

The European Convention on the Protection of the Archaeological Heritage

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In January 1992, 20 States signed the *European Convention on the Protection of the Archaeological Heritage (Revised)* which is intended to replace the original Convention of 1969. Signature indicates that States agree on the actual text that was before the meeting where the Convention was considered, in this case the Third European Conference of Ministers Responsible for the Cultural Heritage. It obliges States not to do anything actively contrary to the provisions of the Convention. However, States are not bound by the Convention until they ratify it. As at June 1992 no States had yet ratified the Revised Convention, but this is understandable as it usually takes at least six months for such a process to be completed even by the most enthusiastic of States.

The 1969 European Convention

The origins of the 1969 Convention are convoluted. The agenda for the fifth session of the Council for Cultural Co-operation in 1964 contained the topic 'Protection of the European archaeological heritage and regulation of the trade in archaeological finds'. The initial move for consideration of these issues came from the Italian delegation, which had announced its intention of submitting a draft European convention designed to control unlawful export and import of cultural property. The Italian initiative was aimed at exposing the danger to European archaeological sites posed by clandestine diggings 'fostered by the illicit export of and traffic in antiquities'. The Committee decided to investigate what steps should be taken to deal with these problems. An Italian expert, Massimo Pallottino, was engaged to prepare a report based on replies to a questionnaire sent to Governments. The

report advocated an approach based on stringent controls over trade in antiquities in order to remedy the then existing situation in respect of clandestine excavation. Once this was done, reasoned the Report, ownership and trade could once again be liberalized (Pallottino 1965).

The Council for Cultural Co-operation established a Working Party to draft a Convention but what ultimately emerged contained little on the problem of unlawful traffic and its repression. The 1969 Convention is mainly concerned with archaeological excavation and extraction of information from those excavations. It entered into force in 1970; the following States are currently party to it: Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Holy See, Italy, Liechtenstein, Luxembourg, Malta, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

Pressures for revision

The 1969 Convention did not deal adequately with the major problem of clandestine excavation, nor did it foresee the impact of multitudinous large-scale construction projects. During the past two decades Europe has experienced the development of ever-bigger motorway networks, underground railways and high-speed train routes, huge car parks and high-rise buildings. New forms of treatment have been applied to the land itself with changes in methods of agriculture, e.g. consolidation of fields and holdings, deep ploughing and levelling. All of these threaten the archaeological heritage through their disturbance of the sub-soil. The web of law and legislation involved is complex: specific legislation applied to antiquities and archaeology; general cultural heritage

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legislation; environmental legislation; town planning; public works; building regulations etc.

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Two Colloquia addressing the problems raised were staged by the Council of Europe: one on *Archaeology and planning* at Florence in 1984; the other on *Archaeology and major public works* at Nice in 1987. The Conclusions of the latter included guidelines for the preparation of a Council of Europe Recommendation on the desirable relationship between development and the archaeological heritage. In April of 1989 the Committee of Ministers adopted a *Recommendation Concerning the Protection and Enhancement of the Archaeological Heritage in the Context of Town and Country Planning Operations*.

Revision

At the same time as the Recommendation was being prepared, work started on the more difficult and time-consuming task of revising the Convention. The matter was handled by the Select Committee of Experts on Archaeology and Planning. This body, after determining in 1988 that the Convention should be revised and having had its determination endorsed by the Committee of Ministers, worked through 1990–91 to produce the version ultimately signed in Malta.

The Revised Convention

The Revised Convention stresses the value of the archaeological heritage as 'a source of the European collective memory and as an instrument for historical and scientific study'. As such, it is the aim of the Revised Convention to protect this heritage (Article 1) which is an element of the general common heritage of Europe. The Preamble makes clear that the *European Convention on the Protection of the Archaeological Heritage (Revised)* should be seen as part of a broad and evolutionary process within the Council of Europe.

In the 38 years since the *European Cultural Convention* came into force, the Council has seen the successful implementation of its *Convention for the Protection of the Architectural Heritage of Europe* 1985 and

preparation of the *European Convention on Offences Relating to Cultural Property* 1985 (not in force) while the Parliamentary Assembly has adopted Recommendations on the underwater cultural heritage, use of metal detectors and circulation of works of art. A draft *Convention for the Protection of the Underwater Cultural Heritage* was prepared but, for political reasons, was never completed (Strati 1991).

