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Sulla tutela del patrimonio culturale

Summary Report of Conference on "A new perspective on the protection of cultural property through criminal law" [*]

di *Felicia Caponigri e Anna Pirri*

On February 3rd and 4th of 2017, the Council of Europe, the Italian Ministry of Justice and the Italian Ministry of Cultural Heritage and Activities and Tourism organized the conference, "A new perspective on the protection of cultural property through criminal law", at the IMT School for Advanced Studies in Lucca, Italy to discuss the drafting and future implementation of the "Convention on Offences Relating to Cultural Property". The following is a summary report of the conference sessions, in addition to separate recommendations inspired by the conference contributions.

Keywords: Cultural property; Criminal law; Council of Europe; Convention on Offences relating to cultural property.

I. Introduction

The international community is aware of the importance of preserving cultural heritage on the world stage. Since the mid-twentieth century many are the resolutions, binding or not, issued by international and EU bodies for the preservation and the protection of artworks, historical buildings, archaeological finds or sites and landscapes. Today, protection of cultural property through criminal law presents an extremely important challenge. Terrorism is destroying our universal patrimony. This is evident in the increasing destruction conducted by Daesh in Syria and Iraq, which includes the attack on Palmyra. Beginning with the Taliban's destruction of the Bamiyan Buddhas in 2001, offences against cultural property now also include the recent destruction by Ansar Dine in Mali. These offences against cultural property are an attack on contemporary democracy. Furthermore, illegal trafficking of cultural property is a source of funding for terrorist groups. Illegally excavated cultural objects are illegally exported and imported to Europe, where a flourishing market exists thanks to a high demand for cultural property. All this is a wake-up call for a specific and targeted intervention against these crimes.

To address this situation, the Council of Europe began work on a draft of a new "Convention on Offences relating to Cultural Property". The general key challenges include drafting a binding Convention that both expressly introduces the notion of criminal offenses to the legal regime of the protection of cultural property and also widens the scope of these criminal penalties to many cases and situations not covered by previous and existing conventions. The draft Convention exists within an already extensive international legal framework: the 1954 Hague "Convention for the Protection of Cultural Property in the Event of Armed Conflict" introduced legal protection of cultural property to the international community, while limiting such protection to times of war. While the 1999 Second Protocol to the 1954 Hague Convention has already introduced the notion of criminal liability for offences relating to cultural property, it leaves the adoption of these measures up to the individual State parties and does not explicitly mandate individual criminal liability. The 1970 Unesco "Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" introduced legal protection of cultural property in times of peace. However, neither the 1970 Unesco Convention nor the 1995 Unidroit Convention compelled criminalization at an individual level. Moreover, the scope of these conventions was limited to the States which ratified them, and their definitions of cultural property were arguably ambiguous. Since the 1985 Delphi Convention, the legal instruments employed to protect cultural property have proliferated. They include, to name a few: the 2000 Palermo Convention and UN Convention against Corruption, the numerous UN Security Council Resolutions addressing trafficking in cultural property and its links with terrorist groups, as well as general guidelines and recommendations issued by international organizations

and non-governmental bodies.

This report is the outcome of the work done at the two day conference, "A new perspective on the protection of cultural property through criminal law", to address the drafting and future implementation of the "Convention on Offences Relating to Cultural Property".

The event was organized by IMT in co-operation with the Council of Europe under the Patronage of the Italian Ministry of Justice and the Italian Ministry of Cultural Heritage and Activities and Tourism. Participants in the Conference were both leading academics in the field and practitioners from the most relevant international and national institutions dealing with cultural property [1].

II. Key Challenges Identified

The conference proceedings seemingly identified the following statements as the main challenges to drafting a new "Convention to Protect Cultural Property through Criminal Law":

- Protection and preservation of cultural heritage is increasingly threatened by criminal activities, including terrorism, illegal trade, and trafficking on the black market

- Acts against cultural property are wide and varied; they lead to different kinds and degrees of crimes, thereby requiring a legal framework that is itself nuanced, complex and flexible enough to address these variances

- Different criminal legislative systems currently exist and therefore harmonization is lacking. At the international level, there is a complex application of soft law principles, enforcement tools, international conventions and resolutions and there are different impositions of liability on individuals and legal persons. National legal systems define crimes differently according to level of subjective intent, from negligence to willful blindness and those giving rise to fraud

