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NOTE FROM THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE
CHAIR OF THE PERMANENT COUNCIL TRANSMITTING THE REPORT ON
“MODEL LEGISLATION ON PROTECTION OF CULTURAL PROPERTY IN THE
EVENT OF ARMED CONFLICT”



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURÍDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZATION OF AMERICAN STATES

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Rio de Janeiro, March 8, 2013

Excellency:

On behalf of the Inter-American Juridical Committee I am pleased to forward to the Permanent Council of the Organization of American States, through your good offices, the report on “Model Legislation on protection of cultural property in the event of armed conflict,” adopted by the Inter-American Juridical Committee at its session in March 2013 pursuant to a General Assembly mandate requesting the Committee to “propose model laws to support the efforts made by member states to fulfill obligations under international humanitarian law treaties, with an emphasis on protection of cultural property in the event of armed conflict.”

Accept, Excellency, the renewed assurances of my highest consideration.

João Clemente Baena Soares
Chair
Inter-American Juridical Committee

To His Excellency
Ambassador Arturo Vallarino
Permanent Representative of Panama
to the Organization of American States
Chair of the Permanent Council

MODEL LEGISLATION ON PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

(Presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATE

Taking into account resolution AG/RES. 2650 (XLI-O/11), adopted at the fourth plenary session, held in San Salvador, El Salvador, on June 7, 2011, of the forty-first regular session of the General Assembly of the Organization of American States (OAS), which resolution is entitled “Promotion of and Respect for International Humanitarian Law,” and which refers to the rich legacy of cultural assets in the Hemisphere recognized by UNESCO as world heritage, which would benefit from the protection systems of international humanitarian law; and that, in that resolution, the OAS General Assembly resolves, in operative paragraphs 1 and 4.d:

1. *To urge the Member States and the parties engaged in armed conflict to honor and fulfill their obligations under international humanitarian law, including those pertaining to safeguarding the life, well-being, and dignity of protected persons and property, and the proper treatment of prisoners of war.*
4. *To urge the Member States to adopt such legislative or other measures as may be necessary to meet their legal obligations under the treaties on international humanitarian law to which they are party, including:*
 - d. *To adopt provisions to guarantee protection of cultural property from the effects of armed conflict, which may include preventive measures related to the preparation of inventories, the planning of emergency measures, and the appointment of competent authorities.*

and in operative paragraph 12 resolves:

To request the Inter-American Juridical Committee (CJI), to propose model laws to support the efforts made by member states to fulfill obligations under international humanitarian law treaties, with an emphasis on protection of cultural property in the event of armed conflict, and to report on the progress made to the General Assembly at its forty-second and forty-third regular sessions, respectively.

Taking into account that the Inter-American Juridical Committee, at its 79th regular session, held from August 1 to 6, 2011, in Rio de Janeiro, Brazil, adopted resolution CJI/RES. 182 (LXXXIX-O/11), entitled “Agenda for the Eightieth Regular Session of the Inter-American Juridical Committee,” which was to be held in Mexico City, Dr. Freddy Castillo Castellanos and the undersigned were appointed rapporteurs for the topic “Model legislation on protection of cultural property in the event of armed conflict.” (CJI/doc.403/12). As rapporteur for the topic, I placed this report for the discussion and deliberation of the Inter-American Juridical Committee at its 80th regular session.

Also taking into account that resolution AG/RES. 2722 (XLII-O/12), “Promotion of and Respect for International Humanitarian Law,” adopted at the forty-second regular session of the General Assembly of the Organization of American States (OAS), held in Cochabamba, Bolivia, gave the Inter-American Juridical Committee the following mandate: “To ask the Committee to report on progress

made in developing model legislation to support efforts undertaken by the member states to implement their obligations under treaties on the subject of international humanitarian law, with emphasis on protecting cultural goods in the event of armed conflict.”

In consideration whereof, the 81st regular session of the Inter-American Juridical Committee, which took place in the city of Rio de Janeiro, Brazil, on August 6 to 11, 2012, was presented with a Second Report on this topic. That report was discussed by the members of the IACJ with a view to including additional elements to enrich its contents, prior to its presentation at the Committee’s 82nd regular session, to be held in Rio de Janeiro, Brazil, on March 11 to 15, 2013. Accordingly, the following report is hereby submitted.