An examination of particular aspects of the Revised Convention shows how protection is intended to apply and the extent to which it is likely to be effective.

a Definition

Of prime importance in any legal instrument seeking to protect the cultural heritage is the definition of what is to be protected. Many European countries define their archaeological heritage by reference to what is of archaeological significance. The Revised Convention endeavours to set up a more comprehensive definition. The phrase 'elements of the archaeological heritage' is used in order to highlight the fact that it is not just objects that are important. Any evidence, of whatever nature, that can throw light on the past of humanity is important. If that evidence meets certain specified criteria, then it is an 'element of the archaeological heritage' for the purposes of the Convention.

There are four criteria: first, there must be something, even a trace, that shows humanity's past; secondly, the preservation and study of that thing must be able to help 'retrace the history of mankind and its relation with the natural environment'; thirdly, it must be something 'for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information'; fourthly, the thing must be located 'in any area within the jurisdiction of the Parties'.

Article 1 indicates the type of things that are to be included as part of the archaeological heritage: 'structures, constructions, groups of buildings, developed sites, movable objects, monuments of other kinds'. The list is not exclusive but intended merely to indicate the range of things definitely included. Most importantly, the context in which each is found is specifically

stated to be part of the archaeological heritage. Finally, these things are part of the heritage 'whether situated on land or under water', which raises the fourth aspect of the definition: that of jurisdiction.

b Jurisdiction

States control activities on their land-mass and within an area of sea surrounding it – provided, of course, that they are not land-locked. How broad that area of sea is depends on many factors – political, economic, technical (O'Keefe & Prott 1984; 1990). Most States at present control archaeological activities within their territorial sea. Whether coastal state control should extend further and, if so, how far, is a highly controversial issue. In Europe, some States have legislation applying to aspects of the archaeological heritage on the continental shelf, e.g. Ireland, Spain. French legislation refers to the contiguous zone which is a 12-mile wide strip beyond the territorial sea. The Revised Convention leaves it to each State to establish the extent of its own jurisdiction, thereby avoiding the controversy.

The inclusion of jurisdiction as one of the criteria for establishing an element of the archaeological heritage thus is purely political but of considerable significance. Jurisdiction may be exercised on grounds other than territorial, nationality being of next greatest importance. Some States, for some purposes, exercise control over their citizens wherever they may be. However, by its reference to area the Revised Convention indicates that the thing must be within the geographical limits, however defined, of the State before it can be considered an element of the archaeological heritage.

c Construction projects

Having described above the pressures leading to revision of the 1969 Convention, it is fitting at this point to examine the results as embodied in the Revised Convention. These appear in Article 5 where primary emphasis is laid on the necessity for planning and consultation. That Article must be read in conjunction with other provisions such as Article 2 (maintenance of an inventory of the archaeological heritage) and Article 7 (preparation of surveys, inventories and maps of archaeological sites).

As regards planning, States Party undertake to make certain that archaeologists participate in the development of relevant policies so as to 'ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest'. Archaeologists are also to participate in the various stages of development schemes. Achievement of both these requirements is assisted by a further provision whereby States undertake to ensure that a full consideration appear in environmental impact statements and resulting decisions not only of archaeological sites but also of their settings. The importance of the setting is stressed also in Article 5(v) which deals with the opening of sites to the public and especially the provision of structures for handling large numbers of visitors. These must not adversely affect the archaeological and scientific character of the site and its surroundings. The *Explanatory Report* states: 'Constructions should not be obtrusive on the landscape nor alter the physical conditions of the site as by changing water runoff, wind patterns, sunlight dispersion etc.' (Council of Europe 1992).

Consultation between archaeologists and town and regional planners is emphasized. Two aspects in particular are stressed: firstly, such consultation should be aimed at modification of development plans which are likely to have adverse effects on the archaeological heritage; secondly, if modification is not possible, then sufficient time should be made available to allow the site to be excavated. The ICOMOS Charter states: 'Excavation should be carried out on sites and monuments threatened by development . . .' (Article 5). Under Article 6 of the Revised Convention States undertake 'to increase the material resources for rescue archaeology'. Where elements of the archaeological heritage come to light during development work, the stated objective is for preservation *in situ*.

d Protective measures

The Preamble affirms the importance of 'appropriate administrative and scientific supervision procedures'. Articles 2, 3 and 4 amplify this by requiring States becoming party to implement various protective measures. For example, all States Party must put in place 'a legal system for the protection

of the archaeological heritage'. The system must provide for an inventory; designation of protected monuments and areas; creation of archaeological reserves; mandatory reporting of finds. Ownership of the archaeological heritage is left to one side as this is a matter on which a common approach is not yet obtainable. However, the Revised Convention does state that the legal system require persons finding elements of the heritage to make them available for examination by the component authorities.