- Nations are hesitant, no matter the accepted value of cultural property, to cede a part of their sovereignty

- The responsibility of monitoring the protection of cultural property and offences relating to it often falls to international or national groups which may or may not be coordinated in their efforts

- The voices of governments and non-governmental actors often drown out the voices of private and other actors in discussions related to the protection of cultural property

III. Conference Sessions

III.1. The New Council of Europe Convention: Challenges and Opportunities

The conference opened with *Session 1, The New Council of Europe Convention: Challenges and Opportunities*, chaired by Lorenzo Casini, Legal Counsel to the Italian Ministry of Cultural Heritage and Professor at IMT Lucca. Casini emphasized that the European Committee on Offences Relating to Cultural Property is faced with the opportunity to dictate common rules to address the current complex situation. At the same time, the Committee's drafting efforts face challenges: nations are often hesitant to cede portions of their inherent sovereignty and the Committee desires to apply supranationally mandated criminal sanctions to a broad definition of cultural heritage, which may or may not prove easy to interpret in practice.

The speakers, in turn, addressed these challenges and proposed practical solutions. Hans-Holger Herrnfeld, the Chair of the Council of Europe Committee on Offences relating to Cultural Property (PC-IBC), noted that the broad definition of cultural property in the draft Convention includes moveable cultural property of any State that is a party to the 1970 Unesco "Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property", and any immoveable cultural property that is on the list of world and natural heritage referenced in the 1972 Unesco "Convention concerning the Protection of the World Cultural and Natural Heritage". Such references allow the Convention to expand its scope to the cultural property of States which may not even be parties to the Convention. In this way, the draft Convention adequately addresses the current complex situation and adds value to the current international legal framework. At the same time, Herrnfeld supported giving some flexibility to States that are parties to the Convention in order to address the inherent national differences in definitions of criminal offences relating to cultural property: in this way over-criminalization might be avoided. Marie Pfammatter, from the University of Geneva, proposed that one of the Convention's added values is its ability to cover the entire chain of illegal imports and illegal exports: once an object is illegally exported, every successive import and export is also illegal. In this way, while the specific requirements of what constitutes adequate documentation are still being discussed, the chances that an object can be recovered among the mass of objects at customs is increased. Reiterating that the Convention has the opportunity to become the first instrument of international cultural heritage law that is specifically meant to prosecute and punish crimes against cultural property, Alessandro Chechi, also of the University of Geneva, urged States to receive the Convention enthusiastically because its provisions are not revolutionary, but rather a reflection of rules that are already part of current national and international laws. Chechi emphasized that the Convention's success will depend on the response of States, given the limits of sovereignty. An effective execution of the draft Convention will depend not on experts but on the interests of individual States and the resources that are at play.

This gives rise to the need for an Observatory or Agency that will monitor the ratification and implementation of the Convention.

III.2. The Legal Protection of Cultural Property: A Multidisciplinary Perspective

The objective of *Session 2, The Legal Protection of Cultural Property: A Multidisciplinary Perspective*, chaired by Lorenzo Casini, was to underline the importance of a multidisciplinary approach to the study of cultural heritage and the legislations surrounding it. Some criminal law experts perceive a shift from a situation characterized by a lack of regulation towards a cultural property regime with an overemphasis on criminal legislation, suggesting that a draft of a criminal set of rules in an international context implies the issue of harmonization. Luis Arroyo Zapatero, President of the International Society of Social Defence and Humane Criminal Policy, clearly stated it is important that this harmonization is obtained at a horizontal level. The main differences in national legislations are grounded in the distinction between source countries and market countries, which privilege different interests in the circulation of cultural heritage. Another challenge to harmonization is the dichotomy between the punishments for intentional or fraudulent conduct and culpable negligence in cultural property crimes. There is also a third kind of liability to consider (evident in Anglo-Saxon legislations): wilful blindness. Such a subjective intent is suitable to crimes relating to cultural property because it is characteristic of economic crimes. Criminalizing wilful blindness could be the appropriate response to professional dealers that avoid acquiring knowledge about their illegal sales.