II. BACKGROUND

International humanitarian law (IHL) is the collection of legal provisions, most of them enshrined in the 1949 Geneva Conventions and their additional protocols of 1977, the aim of which is to protect persons not participating in hostilities or who have decided no longer to participate in a conflict and their property, and to limit the means and methods of waging war. The various provisions of international humanitarian law are intended to prevent and limit human suffering in times of armed conflict. Their fulfillment is compulsory both for governments and armies participating in a conflict and for the various armed opposition groups or any other participant in a conflict. International humanitarian law limits the use of methods of war and of means used in conflicts.

International humanitarian law essentially is contained in the four 1949 Geneva Conventions, and in their additional protocols, but there are also other treaties governing various aspects of these matters, and many of their provisions may be of relevance for this topic. Those instruments are: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols; the 1972 Biological Weapons Convention; the 1980 Convention on the Use of Certain Conventional Weapons and its five protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Treaty (Mine Ban Treaty); the 2008 Convention on Cluster Munitions; and the Optional Protocol to the United Nations Convention on the Rights of the Child on the involvement of children in armed conflict. The current practice of states is to accept many provisions of international humanitarian law as customary law.

International humanitarian law distinguishes between international and non-international armed conflict. In international armed conflict, at least two states are involved and national liberation movements may also be included. Non-international armed conflict involves, within a single state, regular armed forces and armed dissident groups, or more than one armed group; in these conflicts in particular, common Article 3 of the four 1949 Geneva Conventions and the Additional Protocol II of 1977 applies.

International humanitarian law provides for the use of certain distinctive emblems to identify protected persons, property, and places, mainly the emblems of the Red Cross and Red Crescent, as well as specific distinctive emblems for cultural property and civil protection.

III. PROTECTION OF CULTURAL PROPERTY

The topic of this report is the protection of cultural property in the event of armed conflict through development of model legislation. We need to determine what is meant by cultural property. It is defined in Article 1 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, as follows:

For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or

archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments.'

We should also refer to the principal instruments of international humanitarian law that protect cultural property in the event of armed conflict: the Peace Conferences of 1899 and 1907; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which is the main treaty of international humanitarian law for the protection of such property, and which includes Regulations for Execution, as well as the two Additional Protocols, of 1954 and 1999. There also are other instruments containing provisions on the protection of cultural property in cases of armed conflict: Additional Protocols I (particularly Articles 38, 53, and 85) and II (especially Article 16) of 1977 to the four 1949 Geneva Conventions, and the 1998 Rome Statute establishing the International Criminal Court.

The Hague Peace Conferences of 1899 and 1907 played a decisive role in the development of the protection of cultural property at times of war, and were based on the 1874 Brussels Conference on arms limitations. The chief purpose of the First Conference held in The Hague on May 15 to July 31, 1899, was to discuss peace and disarmament and to adopt a Convention for the peaceful settlement of international disputes addressing not only arbitration but also other peaceful conflict settlement mechanisms. It adopted rules on the laws and customs of war on land and established the international court of arbitration, embracing the use of good offices, mediation, and arbitration to prevent armed conflicts between nations. It also created a permanent mechanism for the establishment of arbitration tribunals, which was the forerunner of the Permanent Court of Arbitration.

The Second Hague Peace Conference, which took place from June 15 to October 18, 1907, reviewed the 1899 Convention and the rules for the arbitration procedure. It adopted 13 international conventions, of which IV and IX covered the laws and customs of war on land. These also contained provisions governing the protection of cultural property, as did Article 5 of the same Conference. The meeting also received a joint proposal for the creation of a Permanent Court of International Justice.

Both Conferences placed a ban on attacking "open cities" and the obligation of taking the steps necessary, to the extent that was possible, to respect buildings dedicated to worship, the arts, science, and charity, historical monuments, hospitals, and places occupied by the sick and injured, with the exception of those buildings also designed for military purposes. They also included two kinds of responsibility: individual criminal responsibility, for individuals who seized or destroyed cultural property, and the states' liability for indemnifying the damage caused by their armed forces.

These conventions were unable to prevent the destruction of countless cultural assets during the First World War, despite playing a prohibitive role as part of customary international law. It therefore became necessary to adopt an instrument to specifically regulate the protection of cultural property during wartime: thus, on April 15, 1935, the Treaty of Washington on the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the "Roerich Pact," to be observed at times of both peace and war, was signed. This treaty created a distinctive sign for protected historical and institutional monuments, covering only cultural assets in the form of buildings, and it enshrined the neutrality of the historical monuments, museums, and institutions set down on a list by the contracting governments.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is virtually the first universal instrument establishing a regime to protect such property and was the culmination of great effort. It was the first coherent set of legal provisions enshrined entirely for the protection of cultural property, and introduced the concept of cultural property, thus protecting

all property that constitutes, in essence, the manifestation of the culture of a particular people and that, by virtue of its importance, should be preserved from the effects of war. The other instruments cited broaden the scope of application or reinforce the protection regime it established. All such property enjoys general protection, and some of it special protection aimed at its preservation, because it constitutes cultural heritage that is part of the identity of each people.