All member States of the Council of Europe currently have legislation that to some extent implements such a system. Although membership of the Revised Convention will probably require some States to upgrade their system of protection, it could be criticized for lack of emphasis on quality. For example, mandatory reporting of finds is required but the *Explanatory Report* notes: 'A State, however, may only require mandatory reporting of finds of precious materials or on already listed sites' – presumably on the basis that implementation of the legal system requiring reporting need only be 'by means appropriate to the State in question'. Reference is made to the inventory, which could be a very useful device for keeping track of elements of the archaeological heritage and monitoring their condition. However, should it include both public and private holdings? The Revised Convention does not help in answering this question. Good arguments can be made either way but in the absence of guidance governments will opt for the solution with least political implications, ignoring the interests mentioned above.

Work on the archaeological heritage is dealt with in Article 3. This emphasizes the principles of a scientific approach to such work. In particular, the use of non-destructive methods of investigation is stressed. Here the Revised Convention is at one with the *ICOMOS Charter for the Protection and Management of the Archaeological Heritage* Article 5: 'It must be an over-riding principle that the gathering of information about the archaeological heritage should not destroy any more archaeological evidence than is necessary for the protection or scientific objectives of the investigation. Non-destructive techniques, aerial and ground

survey, and sampling should therefore be encouraged wherever possible, in preference to total excavation'. If excavation is undertaken, States are obliged to ensure that, in applying procedures for authorization and supervision, what is excavated is properly preserved, conserved and managed. In other words, a person proposing to excavate would be required to obtain permission to do so. If that person was not able to guarantee proper treatment of the site and the material excavated then permission should not be granted. As the *ICOMOS Charter* states: '... the archaeological heritage should not be exposed by excavation or left exposed after excavation if provision for its proper maintenance and management after excavation cannot be guaranteed'. Furthermore, under the Revised Convention, States must ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorized persons. This can be interpreted to mean that the excavation should be supervised by such personnel or, alternatively, that all the work be carried out by them. The first interpretation would appear preferable and is endorsed by the *Explanatory Memorandum*. This interpretation allows continuance of the practice in a number of countries of using volunteer members of the public, in many cases highly skilled excavators. Not only does this lessen costs but, most importantly, those who are most interested become involved in the process and the archaeological constituency is increased, something that is vitally essential for the preservation of the heritage.

In applying procedures for authorization and supervision of excavation and other archaeological activities, States are obliged to do this in such a way as to 'prevent any illicit excavation or removal of elements of the archaeological heritage'. There can be no objection to this requirement. The problem is that illicit excavation and removal often occurs outside authorized excavations. In recent years many discoveries have been made by the users of metal-detectors. Such people are not engaged in archaeology since usually no attempt is made to extract any scientific information from the find and, dare one say, in many cases the find is concealed and sold into the international art market.

Article 3(3) does not oblige governments to adopt the licensing or registration of users of metal-detectors. What it does do is stated by the *Explanatory Report* in these terms: 'Firstly, such obligation applies to the cases foreseen by domestic law. Secondly, prior authorization of the use of metal detectors or "any other detection equipment" applies only to "archaeological research"'. This can only be described as a very weak provision for dealing with the very real problem posed by indiscriminate and unscientific use of metal detectors. The phrase 'any other detection equipment' is intended to cover the use of such equipment as ultra-sound and ground radar.

Article 4 imposes certain obligations on States to implement measures for the physical protection of the archaeological heritage. States, 'as circumstances demand', must acquire and provide protection for archaeological reserves; provide for conservation and maintenance of the archaeological heritage, if not *in situ*, then in appropriate storage places. The Revised Convention clearly anticipates that the heritage will be maintained where found if at all possible, a principle endorsed by the ICOMOS Charter (Article 6).

e Dissemination of knowledge

There are several provisions of the Revised Convention designed to enhance the spread of knowledge gained as a result of archaeological activities. Article 7 refers to the perennial problem of publication. Normally, information is made available through publication of the results. This may not take place till long after the excavation as often there are many specialists whose work has to be co-ordinated and whose combined findings have to be analysed. The Article requires States to ensure the drafting of preliminary reports or what it calls a 'publishable scientific summary record' and then 'the necessary comprehensive publication of specialized studies'. As the *Explanatory Report* notes: 'The first would reveal what was discovered during the operation, the second would be a comparative analysis of the results of the operation'.