Stefano Manacorda, Professor of Criminal Law at the University of Campania Luigi Vanvitelli, underlined how the economic interests which drive the illegal trafficking of cultural property and which are also connected to the financing of terrorism and organised crime should be considered the priority in defining the criminal law approach. Consequently, it is important to focus on two main points related to the placing of cultural property on the market:

1. Prevention: identify who are the subjects who should be involved in the prevention of such offenses (i.e. individuals, States, legal persons, museums) and establish codes of conduct for all the relevant institutions.

2. Penalty: introduce penalties typical of economic crimes: not just sentences of imprisonment but also asset confiscation and deprivation of rights both for individuals and legal persons. In this way, professional dealers that engage in fraudulent transactions could be removed from the market.

Manacorda also emphasized that the draft Convention has the opportunity to clarify what constitutes the crime of trafficking by including a precise definition of it. The principal criminal dimensions of offenses relating to cultural property are already complex: the draft Convention's Article 10, entitled "Other offences related to the trafficking in cultural property", might untangle this completely by specifying and defining trafficking by referring to UN guidelines and other practical tools. Furthermore, Manacorda noted an ambiguity: the draft Convention, in relation with corporations, allows criminal, administrative but also civil sanctions. These latter cannot be considered punitive in nature and should not be admitted. Such a contradictory framework of sanctions might be reconsidered.

The perspective of U.S. legislation on the protection of cultural property was illustrated by Derek Fincham, Associate Professor of Law at South Texas College of Law Houston. Fincham tried to map the possible interconnections between the new Convention drafted by the Council of Europe and the American market. In his opinion American legislation that protects cultural property is lacking in its regulation and enforcement tools; this lack is visible in the number of cultural property objects that are illegally trafficked through museums and private dealers. Fincham did note, however, that the implementation of specific documentation requirements would seemingly help the U.S. in its efforts, providing more evidence for investigators to consult as they traced illegally trafficked cultural property.

It seems a specific police force should be founded to address crimes such as theft, illegal trafficking of cultural goods and other offences concerning cultural heritage. Fabrizio Parrulli, Commander of the Carabinieri Force for the Protection of Cultural Heritage, listed the main activities to prevent and address offences against cultural property: monitoring of archeologic areas, control of commercial activities realised online and along the borders. The crimes concerning cultural heritage often occur across boundaries and this is why databases should be internationally accessible. One example of such a database is the Italian "Leonardo" with more than 6 million goods listed with proper descriptions and images. Technology could also be used to create a mobile app that allows individuals to easily verify if a cultural object has an illicit provenance or not (like the free app iTPC created by the Italian Carabinieri Force for the Protection of Cultural Heritage).

Tullio Scovazzi, Professor of International Law at the University Milano-Bicocca, emphasized that, in certain cases and especially as regards archaeological properties, removing an object from its natural context is tantamount to destroying it. This statement implies two fundamental assumptions:

1. It is important to safeguard an object's original context;

2. Cultural properties should not be considered the same as any other commodities.

In such cases, Scovazzi emphasized, trafficking is tantamount to destruction, as all the information that could come from the object is lost. For this reason, Scovazzi, like Manacorda, highlighted that the draft Convention allows for the watering down of certain offences. This could undermine legislation already in place, such as Italy's criminal sanction of illegal excavation. In this sense, Scovazzi reiterated that cultural property should not be regulated like any other commodity. The special value of cultural property must also always be properly defended through adequate criminal

sanctions.

These presentations seemed to suggest that the importance of the draft Convention could reside in its ability to merge into one unique regulation different concepts in the legislation of cultural heritage. Criminal law should not only be applied to combat terrorism's effects on cultural property, but might also be applied as a general remedy to all possible situations and contexts.

III.3. The International Protection of Cultural Property: A "Long and Winding Road"?

At the opening of *Session 3, The International Protection of Cultural Property: A "Long and Winding Road?"*, the Chair Maria Luisa Catoni, Professor at IMT Lucca, observed that the draft Convention reflects States' acceptance of the premise that cultural property is indeed something of value and that such value is related to different territories. The protection of cultural property in the draft Convention seems to be linked not to a method of protection but to cultural heritage itself, no matter whose territory it is linked to or by which territory it is defined. It is in this spirit that the draft Convention, and its conception of cultural property, can serve as the legal link between small territories and supranational territories. The speakers in this session reflected these separate territories and the draft Convention was the unspoken link between them.