Therefore, the Additional Protocol of 1954 provides a protection regime for situations in which the territory of a state is occupied by another state. Its Additional Protocol of 1999 allows States Parties to complete and reinforce the system established in 1954, instituting a system of enhanced protection for cultural property of the greatest importance to humanity, provides also for individual criminal responsibility, stipulates new precautionary measures concerning attacks, and against the effects of attacks, and creates more effective institutions to ensure monitoring of compliance with the cultural property protection regime, such as the creation of a Committee of Experts and a Fund, to be used by States in implementing their obligations arising from that instrument.

The Additional Protocols of 1977 to the four 1949 Geneva Conventions establish provisions on the protection of cultural property in times of armed conflict, whether international or non-international, prohibit the transformation of cultural property into military targets, and prohibit acts of hostility against them; infractions, under certain conditions, can constitute war crimes.

Article 8, "War Crimes," section 2.ix, of the 1998 Rome Statute establishing the International Criminal Court makes it possible to prosecute persons presumed, in the event of armed conflict, whether international or non-international, to have directed deliberate attacks against civilian property and buildings devoted to religious observance, education, arts, sciences, or charity, monuments, hospitals, and places where the infirm and wounded are gathered, as long as those buildings are not military targets. Under Article 5 of the Rome Statute, the Court has competence over the following crimes: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes, and (d) the crime of aggression.

Accordingly, a model law should harmonize the application of all legal provisions set forth in all those instruments to safeguard cultural property in the Hemisphere.

We must consider as well that cultural property is to be protected at all times, both in peace and in war. To that end, governments provide means of identification and preservation and specialized personnel tasked with classifying and safeguarding the property. Governments must take all preventive and preparatory measures in times of peace, so as to be able to protect cultural property in the event of armed conflict, whether international or non-international. It would be advisable to establish the necessary ties between civilian and military protection systems and the various responsible entities to ensure understanding of and compliance with the specific rules designed for application during armed conflicts.

In addition, other treaties also exist that regulate the protection of cultural property at times of armed conflict. These include: the 1970 Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage; the 1976 Convention of San Salvador on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations; the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("the Rome Convention"); and the 2005 Study of Customary International Humanitarian Law prepared by the International Committee of the Red Cross (ICRC), Rules 38 to 41.

IV. RATIFICATION OF THE MAIN IHL CONVENTIONS ON THIS TOPIC BY THE MEMBER STATES OF THE INTER-AMERICAN SYSTEM

The four Geneva Conventions of 1949 have been ratified by all the nations of the Americas: that is, 35 OAS Member States, namely: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

Their Additional Protocol I of 1977 has been ratified by 34 of the region's states, the only state that has not ratified is the United States of America.

Additional Protocol II of 1977 has been ratified by 33 of the region's states; only two states have not ratified: the United States of America and Mexico.

And the Additional Protocol of 2005 has been ratified by 15 of the region's states namely: Argentina, Belize, Brazil, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Paraguay and United States of America, with ratification by 20 states pending Antigua and Barbuda, Bahamas, Barbados, Bolivia, Colombia, Cuba, Dominica, Ecuador, Granada, Haiti, Jamaica, Panama, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict has been ratified by 22 states in the Hemisphere namely: Argentina, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Peru, United States of America, Uruguay and Venezuela, with ratification by 13 states pending: Antigua and Barbuda, Bahamas, Belize, Dominica, Granada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname and Trinidad and Tobago.

Its Additional Protocol of 1954 has been ratified by 19 of the region's states, of the Hemisphere, namely: Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay, with ratification by 16 states pending: Antigua and Barbuda, Bahamas, Belize, Bolivia, Dominica, Granada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America and Venezuela.

And its Additional Protocol of 1999 has been ratified by 18, including: Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay, with ratification by 17 states pending: Antigua and Barbuda, Bahamas, Belize, Bolivia, Cuba, Dominica, Granada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States Of America and Venezuela.

