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## **CULTURAL HERITAGE ASSETS**

(presented by Dr. Joel Hernández García)

### **INTRODUCTION**

The OAS General Assembly, in resolution AG/RES. 2886 (XLVI-O/16) titled International Law, approved on June 14, 2016, gave the following mandate to the Committee:

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 of existing regulations in this area to bolster the inter-American legal framework in this area.[AG/RES. 2886 (XLVI-O/16)]

The Department of International Law on its role of technical secretariat of the Committee (the Secretariat) has completed an extensive study of the relevant instruments on the subject, both global and regional (document DDI/doc.5/16 of August 30, 2016). In addition, Dr. Elizabeth Villalta presented a document with the status of ratification of the pertinent conventions (document CJI/doc.507/16 of September 26, 2016).

To address the General Assembly's request, this document deals with the following aspects:

#### **1. ANALYSIS OF LEGAL INSTRUMENTS ON PROTECTION OF CULTURAL HERITAGE ASSETS AT THE GLOBAL AND AMERICAN LEVELS**

The document prepared by the Secretariat includes all binding and non-binding instruments on the subject. It shows the existence of 18 multilateral treaties prepared under the auspices of UNESCO, UNIDROIT, the OAS, and the Council of Europe. In addition there are 49 recommendation instruments and resolutions adopted by international organizations such as the UN, the OAS, the European Union, and the African Union.

As the Secretariat's document indicates, the conventions, declarations, and recommendations on this subject have multiplied in recent years, and their coverage has expanded substantially. Initially, they were limited to heritage property, and over time they have been expanded to include intangible assets, such as ancestral practices, literature, or the culinary tradition of regions, peoples, and countries.

### **Definition of “cultural heritage assets”**

At the outset of this study we must define the term that will orient the analysis. Naturally, the matter varies from one instrument to another, although in general tangible and intangible assets are fully covered in the documents.

A first definition to be considered is that of “cultural heritage,” adopted at the World Conference on Cultural Practices of UNESCO, held in Mexico in 1982. Paragraph 23 of the Mexico City Declaration states:

The cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries.

With a territorial approach, the Convention of San Salvador of 1976 stipulates in Article 5 that “The cultural heritage of each state consists of the property...found or created in its territory and legally acquired items of foreign origin.”

The “heritage” designation is assigned by each state based on its national legislation. The various instruments establish the prerogative of the states parties to identify cultural heritage in their domestic legislation and the mechanism for communicating their inventories to the other parties.

For example, most countries in the Hemisphere define these assets as inalienable and imprescriptible property of the state with respect to certain cultural assets. This authority is recognized and codified in Article 13, paragraph d) of the UNESCO Convention of 1970, in the understanding that the inalienable quality does not depend on having previously exercised physical control of them, so it includes those not yet discovered, those discovered illegally in clandestine excavations, and those not officially catalogued.

### **Classification of the multilateral treaties:**

To understand the subject matter of existing multilateral treaties, they could be classified in four groups. Here is a summary of the most relevant instruments in each of them.

**a. Treaties on protection of cultural assets in cases of armed conflict**

The need to protect cultural assets arose from the devastating effects of armed conflicts on these assets. In other words, protection is part of the law of war so that hostilities do not destroy protected cultural assets. As a result of World War I, and in an effort to develop the principles of the Hague Conventions of 1899 and 1907, the Pan American Union adopted the **Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)**, in Washington D.C. on April 15, 1935. It was signed by 21 members of the Union of which 10 submitted their corresponding instrument of ratification. In accordance with Article 1 of the Pact, "The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents." The Pact also grants protection to personnel of these institutions in time of peace as well as in war.

To identify the protected cultural assets, the Pact provided for a distinctive flag (red circle with a triple red sphere in the circle on a white background) in accordance with the model attached to the Treaty.

**The Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed in The Hague on May 14, 1954** is the first international treaty of universal scope dealing exclusively with the protection of cultural property in the event of armed conflict. The purpose of this instrument is to protect cultural property as defined in the Convention in two ways: (i) safeguarding and (ii) respect for that property.

With respect to the former, the parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate. With respect to the latter, the parties undertake to respect cultural property situated within their own territory as well as within the territory of other parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict, and by refraining from any act of hostility directed against such property.

Currently 22 OAS member states are parties to this Convention. The 1954 Protocol has been ratified by 19 states in the Hemisphere and the second Protocol of 1999 has been ratified by 18 states in the Hemisphere.

**b. Protection of intangible, natural, and underwater cultural heritage**

UNESCO has adopted extensive regulations for the protection of various types of cultural heritage. These are the most important:

The **Convention concerning the Protection of World Cultural and Natural Heritage**, signed in Paris on November 16, 1972, seeks to prevent the deterioration or disappearance of cultural and natural heritage in view of the extent and seriousness of the threats to it. Thirty-five OAS member states are parties to this Convention.

