

89th REGULAR SESSION
3 - 14 October, 2016
Rio de Janeiro, Brazil

OEA/Ser.Q
CJI/doc.512/16
5 October 2016
Original: Spanish

CULTURAL HERITAGE ASSETS

(presented by Doctor Joel Hernández García)

INTRODUCTION

The OAS General Assembly, in Resolution AG/RES. 2886 (XLVI-O16) on International Law approved June 14, 2016, produced a new mandate for the Committee, reading:

“To instruct the Inter-American Juridical Committee to study existing legal instruments, in both the inter-American and international systems, pertaining to the protection of cultural heritage assets in order to inform the Permanent Council, prior to the forty-seventh regular session, about the current status, with the purpose of strengthening the inter-American legal system on the subject” AG/Res. 2886 (XLVI-O/16).

The Secretariat has conducted extended studies about the relevant instruments on the subject both at the global and regional levels (document DDI/doc.5/16 of August 30, 2016). In turn, Dr. Elizabeth Villalta presented a document on the ratification status of the conventions on the subject (CJI/doc.507/16 of September 26, 2016).

This document contains the initial thoughts on the type of work to be conducted by the Committee in order to progress in fulfilling the mandate of the General Assembly.

A NEW INTERNATIONAL CONVENTION

The documents presented by the Secretariat and by Dr. Elizabeth Villalta show a large variety of international instruments, a good number of them with extremely low ratification rates. In principle, it is estimated that a new inter-American Convention would hardly contribute with solutions in the field of asset protection in the fight against cultural asset trafficking and their restitution. The circumstances and challenges in these fields go beyond the Hemisphere ambit and therefore call for a global approach.

In addition, there is no assurance whatsoever that the States in the region would be part of a new treaty. As an example, let's consider the UNIDROIT Convention on stolen or illegally exported cultural objects (1995 Rome Convention). This convention was specifically conceived in consideration of the limitations – but not the “deficiencies” – of the 1970 UNESCO Convention; only 37 countries are parties to this instrument, including Argentina, Bolivia, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay and Peru. No relevant “market” country is a party to this Convention.

MODEL LEGISLATION

Almost all the States of the region (Argentina, Bolivia, Chile, Colombia, Ecuador, Guatemala, Mexico, Peru, etc.;) have solid legal frameworks in the area of protection of cultural heritage assets (paleontological, archaeological, historical, artistic and documentary assets); furthermore, a good number of States have exercised their sovereign powers to award themselves legitimate ownership, on full categories of certain objects.

These assets are defined as inalienable and imprescriptible ownership of the State in the case of certain cultural assets, as established and recognized in Article 13 of the 1970 UNESCO Convention, independently of any prior physical control of the States over those assets, and therefore including undiscovered assets, illegally discovered objects – in clandestine excavations – and the objects that have never been officially catalogued.

There are UNESCO-UNIDROIT model provisions in this field, defining the property or ownership of the State over undiscovered cultural assets, and those provisions constitute a legislative guide for States to define the concept of “State property”, allowing them to exercise their own jurisdiction over those assets.

Following this example, a first exercise for the Rapporteur would be to determine if there is any practical usefulness in proposing legislation or model provisions on specific aspects of the protection of cultural assets.

AN INITIAL PROPOSAL

There are two problems that countries in the region face regarding the protection of cultural assets. On one hand, the question involving prevention of the illicit trafficking of that type of goods and on the other, restitution of those goods in case of theft.

In order to strengthen the capacity of the States in the America, we could perhaps explore the convenience of having a “Practical Guide” (“User Guide”) applicable by international instruments on the topic (both conventions and soft-legislation).

A starting point might include the study of (i) International Guidelines on the Replies Involving Crime Prevention and Criminal Justice vis-à-vis Trafficking of Cultural Assets and other Related Crimes, and (ii) Practical Guidelines in the 1970 Convention.

International Directives regarding the Replies for the Prevention of Crimes and Criminal Justice for the Traffic of Cultural Heritage Assets and other Connected Felonies (enclosed)

The International Directives are the result of an important effort of the international community to strengthen the cooperation and the collective reply against all forms and aspects of the traffic of cultural heritage assets. There is an evident connection between these Directives and the adoption of concrete and substantive measures on the part of the State within the ambit of the UNESCO –among these, the adoption in 2015 of Practical Directives of the 1970 Convention -, also as the actual initiatives of the Organization to provide efficient protection for cultural heritage assets.

In the context of the traffic of cultural heritage assets, the fact that archeological artifacts, product of illegal excavations – later stolen from the respective territory - have been

discovered- illegally, does not allow the State of provenance to offer elements to support the requests for the return of the stolen objects.

The domestic law that allows the State the property of a category of cultural heritage assets, should constitute the first line of defense against these thefts/plunder. Also, these laws should obstruct the laundering and international commerce of these goods, when their origin (i.e. when it is impossible to determine when they were “exported” from the territory of origin or when they are circulating in the arts and antiques market).

These laws cannot fulfill their protective purpose or contribute to ease restitutions, if pillage from the territory of a cultural heritage asset – as agreed by the domestic law in force and explicit – that belongs to a State is not considered internationally as a theft of public property, and if such laws are not, at least and according to the case, regarded as such by the required State, as restitution requests are processed.

Practical Guidelines of the 1970 Convention

Although the Guidelines are an accessory of the Convention, they do not derive from the precepts of same, and therefore, are not legally binding (differently, for example, of the Guidelines – that are binding – when applying the 1999 Second Protocol of the 1954 Hague Convention, deriving from Article 27 of the same Protocol).

The Practical Guidelines of the 1970 Convention (Practical Guidelines) contribute to the conceptual development of the 1970 Convention, for the effects of setting up, referring to the limits of the legal framework vis-à-vis the protection and recovery of cultural and heritage assets, which practice has shown, as well as to promote the cooperation and amicable relations in such assets matters among the Parties.

In relation to the above, Practical Guidelines refer to:

- i) the impossibility of having exhaustive security measures and surveillance of archaeological areas;
- ii) the importance of certain cultural assets, independent of their prior registration in the respective State records;
- iii) problems presented by the notion of complete or extended inventories of cultural goods protected, for the purposes of restitution - recovery;
- iv) international cooperation and diplomatic agreements regarding cultural assets, resulting from illegal excavations;
- v) When norms grant the legitimate property of a certain state over categories of cultural assets, international parties should refrain from ignoring those norms;
- vi) the lack of previously established criteria for qualifying good faith in the purchasing of cultural assets, according to parameters that offer a certain degree of objectivity and verification; and
- vii) a cause-effect relation between the demand and the trafficking of cultural heritage assets, as well as on the negative effects of such actions.

A Practical Guide is aimed at:

- Pointing out to the attention of the States, the relevance and convenience of taking into consideration the existing instruments, when designing and executing their respective policies and strategies, insomuch domestic and international (including matters of restitution-recovery).
- Highlighting regional good practices.
- Proposing mechanisms for regional cooperation, as well as the close coordination of States in specific international forums, for promoting and sustaining hemispheric initiatives.