The 1998 Rome Statute creating the International Criminal Court has been ratified by 28 states of the Americas, namely: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, Granada, Guatemala, Guyana, Honduras, México, Panamá, Paraguay, Peru, San Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela, with ratification by 7 states pending: Bahamas, Cuba, El Salvador, Haiti, Jamaica, Nicaragua and United States Of America.

The 1972 Biological Weapons Convention has been ratified by 33 states in the Hemisphere, namely: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, San Kitts and Nevis,

Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela, with ratification by 2 states pending: Guyana and Haiti.

The 1980 Convention on the Use of Certain Conventional Weapons has been ratified by the following 24 states in the region: Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America, Uruguay and Venezuela, with ratification by 11 states pending: Bahamas, Barbados, Belize, Dominica, Granada, Guyana, Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname and Trinidad and Tobago.

Its Additional Protocol I of 1980 has been ratified by 24 states, namely: Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America, Uruguay and Venezuela, with ratification by 11 states pending: Bahamas, Barbados, Belize, Dominica, Granada, Guyana, Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname and Trinidad and Tobago.

Additional Protocol II of 1980 by 18 States, namely: Argentina, Bolivia, Brazil, Canada, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, United States of America, Uruguay and Venezuela, with ratification by 17 states pending: Antigua and Barbuda, Bahamas, Barbados, Belize, Chile, Dominica, Granada, Guyana, Haiti, Jamaica, Nicaragua, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname and Trinidad and Tobago.

Additional Protocol III of 1980 by 24 states, namely: Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America, Uruguay and Venezuela, with ratification by 11 states pending: Bahamas, Barbados, Belize, Dominica, Granada, Guyana, Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname and Trinidad and Tobago.

Additional Protocol IV of 1985 by 22 states, namely: Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America and Uruguay, with ratification by 13 states pending: Bahamas, Barbados, Belize, Cuba, Dominica, Granada, Guyana, Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname, Trinidad and Tobago and Venezuela.

And Additional Protocol V of 2003 by 16 states, namely: Argentina, Canada, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panamá, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America and Uruguay, with ratification by 19 states pending: Antigua and Barbuda, Bahamas, Barbados, Belize, Bolivia, Brazil, Colombia, Cuba, Dominica, Dominican Republic, Granada, Guyana, Haiti, Mexico, Saint Kitts and Nevis, Saint Lucia, Suriname, Trinidad and Tobago and Venezuela.

The 1993 Chemical Weapons Convention has been ratified by 35 OAS Member States: Antigua y Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

The 1997 Ottawa Mine Ban Treaty has been ratified by 33 states in the region, namely: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti,

Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela, with ratification by 2 states pending: Cuba and United States of America.

The 2008 Convention on Cluster Munitions has been ratified by 15 of the region's states, namely: Antigua and Barbuda, Chile, Costa Rica, Dominican Republic Ecuador, El Salvador, Granada, Guatemala, Honduras, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Trinidad and Tobago and Uruguay, with ratification by 20 states pending: Argentina, Bahamas, Barbados, Belize, Bolivia, Basil, Canada, Colombia, Cuba, Dominica, Guyana, Haiti, Jamaica, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Suriname, United States of America and Venezuela.

The 2000 Optional Protocol to the United Nations Convention on the Rights of the Child on the involvement of children in armed conflict has been ratified by 26 states in the region, namely: Argentina, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Vincent and the Grenadines, United States of America, Uruguay, and Venezuela, with ratification by nine states pending: Antigua and Barbuda, Bahamas, Barbados, Dominican Republic, Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname, and Trinidad and Tobago.

It would be useful for those states of the Americas that are not yet parties to these instruments to analyze the possibility of ratifying them.

V. ABOUT THE MODEL LEGISLATION

Consequently, the Model Law to be implemented should provide clear rules as to the general special, and enhanced protection of cultural property, as provided for in the main instruments. General protection involves the safeguarding of and respect for all cultural property; special protection covers a limited number of refuges intended to preserve movable cultural properties in the event of an armed conflict, centers containing monuments, and other immovable cultural property of great importance; and enhanced protection is for cultural heritage properties of the highest importance for humankind.

In this way, general protection is extended to a large number of objects, with a few artifacts of exceptional importance receiving particularly close protection. Thus, all the cultural properties referred to in Article 1 of the 1954 Convention receive general protection, to be afforded by the authorities of the country where they are located. A domestic legal instrument is therefore needed to oblige those authorities to take certain steps to ensure that safeguarding and respect and to allow governments to mark protected assets and properties with the protective emblem, a matter that could also be addressed in the Model Law.