The **Convention on the Protection of the Underwater Cultural Heritage**, signed in Paris on November 3, 2001, is intended to protect and preserve the underwater cultural heritage as an integral part of world cultural heritage, which is threatened by unauthorized activities. Currently 18 Hemisphere states are parties to this Convention.

The **Convention for the Safeguarding of the Intangible Cultural Heritage**, signed in Paris on October 17, 2003, establishes measures to guarantee the viability of intangible cultural heritage as defined in the Convention. These measures include the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, and revitalization of the various aspects of such heritage. Thirty-one Hemisphere states are parties to this Convention.

The **Convention on the Protection and Promotion of the Diversity of Cultural Expressions**, signed in Paris on October 20, 2005, seeks to preserve cultural diversity by including culture as a strategic element in national and international development policies, and in international cooperation for development. Thirty-three OAS member states are parties to this Convention.

**c. Protection of archeological property**

In the context of the Council of Europe, the **European Convention on the Protection of the Archaeological Heritage** was adopted in London on May 6, 1969, and revised by the Convention adopted in La Valetta on January 16, 1992. The Convention seeks to establish specific measures for the protection of archeological property, as defined in the instrument.

According to the practice of the Council of Europe, the Convention is open to accession by states that are not members of the Council by invitation of the Commission of Ministers. To date, no state in the Americas has expressed interest in acceding to the treaty, probably because the OAS has adopted a broader instrument on the subject, which will be discussed below.

**d. Prohibition of export, import, and illicit transfer of cultural property**

OAS member states have special interest in the topic of prohibition of the exportation and importation of cultural property. In this regard international cooperation is required more than in other cases to carry out the restitution of property that has been illicitly removed from a territory. Three international organizations have sponsored conventions on this subject: UNESCO, the OAS, and the International Institute for the Unification of Private Law

(UNIDROIT). The international organizations have developed regulations to facilitate compliance with these conventions.

**The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property**, signed in Paris on November 14, 1970, seeks to protect cultural property from theft, clandestine excavations, and illicit exports. Twenty-six Hemisphere states are parties to this Convention, including two countries with a relevant “market” for cultural property.

**The Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador)**, approved in Santiago, Chile, on June 16, 1976, was specifically established to deal with “the continuous looting and plundering of the native cultural heritage suffered by the countries of the hemisphere, particularly the Latin American countries.” To address this problem, the Convention of San Salvador contains provisions on: (i) the legal ownership regime; (ii) the obligation to identify, register, protect, and safeguard the cultural heritage of the parties; (iii) the obligation to take measures to prevent and curb the unlawful export, import, and removal of cultural property; and (iv) the obligation to take measures for the return of such property to the state to which it belongs in the event of its removal.

Twelve OAS member states are parties to this Convention, but no country that is a relevant “market” for cultural property.

**The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects**, signed in Rome on June 24, 1995, applies to claims of an international character for the restitution of stolen cultural objects and the return of cultural objects exported illegally. Only 11 Hemisphere states are parties, none of them a relevant “market” for cultural property.

## **2. CURRENT STATUS OF THE RULES IN FORCE**

The analysis accomplished reveals a substantial number of international instruments, many of which have received limited ratifications. From the review so far we can conclude:

- 2.1 There is a broad gamut of binding and soft-law instruments developed by international organizations. These instruments provide extensive coverage of aspects related to the protection, conservation, safeguarding, and restitution of cultural property.
- 2.2 The status of ratification of the binding instruments varies, but is generally low. A major concern is that few countries with a relevant “market” for cultural assets are parties to the principal instruments.
- 2.3 The prevention of the export, import, and illegal transfer of cultural heritage remains the region’s main concern. Recovery and restitution of illegally exported property demands greater cooperation by the states.

- 2.4 The Convention of San Salvador of 1976 is the only instrument adopted in the framework of the OAS. However, only 12 member states are parties to it and none of them is a relevant “market” for cultural property.
- 2.5 However, most OAS member states are parties to the UNESCO Convention of 1970, and 26 Hemisphere nations have ratified it. This Convention has a total of 131 states parties, with a significant number of countries with a relevant “market.”
- 2.6 Nearly all the states of the region (Argentina, Bolivia, Chile, Colombia, Ecuador, Guatemala, Mexico, Peru, etc.) have strong legal frameworks for the protection of cultural heritage property. Many of them have exercised their sovereign authority to declare ownership of whole categories of certain assets. Therefore, it does not appear necessary to prepare a model law to strengthen domestic legislation.
- 2.7 In principle, this Rapporteur considers that a new inter-American convention would not contribute to solving the problems of protection of cultural property, fighting illegal trafficking in it, and restitution, given the extensive regulations already in place.
- 2.8 Since the problem of illicit transfer of cultural property is worldwide, it must be addressed globally in order to seek broader cooperation from more countries with a relevant “market.”