Véronique Dauge, representative of Unesco, outlined the historical evolution of UN conventions, protocols and guidelines supporting the protection of cultural property. By noting the specific differences in application and in scope between these international legal instruments and specific provisions within them, Dauge emphasized both the already existing synergy between them and the need to further strengthen such existing complementary instruments. In this respect, Dauge emphasized that overlaps between the draft Convention and the current international legal framework should be avoided.

Celso Coracini, the representative of Unodc, while noting that there is a much-needed search for new opportunities to address the problem of offences against cultural heritage, presented the existing international framework on the protection of cultural property through criminal law and the ways in which Unodc already operates within it to help combat the illicit trafficking of cultural property and related offences. Indeed, Coracini emphasized the importance of realizing that preparatory notes for the Palermo Convention reveal that States proposed that offences against cultural heritage be included within the scope of its application. Moreover, Coracini emphasized that criminal offences against cultural property must be seen in relation to and alongside other criminal acts- including drug trafficking and terrorism. The importance of the International Guidelines for Crime Prevention and Criminal Justice Responses with respect to Trafficking in Cultural Property and Other Related Offences, adopted by the General Assembly in its resolution 69/196, was also highlighted. The efforts of Unodc, including its creation of the "Sherloc" database and its awareness raising activities that present criminal offences against cultural heritage as socially unacceptable, follow and complement the international legal framework. In conclusion, Coracini called for more action at the national level to implement these international commitments and noted that Unodc stands ready to help nations in the efforts related to this implementation.

The impressions drawn from these presentations included that the draft Convention may itself complement the current international cultural heritage legal framework and potentially allow parties to cooperate by sharing information and strengthening each other's investigations and legal proceedings. Within the context of the other contributions, it appears to the authors of this report that the draft Convention can make an important difference in the international legal framework by extending existing international norms and acting with reference to existing international conventions.

The State parties which followed detailed their own national legislations and how the Committee should be aware of these States' positive contributions to the policing of offences related to cultural property. In addition to implementing the provisions of a number of conventions, France has imposed regulations that go above and beyond international requirements: professional standards and laws mandate that art dealers keep a log book reflecting the provenance of the art they offer for sale to facilitate investigations, and violating this requirement may carry a criminal sanction. Greece, a source country and already a party to the principal multilateral treaties relating to the protection of cultural property, has also concluded, in implementation of the 1970 Unesco Convention, a number of bilateral agreements relating to the prohibition and prevention of the illicit import, export, transit and transfer of ownership of cultural property, as well as to the promotion of the return of cultural property to its country of origin. In addition, Greece has adopted legislation providing for the criminalization of a number of offences against cultural property, such as illegal excavation, illegal export and import of cultural objects, damage to a monument and illegal trading in antiquities. Norway has, together with the other Nordic countries under the auspices of the Nordic Council of Ministers, initiated a cooperation with regards to coordinated efforts in order to make more efficient use of joint administrative resources. The shared purpose is to ease communication between law enforcement agencies and cultural expertise, and to cooperate with regard to skills building programs, awareness raising, etc. The Police University College in Oslo has, for instance, a specialized course related to cultural crimes, which is also open to students from the other Nordic countries. It is also envisaged to organize annual seminars or conferences to discuss matters of joint interest, such as measures to prevent the illicit import of cultural property into the Nordic countries, as well as illicit exportation from these countries. The Nordic idea is to try to create a microcosm of what Norway believes should occur at the international level under the guidance of Unesco and other relevant international instruments.

III.4. The Circulation of Cultural Property: Best and Worst Practices

Session 4, The Circulation of Cultural Property: Best and Worst Practices, chaired by Giovanni Melillo, Chief of Cabinet of the Italian Ministry of Justice, aimed to analyse the different aspects of the circulation of cultural property in relation to market procedures and standards. The panel presented the different perspectives of different actors from different backgrounds active in the field of cultural property. Nada Asmar, Deputy Prosecutor General of Lebanon's Court of Cassation, provided a key point of view of the Middle Eastern context. The first aspect to underline is the common asset of interests between Occidental and Middle Eastern countries: both of them have the same concerns when facing new escalations of terrorism. These common assets of interests and worries seek international cooperation against the destruction or theft of cultural property belonging to humanity as a whole. Lebanon has an elevated standard of regulation: different international conventions have been ratified and the national legislation criminally penalizes the illegal trafficking of cultural property and antiquities. The collaboration between the judicial authority and the border police is successful. The most critical issue is corruption, which could be addressed with an elevated standard of education at all levels and a professional formation of the staff involved in the protection and preservation of cultural property.