Accordingly, the general protection mostly involves imposing on the contracting State an obligation to respect and safeguard, requiring it to prepare beforehand, in peacetime, for the protection of such property by taking the necessary measures to that end, adopting legislative or administrative measures for its protection.

The general principle of protection of cultural property in the event of armed conflict is based on the obligation to safeguard and respect such property. Therefore, safeguarding such property involves a set of measures that must be taken in peacetime to ensure the best possible material conditions for its protection. This is where the Model Legislation could make a contribution.

We must consider as well that the responsibility to protect cultural property belongs to both parties to a conflict, that is, both to the party who controls the cultural property and to its adversary. The only possible justification for removing the obligation to respect cultural property is the concept of "*imperative military necessity*", which should be clearly defined in the Model Legislation and in line with the international standards set by the applicable instruments.

As for enhanced protection, property protected under this regime is more limited and the conditions for enjoyment of such protection are more difficult to meet, since it is given immunity

against all acts of hostility and all use, including the use of its immediate proximity. Here, no exception for imperative military necessity is provided.

Property subject to enhanced protection must meet the following conditions: (1) it must be at a sufficient distance from a major industrial center or from any important military target; and (2) it must not be used for military purposes. Nevertheless, if a state party pledges not to make any use of the object in question in the event of armed conflict, enhanced protection of the cultural property may be granted.

Enhanced protection may be granted solely to property registered in the International List of Cultural Property under Enhanced Protection. The List accords the status of enhanced protection granted by the 1954 Hague Convention.

Also necessary are national enacting measures to ensure that cultural property is safeguarded and respected. These measures, which would need to be governed by the Model Legislation, are:

- a. Measures concerning identification and inventory. Identification is the decision, taken by a national authority, that an object, a building, or a site shall be deemed cultural property worthy of protection. The inventory is the list of all property protected, made available to the entities responsible for its protection, that is, the civilian and military authorities, specialized organizations, and other interested institutions. State-based practices in terms of marking or identification of cultural property have not been very successful, so this could be regulated in the model legislation.
- b. Measures concerning the distinctive emblem—since all cultural property under general protection or enhanced protection is marked with a distinctive emblem for one or the other.
- c. Measures concerning the identity card. Persons tasked with protecting cultural property carry an identity card bearing the appropriate distinctive emblem, i.e., specifying whether the cultural property is under general protection or enhanced protection, and also providing the person's given names and surnames, date of birth, title or rank, function, photograph, signature, and fingerprints, and the embossed stamp of the competent authorities. This identity card could be harmonized for all the states of the Hemisphere in the model legislation.
- d. Measures supporting the International List of Cultural Property under Enhanced Protection. Refuges, centers containing monuments, and other immovable property under enhanced protection should be recorded in the List, which is kept by the Director General of UNESCO. To that end, the national authority should indicate the location of the property and certify that it meets the established criteria for such protection.
- e. Measures concerning dissemination. It is necessary to translate the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its Additional Protocols, and its Regulations for Execution. These should be disseminated in the four official languages of that Convention—that is, in English, French, Spanish, and Russian—as well as in the official languages of the Organization of American States (OAS) (English, French, Spanish, and Portuguese), so that the principles contained therein are known by the population as a whole. These measures also have not been well implemented at the state level, although significant efforts are being made to comply with this duty to disseminate and instruct.
- f. As for measures concerning criminal sanctions, these are necessary to enforce the provisions of these instruments. Violations will be punished at the national level with criminal or disciplinary sanctions, which should also be included in the model legislation.

In order to monitor compliance with the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 26, section two, thereof provides: “*The High Contracting Parties ... at least once every four years, ... shall forward to the Director-General a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfillment of the present Convention and of the Regulations for its execution.*”

They established thereby an international mechanism to monitor compliance by states, based on the reporting system. Still, practice at the state level also has had little success in the presentation of such reports, and they have not always given a strict account of measures taken in compliance with each provision of the 1954 Hague Convention. Perhaps a body should be created to monitor and oversee these reports. This is another point that could be developed in the model legislation.

The 1999 Additional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict establishes measures to improve its application and efficacy, as well as a series of innovations that reinforce the protection of such property. For example, it provides that the scope of application is armed conflict, whether international or non-international, since most conflicts now are non-international and require protection of cultural property. The 1999 Protocol sets forth better guidance on protective measures states should take in peacetime against the devastating effects of future hostilities in the states.

Therefore, states should take preventive measures in times of peace, such as inventories; planning of emergency measures; preparations for possible evacuation of cultural property; dissemination of all these measures; and designation of competent authorities tasked with safeguarding such property. This prevention work could also be developed in the model legislation.