Article 7 also requires States 'to make or bring up to date surveys, inventories and maps of archaeological sites'. Such a resource

base is essential for proper management of the archaeological heritage, particularly in the context of construction projects. It is impossible to forward-plan such projects without this information (Kristiansen 1984). Its absence will often result in the worst type of rescue archaeology, that done under less than satisfactory conditions with concomitant problems of conservation and storage of materials excavated. On the other hand, such a resource base provides its own dangers in the wrong hands. Various policy questions have to be considered. To what extent should members of the general public have access to the resource base? Is there a public right of access if public funds have been expended in gathering the information? Should there be some type of screening process? For example, should there be two levels of information – one automatically available to the public and the other only after examination of the *bona fides* of the person making the request, if it is to be made available at all? The problems gain greater immediacy if the information is incorporated in an electronic database which could allow access without the requester even making an appearance.

In many instances, the more minds that are brought to bear on a problem, the greater the chance of a solution. Moreover, study of material by a number of researchers increases the possibility of new insights. With these factors in view, States Party to the Revised Convention undertake to 'facilitate the national and international exchange of elements of the archaeological heritage for professional scientific purposes' (Article 8). Such exchanges may also allow the material to be subjected to examination by special processes not available in the country where excavated. There is a *caveat* in that these exchanges must not prejudice the cultural and scientific value of the elements involved.

The second aspect of dissemination is an undertaking on the part of States to promote pooling of information on archaeological research and excavations in process. This is surely axiomatic in the European context where the development of civilizations has little bearing on current political boundaries. What is found in one State will often be very relevant to research into, and understanding of, developments on what is now the territory of other States. Article 8(ii) also requires

States 'to contribute to the organization of international research programmes'. Once again this is directly relevant to the European context and the need to have a common understanding of how developments occurred over the continent.

The ultimate beneficiary of archaeological research is the public through dissemination of knowledge of humanity's past thus creating a sense of wonder, of identity and continuity, of understanding. Although there is a segment of the public that is prepared to study the detailed reports resulting from archaeological research, for most people the highlights need to be emphasized and the results presented in a simplified way. This can be the start of an educative process that is stressed in Article 9, which deals with the promotion of public awareness. States, on becoming party to the Revised Convention, undertake to carry out educational activities 'with a view to rousing and developing an awareness in public opinion of the value of the archaeological heritage for understanding the past and of the threats to this heritage'. It need hardly be necessary to say that a public which appreciates the heritage will also be prepared to devote more resources to preserving it.

An essential aspect of education in the values of the archaeological heritage lies in public access to its various elements, in particular to sites. This is stressed in Article 9 along with the need for display of material recovered. The *Explanatory Report* notes that this right of access is not absolute and in some circumstances it may be necessary to deny such access in order to preserve the heritage from damage.

f Funding

When dealing with construction projects above, mention was made of an obligation on States Party to the Revised Convention to increase material resources for rescue archaeology. This appears in Article 6, which also has an obligation for States to arrange for 'public financial support for archaeological research from national, regional and local authorities in accordance with their respective competence'. Probably more importantly, States Party undertake to ensure that the costs of any archaeological work resulting from 'major public or private development schemes' will be met from the

finances of those schemes. Furthermore, the budget for such schemes must be required to make provision 'for preliminary archaeological study and prospection, for a scientific summary record as well as for the full publication and recording of the findings' in the same way as provision is made for environmental impact studies. These requirements are becoming common features in many States but, particularly in times of recession, an international legal obligation to require such provisions may be of considerable value to those seeking to protect the archaeological heritage.

g Unlawful trade

There is one Article in the Revised Convention dealing with what is called 'illicit circulation' of elements of the archaeological heritage. This is a long-standing problem; moreover it is one that raises extremely complex issues. These cannot be dealt with in a Convention whose primary purpose is the standardized regulation of archaeological activities. 'Illicit circulation' of elements of the archaeological heritage is but a part, albeit an important part, of the unlawful trade in cultural heritage items in general. In fact, inclusion of anything that might impose substantive obligations to deal with such illicit circulation may well provide an excuse for certain governments to refuse to ratify the Convention. Furthermore, there is action in other international fora that has substantive bearing on this matter. The European Community is considering a Directive designed to regulate certain aspects of trade within and without the Community. The International Institute for the Unification of Private Law (UNIDROIT) has before it a draft *Convention on Stolen or Illegally Exported Cultural Objects* which is intended to complement the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970. In these circumstances it would have been inappropriate for the Council of Europe to attempt in the Revision to deal substantively with the issues. This position is in fact recognized by Article 11, which states that the Revised Convention does not affect existing or future bilateral or multilateral treaties concerning illicit circulation of elements of the archaeological heritage.