A good example of intervention, illustrated by Tullio del Sette, Commander General of the Carabinieri Force, is the early constitution of a special interdepartmental force, founded in cooperation between the Italian Carabinieri and the Italian Ministry of Cultural Heritage and Activities and Tourism. The so called "caschi blu cultura" is a unit composed of art historians, restorers and carabinieri who either intervene in situations of pre or post war crisis or in situations of natural calamities for the preservation of cultural property.

The director of the Uffizi Galleries, Eike Schmidt, through the example of the mandated destruction of ivory in the U.S., underlined how developing and implementing a system of cataloguing and archiving of information regarding cultural goods could operate as an important standard of prevention. A set of guidelines that is universally recognised and applied concerning artworks and archaeological finds will be essential to guarantee that these objects cross borders legally. Such a method is necessitated by circumstance because each State has its own regulation for the circulation of cultural heritage and the required documents vary from country to country. Once this standard of information is universally applied, it will be possible to conceive or designate a database that further facilitates the detection of illegal trafficking between borders.

The speech of Paola Severino, former Italian Minister of Justice and Rector of the LUISS Guido Carli University, focused on sanctions, affirming that it is important to have all possible solutions, from soft law to enforcement tools, clearly in mind. The criminal response should not be soft or strict, but flexible and multidisciplinary, just like the phenomenon itself. The attacks against cultural property are complex and they can be understood on multiple levels because:

1. The object to protect includes a wide variety of cultural goods: from objects of little value to others that are priceless

2. Protection is conceived differently depending on whether the country adopting the regulations is a source or a market country

3. A transnational approach requires the harmonization of different legislations. If even one State does not adopt an elevated standard of prevention, the entire system of protection could fail. The common goal must be to safeguard a common interest.

The Convention introduces an important innovation, imposing criminal liability not only on individuals, but also on legal persons. Indeed, the market sector, represented by individual collectors, professional dealers or gallerists and auction houses, is an important actor to consider and include in regulations concerning the protection of cultural property.

Mariolina Bassetti, chairman of Christie's Italy, declared that when market players work in a professional way, they share the same interests and worries as governmental or non-governmental bodies. The aim of the private sector is to underline the importance of promotion: art is culture and also involves commercial exchanges. The promotion of art should be seen as an equal supporter of the protection or preservation of cultural heritage. Asserting that the market is a relevant part of the cultural system is especially true for modern and contemporary art, for which the concepts of preservation and promotion are linked. While it is necessary to protect antique cultural property, it is also necessary to protect future cultural property.

III.5. Conclusion

At the conclusion of the conference, Gabriella Battaini-Dragoni, Deputy Secretary General of the Council of Europe, emphasized how important it was for the Committee to have heard such previously unrepresented voices: representatives of the Carabinieri, private actors such as auction houses (represented by Christie's), and the director of a museum provided valuable perspectives. Moreover, the need for a monitoring device that will give the Convention proverbial teeth had become evident through the conference proceedings.

On this note, Dario Franceschini, the Italian Minister of Cultural Heritage and Activities and Tourism, emphasized the leadership that Italy has already provided for the draft Convention and the country's appreciation and protection of cultural property. Italy's intent is to continue to lead in this area. Italy's cultural heritage legislation is unique in comparison to the legislation of other countries: it fosters a widely accepted belief that certain objects exhibit a great public value that supersedes their private value. Franceschini offered Italy as a host country both for the future signing

of the Convention by State parties and for a monitoring system that would check and ascertain the success of the Convention's implementation. Italy is at the forefront of cultural heritage education: it has initiated the protection of cultural heritage all around the world through programs such as the UN 'Blue Helmets for Culture', and will host the first G7 meeting on Culture.