Part of the enhanced protection regime established in the 1999 Additional Protocol to the 1954 Hague Convention is the obligation to respect cultural property under such protection and the registry of such property in the new International List of Cultural Property under Enhanced Protection. The following requirements must be met: (a) it must be cultural heritage of the greatest importance for humanity; (b) it must be protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection; (c) it must not be used for military purposes or to shield military sites and a declaration must have been made by the party which has control over the cultural property, confirming that it will not be so used. The use for military purposes of property included in this List would constitute a serious violation of this Protocol and the state responsible for the infraction would be subject to the corresponding sanction. This too could be regulated in the model legislation.

Considering all these international instruments of international humanitarian law on the protection of cultural property in the event of armed conflict, which establish a series of protective measures, some of them preventive measures to be taken in peacetime; that the 1999 Protocol to the 1954 Hague Convention also establishes an enhanced protection regime; and that the outcome of state efforts at compliance with these obligations has not been entirely satisfactory, it would be advisable to implement these principal obligations in a model law to enable countries of the Hemisphere to better comply with the obligations stemming from these instruments, particularly in the areas cited in this first rapporteur’s report.

Further study on whether the obligation of states to protect cultural property could extend beyond armed conflict would be advisable—that is, whether this obligation to protect could extend to violent situations other than armed conflict, whether international or non-international. Such violent situations presently affect many states of the American Hemisphere, outnumbering sporadic and isolated acts of violence.

The topic of protection of cultural property in situations of armed conflict is so important to the states of the Hemisphere that a “*Regional Seminar of National Commissions of International*

Humanitarian Law on the Protection of Cultural Property in the Event of Armed Conflict” was held recently, in El Salvador, on December 1 and 2, 2011, with the participation of the International Committee of the Red Cross (ICRC).

At that seminar, the undersigned, with the agreement of the Chair of the Inter-American Juridical Committee (CJI), participated, in her capacity as a member of the Committee, in Module 1, on the topic of “*International Obligations for the Protection of Cultural Property in the Event of Armed Conflict: the 1954 Hague Convention and its two Protocols, of 1954 and 1999*”. She spoke on model legislation on the protection of cultural property in the event of armed conflict.

With the elements previously mentioned, taken from the instruments of international humanitarian law and from instruments specifically governing the protection of cultural property during armed conflict, there are obligations and situations that could be developed in a model law; accordingly, this report presents a model law for the protection of cultural property at times of armed conflict that could be adopted by the member states of the Inter-American system, provided that they deem it appropriate, in doing which they could make use of the opinions of the ICRC, UNESCO, and other international organizations involved with the topic. The text reads as follows:

VI. MODEL LEGISLATION ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

I. Considering the importance of respecting and upholding international humanitarian law (IHL), both conventional and customary, at all times;

II. Considering the substantial progress that has been made with the protection of cultural property since the Hague Peace Conferences of 1899 and 1907, the adoption of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, of its Regulations for Execution, and of its Additional Protocols of 1954 and 1999, with the creation of a regime of specific protection for such assets in the conviction that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind;

III. Considering the need to adopt an appropriate legal framework for minimizing losses of cultural property at times of armed conflict, and for implementing, in times of peace, the measures necessary in order to ensure general, special, and enhanced protection to strengthen respect for cultural assets both during armed conflicts and after hostilities have concluded;

IV. Considering the importance of states undertaking dissemination efforts to ensure that the rules for the protection of cultural assets are known and respected at times of peace, during armed conflicts, and in other situations of violence, natural disasters, and in combating the illicit trafficking of cultural property;

V. Considering the importance of including the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Additional Protocols in the training of military and public security personnel, of the competent civil authorities, and in training programs for the population in general, in order to ensure respect for and the protection of cultural property.

The adoption of the following “**Model Law on the Protection of Cultural Property in the Event of Armed Conflict**” is therefore proposed.

Introduction:

This Model Law on the Protection of Cultural Property in the Event of Armed Conflict has been designed as a reference tool for voluntary use, either in whole or in part, by those States that wish to have clear rules and an appropriate legal framework for the general, special, and enhanced protection of cultural property in order to minimize losses of such property at times of armed conflict.