Article 10 does require States Party to the

Revised Convention to take certain practical steps to combat the illicit circulation of elements of the archaeological heritage. States undertake to make arrangements for pooling of information on illicit excavations and to inform other States of offers of material suspected of coming from such excavations or unlawfully from official excavations. There is no obligation on States actually to go and seek this information; only when it comes to official attention does the obligation come into effect. However, it would seem to be necessary that States party set up the lines of communication beforehand so that when illicit excavation is identified the details can be quickly disseminated.

Museum acquisition is also dealt with in Article 10. Many museums already have an obligation through their membership of the International Council of Museums. ICOM's *Code of Ethics* 1986 states that a museum should not purchase objects where there is 'reasonable cause to believe that their recovery involved the recent unscientific or intentional destruction or damage of ancient monuments or archaeological sites, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities' (para. 3.2). This may or may not impose a legal obligation, depending on the particular legal system applicable. The Revised Convention requires States Party to ensure that 'museums and similar institutions whose acquisition policy is under State control do not acquire elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations'. The particular institutions concerned would be those established under specific or general legislation and those in receipt of public funds. For museums not under State control, the text of the Revised Convention is to be forwarded to them and they are to be encouraged to respect the principles set out above.

h Technical and scientific assistance

As will be obvious from the above analysis of the Revised Convention, it is based of a concept of European co-operation, a point made in the Preamble: '... responsibility for the protection of the archaeological heritage

should rest not only with the State directly concerned but with all European countries . . .'. These principles are taken up again in Article 12, under which States agree 'to afford mutual technical and scientific assistance through the pooling of experience and exchanges of experts in matters concerning the archaeological heritage'. That Article also provides for the exchange of specialists in the preservation of the archaeological heritage. The *Explanatory Report* comments: 'The possibilities offered by in-service training would seem to facilitate occasional or prolonged mobility of the kind indicated. It would be expedient for national or regional in-service training regulations to be adjusted where necessary. In addition to training courses, vocational regulations should make provision, if they do not already do so, for the reception of specialists who wish to practise their occupation or trade in countries other than their country of origin'.

i Supervision

One of the defects of the 1969 Convention was that, although States were required to report on certain of their obligations thereunder, in fact they never did so. There was no mechanism to follow through on this nor to study any report that might have been submitted. When the *Convention for the Protection of the Architectural Heritage of Europe* was drafted this defect was recognized and provision made for a committee to monitor its implementation. A similar committee of experts is to be appointed by the Committee of Ministers of the Council of Europe under the Revised Convention. The committee is to report to the Council of Ministers on implementation of the Revised Convention and on 'the situation of archaeological heritage protection policies' in States Party. It is to make proposals for facilitation of the Revised Convention's application. The *Explanatory Report* notes: 'These measures may be proposals for recommendations to Member States; proposals regarding the Council of Europe's Intergovernmental Work Programme; and any other proposals concerning multilateral international co-operation and the information and motivation of States, local authorities and the European public'.

j Final clauses

These Articles provide the mechanism for bringing the Revised Convention into force and for its future operation. They are standardized for Council of Europe Conventions. The one point of note is the method chosen to deal with the 1969 Convention. Under Article 14, an instrument of ratification, acceptance or approval of the Revised Convention may not be deposited unless the original Convention has been denounced, i.e. the State declares that it is no longer party to it. This requirement is designed to prevent the emergence of a confusing network whereby a State would have differing obligations in respect of other States depending on which of the Convention or the Revised Convention was in force between them. It will also lead to rapid disappearance of the 1969 Convention if States quickly become party to the Revised Convention.

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Conclusion

The Revised Convention is not a radical step in the protection of the archaeological heritage of Europe. It represents a gradual development of principles applicable to work on this aspect of the heritage and its relationship to other activities. Nevertheless, there is much in the Revised Convention that could be used by those endeavouring to improve protection. Its provisions can be pointed to as representing a standard to be met throughout Europe. Of equal importance are the provisions requiring States to co-operate for various purposes facilitating archaeological studies in Europe and the dissemination of knowledge made available from such studies. Although the supervising committee to be established by the Committee of Ministers will help here, to a large degree it will be up to concerned individuals and institutions to see that action implementing them does take place.

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