While Franceschini underlined the symbolic value of cultural heritage, Andrea Orlando, the Italian Minister of Justice, underlined Italy's role in protecting cultural property by sharing information with other countries and by helping to shape international criminal law recommendations. Orlando shared his hope that this draft Convention could overcome the Delphi Convention's inability to exert real effects and promote international cooperation through criminal law. The Convention should truly promote harmonious laws for an effective prohibition of illegal trafficking of cultural property: such an international law text would be met with the willingness and ability of States to implement it. Essentially, Orlando concluded, protecting the destruction of cultural property by imposing criminal sanctions is a way of defending both our collective selves and our collective identity: this is the fundamental reason which should lead Italy, and all States, to support the Convention.

Pietro Pietrini, Director of IMT, ended the conference with a call for education in the face of ignorance, for it is only education that can truly vanquish the ignorance that permits someone to destroy cultural property and allows people without scruples to sell it.

IV. Recommendations Inspired by the Conference Contributions

- *Non-Governmental Organizations*

  - Build on previous conventions and their definitions of cultural property to define cultural property in the new Convention

  - Recognize that the new Convention is part of a previous and still active international legislative framework that protects cultural property

  - Recognize that existing and efficient databases such as "Sherloc" and "Leonardo", operated by Unodc and the Carabinieri respectively, may be built upon to further address the challenges which are part of sharing and accessing information about cultural property and its provenance

  - Reinforce already existing and efficient databases that share information about cultural property and its provenance, promoting the monitoring of offences related to cultural property and their punishment

- *Museums*

  - Realizing that the requirements for the circulation of cultural property are not standardized, promote the creation of a universal record keeping requirement

  - Create a universal registry for cataloging cultural property

- *Private Actors*

  - Include market actors and factors in discussions of the protection of cultural property through criminal law

  - Consider that promotion of cultural property throughout the world is just as essential as protecting and preserving its value

  - Realize that protecting cultural property means preserving ancient cultural property but also promoting what already is and will become cultural property

  - Promote rules and standards that foster a balance between existing public interests in protecting cultural property and the interests of private owners of cultural property

- *Governments (Both "Market" and "Source" Nations)*

  - Facilitate and implement cooperation between different investigative bodies

  - Establish or continue to implement the creation of specialized bodies devoted to the protection of cultural property

  - Foster the specific educational programs already in place to raise awareness of the prevention of offences relating to cultural property

  - Support monitoring and enforcement mechanisms relating to the protection of cultural property that are already in place

  - Craft flexible standards that encourage States to ratify and implement the Convention in their own national legislation

- Recognize the importance of previous legislation and bilateral agreements already negotiated between States for the protection of cultural property

- Create a Committee, Observatory, or Agency devoted to monitoring the ratification, implementation and enforcement of this specific draft Convention

V. Proposals for Implementation Inspired by Conference Contributions

- Agree to one common set of standards and descriptions that will facilitate one common catalog of cultural property around the world

- Create or designate one common and universal database cataloging the records of individual pieces of cultural property, including their current movement or location and prior provenance

- Establish or designate a monitoring device (such as an Observatory or other Agency) to oversee and facilitate the implementation of criminal sanctions in the individual legal systems of States that are parties to the Convention and, therefore, the monitoring of criminal offences against cultural property

- Implement operations for educational activities at all levels and professional formation of the staff involved in the protection of cultural property

Considering that the market is an equal partner in the fight against crimes relating to cultural property, allow for a proportionate and balanced promotion of cultural property - alongside its preservation.

Note

[*] IMT School for Advanced Studies, Lucca, Italy, February 3-4, 2017.

[1] The participants included: Nada Asmar, Mariolina Bassetti, Gabriella Battaini-Dragoni, Lorenzo Casini, Maria Luisa Catoni, Athina Chanaki, Claire Chastanier, Alessandro Chechi, Celso Coracini, Véronique Dauge, Tullio Del Sette, Derek Fincham, Dario Franceschini, Hans-Holger Herrnfeld, Stefano Manacorda, Giovanni Melillo, Andrea Orlando, Fabrizio Parrulli, Maria Pfammatter, Sunneva Saetevik, Eike Schmidt, Tullio Scovazzi, Paola Severino, and Luis Arroyo Zapatero.

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