Purpose and Scope of the Model Law:

This Model Law is intended to assist States in dealing with some of the legal and regulatory issues that commonly arise in connection with the protection of cultural property at times of armed conflict, such as the provision of clear rules for the general, special, and enhanced protection of cultural property; the enforcement of the general principle of protecting cultural property during armed conflicts, which is based on the obligation of safeguarding and respecting such property; measures for marking, identifying, and inventorying cultural property; measures governing the distinctive emblem and identity cards; measures related to the International Register of Cultural Property under all forms of protection; measures related to its dissemination; measures to be taken regarding studies and training programs, etc.

This law lays down the necessary measures to be taken by national authorities responsible for protecting cultural property in case of armed conflict, for implementing obligations defined in instruments of humanitarian international law and the like, related to protection of cultural assets in case of armed conflict.

This law will be called Model Law on Protection of Cultural Property in Case of Armed Conflict.

CHAPTER I

General Provisions, Scope of the Law, Definitions

Article 1. Definition

For the purposes of this law, the following terms shall have the meanings indicated:

Cultural Property: Those properties regulated by Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which provides: “For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined. (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums and large libraries. (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.”

Identification: The decision made by a national authority to consider an object, building, or site as a cultural asset that is worthy of protection.

Inventory: The drawing up of a list of all protected properties, in order to make it available to national authorities and the bodies responsible for protection.

Distinctive emblem: A mark to be borne by cultural property that is under general, special, or enhanced protection.

Identity Card: An identification document given to the persons responsible for the protection of cultural property, in accordance with the different kinds of protection: general, special, and enhanced.

National Authorities: The authorities (civilian, military, law enforcement, or any other kind) charged with protecting and safeguarding cultural property.

Imperative Military Need: Taking the necessary decisions to achieve war goals within the limits and conditions laid down by international norms in accordance with Article 4, paragraph 2, of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Article 6 of that Convention's Second Additional Protocol of 1999.

General Protection: The general principle of protection for cultural property at times of armed conflict is based on the obligation of safeguarding and respecting such property (Article 2 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict).

Safeguarding: The set of measures that are to be taken in times of peace in order to best ensure the material conditions for protection (Article 3 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict).

Respect for Cultural Property: Implies refraining from any and all acts of hostility against such property; it also entails prohibiting, preventing, and, if necessary, halting any form of theft, pillaging, concealment, or misappropriation of cultural properties, and all acts of vandalism against them. The respect obligation also requires prohibiting the use of cultural property, their protection systems, and immediate surroundings for purposes that could expose such property to destruction or harm.

Special Protection: This kind of protection grants Cultural Property immunity against all acts of hostility and against all forms of use for military purposes, including the immediate vicinity (Articles 8 and 9 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict). The special protection regime also applies to refuges, centers containing monuments, and other immovable cultural properties of vital importance.

Enhanced Protection: Cultural Property may be placed under enhanced protection if the following conditions are met: (a) it is cultural heritage of the greatest importance for humanity; (b) it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection; and (c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used. All pursuant to the Second Protocol of 1999 to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

CHAPTER II

Measures to Promote the Protection of Cultural Property

Article 2. National authorities responsible for the protection of cultural property at times of armed conflict shall adopt the following measures:

- a) Administrative or statutory safeguard measures necessary for the protection of cultural property, in times of peace, as a preventive undertaking;
- b) Measures to set a deadline for the prompt marking of cultural property covered by general, special, and enhanced protection, with the corresponding distinctive sign or emblem in those cases in which it is required;
- c) Extend special protection to cultural property, to be observed during any act of hostility, provided that said property is located at a sufficient distance from any large industrial center or important military target and that it is not used for military purposes, depending always on the circumstances and on the protected property.

Those authorities shall agree to make no use of the property in question, in the event of an armed conflict, so that the Special Protection may be afforded.

The obligation of respecting cultural property may be restricted by "imperative military need."

- d) Register the cultural assets covered by special protection in the International Register of Cultural Property under Special Protection;
- e) Protect the cultural property under enhanced protection as determined by the Second Additional Protocol of 1999 to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, particularly the guiding principles for its enforcement, and shall record them in the International List of Cultural Property Under Enhanced Protection.

Article 3. States shall respect Registers of Cultural Property Under General, Special, and Enhanced Protection, regardless of the regime currently in power.

CHAPTER III

Marking, Identifying, and Inventorying Cultural Property

Article 4. National authorities responsible for the protection of cultural property at times of armed conflict shall take the following steps:

- a) those related to mark, identify, and inventory cultural property and shall draw up a list of all protected properties in order to make them available to all the authorities and entities responsible for their protection;
- b) the administrative measures necessary regarding the Distinctive Emblem of Cultural Property, regardless of whether the property is subject to general, special, or enhanced protection. Similarly, they shall provide the individuals responsible for the protection of cultural property with Identity Cards, which shall bear the corresponding Distinctive Emblem.

