circulated during the meeting simply to facilitate the discussions. The Chair expressed the view that, if the meeting could agree on a final version of the CRP, it could be attached to the report of the meeting, and the meeting could consider the original guidelines with the commentary as an internal working document only. However, agreement could not be reached and discussion on the guidelines was suspended after one and a half days (to allow progress on other aspects of the agenda) and only two chapters of the guidelines could be considered. Although specific amendments were proposed, not all of them appeared satisfactory to everyone. On a number of occasions, delegates referred back to certain clauses in the document that had already been discussed. Hence, there was no consensus on the CRP.

As mentioned above, although delegates were not in agreement as to the status of the commentary, there was no consensus that they should be totally excluded from the guidelines. The Secretariat would request member States to explicitly state what they wish the final draft of a set of specific guidelines to contain. The supplementary Note Verbale would thus request comments on the CRP as well as the April draft. The Secretariat also notes that the Chair made it clear that Document UNODC/CCPCJ/EG.1/2012/CRP.2 had no status. It would, therefore, be a misnomer, to refer to the document as a “Revised Draft”. It was a working document of the June meeting, which will feed into future revised draft(s) of the guidelines. Therefore, it would be outside the Secretariat’s mandate to limit comments on the guidelines only to the CRP.

The Secretariat notes that the meeting already proposed the way forward as reflected in paragraphs 4 and 8 of the Report of the meeting. Moreover, as required by the Mandate of ECOSOC, the Secretariat is expected to report to CCPCJ and ECOSOC on progress and, if necessary, request further mandate or direction on how to proceed. The Secretariat suggests that this issue be brought to the CCPCJ.

The Secretariat notes that, although the meeting required close consultation with Member States with a view to further work on the guidelines, it did not require
the Secretariat to produce a compendium of all written responses. As this issue did not arise during the meeting, it would be advisable to seek the views of all other Member States in this regard.

The Secretariat notes that it would be beyond its remit to require Member States to reach “full consensus” before endorsement of the draft guidelines. The Secretariat is of the view that this request may need to be put to the wider community of Member States for discussion and agreement.

2. In paragraph 2 of the letter, two specific points of concern were raised:

The first refers to the title of Section II.A. of the report of the meeting, which is considered as not reflecting the agreement of the meeting. The Secretariat is requested to amend the title to insert “draft” in order to read “Draft guidelines on crime prevention and criminal justice responses with respect to trafficking in cultural property”. The records show that the issue of referring to the guidelines as “draft” guidelines was indeed raised by the delegate from Canada, who proposed that, starting with the title, the guidelines should be referred to as “draft” throughout the document. The delegate of Iran then responded that, although this could be done within the document itself, it could not be done in the title itself, as the latter referred to the wording used in the agenda, which had already been agreed upon at the beginning of the meeting. Canada then agreed with this proposal and the Chair requested the Secretariat to amend the paragraph accordingly adding “draft” wherever the word ‘guidelines’ are mentioned except in the title. This is what is reflected in the report.

The second concern refers to the introduction of the word “conducting” in the last sentence of the paragraph 5 of the report. The Secretariat wishes to explain that the word “conducting” was introduced by the UN Editors to improve the meaning of the sentence. However, the Secretariat could accommodate your request to delete the word: “conducting” by issuing a corrigendum to the Report.

The Secretariat hopes that the concerns raised in the letter have been properly addressed. The Secretariat wishes to express its gratitude for your continued cooperation in the fight against trafficking in cultural property.

Sincerely,

[…]