CHAPTER IV

Coordination Measures for the Protection of Cultural Property

Article 5. National authorities responsible for the protection of cultural property at times of armed conflict shall adopt the following measures:

- a) preventive measures necessary for its protection during times of peace, such as: the preparation of inventories, the planning of emergency measures, the preparation of an emergency plan for the transfer of movable cultural property, or the provision of appropriate on-site protection for such property;
- b) the administrative measures necessary to register their Cultural Property under Enhanced Protection on the corresponding list of cultural property in accordance with the requirements set in the 1999 Additional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. For this purpose, they shall appoint a Representative to be in charge of registering said property;
- c) the measures necessary to ensure coordination between the authorities responsible for combating illicit trafficking in cultural property, to which end they shall join their efforts to prepare inventories and databases, to be used by all the responsible authorities in the region to ensure its effective protection.

CHAPTER V

Promotion of Training and Dissemination

Article 6. The national authorities responsible for the protection of cultural property at times of armed conflict shall take the following measures:

- a) those necessary to include, in the training programs of the armed forces and/or law-enforcement agencies, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, together with its two Additional Protocols of 1954 and 1999,

and to ensure that those provisions are also included in military manuals, military doctrine, military rules and regulations, operating procedures, and training exercises involving the protection of cultural property, etc.

In addition, in times of peace they shall train specialized personnel to be responsible for overseeing that cultural property is respected and for collaborating with civilian authorities in the safeguarding of that property;

- b) incorporate these instruments – that is, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Additional Protocols – into training programs for the competent civilian authorities and for the general population and into the training programs of the personnel charged with the protection of cultural property;
- c) ensure, with the support of the International Committee of the Red Cross (ICRC), UNESCO, and other similar international organizations involved with the topic, the provision of appropriate training for all authorities, officials, and persons with connections to the protection of cultural property.

They shall also work to ensure training for qualified personnel to assist in overseeing that cultural property is respected and to cooperate with the authorities responsible for the protection of that property;

- d) disseminate, in the territory of their States, the provisions for the protection of cultural property contained in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and in its two Additional Protocols, in the official languages of that Convention and in the official languages of the Organization of American States (OAS).

CHAPTER VI

Presentation of Reports

Article 7. National authorities responsible for the protection of cultural property at times of armed conflict shall take the following measures:

- a) submit reports, every four years, to the Director-General of UNESCO, containing the information they deem relevant on the measures taken, prepared, or studied by their administrations;
- b) adopt the measures necessary to control and supervise the presentation of these reports in compliance with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

CHAPTER VII

Responsibility in the Protection of Cultural Property

Article 8. National authorities responsible for the protection of cultural property at times of armed conflict shall take the following measures:

- a) include, in their domestic laws and in accordance with their domestic legal systems, provisions governing criminal sanctions and administrative disciplinary measures for violations or breaches of the terms of this Model Law and of the obligations set forth in the international humanitarian law instruments dealing with the protection of cultural property at times of armed conflict;
- b) criminalize, in their domestic laws, serious violations of the rules of international humanitarian law, including the provisions of Chapter IV of the 1999 Additional Protocol II to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

CHAPTER VIII

Monitoring and Compliance Mechanisms

Article 9. National authorities responsible for the protection of cultural property at times of armed conflict shall monitor compliance with the measures established in this Model Law in order to ensure that they are observed by the authorities responsible for their enforcement.

CHAPTER IX

Cultural Property Protection Fund

Article 10. National authorities responsible for the protection of cultural property at times of armed conflict shall adopt the measures necessary to access and contribute to the Fund for the Protection of Cultural Property in the Event of Armed Conflict created under Article 29 of the 1999 Additional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

CHAPTER X

Implementation Regulations

Article 11. National authorities responsible for the protection of cultural property at times of armed conflict may enact all regulations related to matters necessary for the enforcement of this law.

CHAPTER XI

Transitory Provisions, Reservations and Interpretation of the Law

Article 12. National authorities responsible for the protection of cultural property at times of armed conflict may introduce the transitory provisions or reservations necessary for the enforcement of this law, provided they do not change the spirit of same.

Article 13. National authorities responsible for the protection of cultural property at times of armed conflict shall interpret the provisions contained in this Model Law in accordance with the applicable international instruments.

CHAPTER XII

Entry into Force

Article 14. This law shall enter into force in accordance with the State's domestic law.