### **3. RECOMMENDATIONS TO BOLSTER THE INTER-AMERICAN LEGAL FRAMEWORK**

The countries of the region face two problems with respect to protection of their cultural property. Firstly, to prevent the illicit traffic in this property, and secondly, to recover these assets when they have been removed illegally.

The states also have the challenge of enacting appropriate domestic legislation to support their claims, and having facilities for effective implementation of international regulations.

As for the first aspect, domestic legislation that gives the state ownership of a category of cultural assets should be the first line of defense against their theft. The laws should prevent the laundering and international trade of such assets when their origin is uncertain (e.g., when it is impossible to determine when they were “exported” from the country of origin or how long they have been offered in the antiquities and art market).

With respect to the effective application of international regulations, this Rapporteur considers that the American states should continue working with the most advanced initiatives for protection of cultural property to strengthen existing systems and avoid duplication of effort. Because of the high number of ratifications and broad scope of the UNESCO Convention of 1970, it is the most relevant document on the subject.

From the practical standpoint, it is significant that the UNESCO Convention of 1970 covers the prevention of illicit traffic in cultural property and the restitution phase. Specifically, according to Article 7, the parties undertake to take appropriate steps, at the request of state of origin, to recover and return cultural property after the entry into force of the Convention.

However, there are limitations in the Convention of 1970. UNESCO has been considering ways to improve the restitution of cultural assets, especially paleontological property and archeological artifacts.

In the first place, the Convention (Article 7) only covers cultural property stolen from a museum or a religious or secular public monument or similar institution, provided that such property is documented as appertaining to the inventory of that institution. This means that paleontological property, archeological artifacts, and other things from clandestine excavations are not covered by the Convention.

In the second place, the Convention (Article 7) requires that when cultural property is returned the requesting state pay just compensation to an innocent purchaser or to a person who has valid title to that property. The Convention did not include any criteria for determining when a purchaser has acted in good faith. In this regard the Convention of 1970, like other instruments, has been a challenge to implement.

In 2012, the Second Meeting of States Parties to the 1970 Convention decided to form a Subsidiary Committee composed of 18 states (as of May 2015: Bulgaria, Chad, China, Croatia, Ecuador, Egypt, Italy, Greece, Japan, Madagascar, Morocco, Mexico, Nigeria, Oman, Pakistan, Peru, Rumania, and Turkey) to—among other tasks—prepare guidelines contributing to the implementation of the Convention.

Through its chairperson, the Committee began a process to submit draft guidelines for approval of the Meeting of States Parties to the Convention. Thanks to the commitment of the member states, after a period of continuous and intensive work, the Subsidiary Committee completed Draft Operational Guidelines for the 1970 Convention in just one year.

The Draft Operational Guidelines, diligently prepared by the Subsidiary Committee, were approved by consensus during the first day of the Third Meeting of States Parties to the 1970 Convention (May 18-20, 2015, Paris).

The abovementioned limits have many interrelated substantive ramifications, and in this context the Operational Guidelines are a very useful instrument for strengthening the protection of cultural property, dealing with questions concerning recovery and restitution of cultural property improperly removed from the country of origin, and confronting the trafficking in cultural property and clandestine excavations, while considering and developing the following topics, among others of great importance:

- i. The impossibility of adopting exhaustive security measures at paleontological and archeological sites;
- ii. The importance of certain cultural property that has not been previously inscribed in the respective state registry;
- iii. Problems in the concept of exhaustive or extensive inventories of protected cultural property for purposes of its restitution and recovery;
- iv. International cooperation and agreements through diplomatic channels regarding cultural property resulting from clandestine excavations;
- v. International recognition of laws that give a state ownership of a category of cultural property;
- vi. Lack of established criteria to determine the good faith of purchasers of cultural property with parameters that afford a certain degree of objectivity and verification; and
- vii. Cause and effect relationship between the demand and traffic in cultural property, and the negative repercussions of the latter.

To strengthen the capacity of the Hemisphere states, a “User’s Guide” could be developed for application of international instruments on the subject (both Conventions and soft law).

A User’s Guide would have the following objectives:

- Call the states’ attention to the relevance of and need to take into consideration the existing instruments when designing and executing their respective policies and strategies, both domestic and international (including the matter of restitution and recovery).
- Highlight good regional practices.
- Propose mechanisms for regional cooperation and close coordination of states in pertinent international forums for promoting and sustaining Hemispheric initiatives.

The purpose of an instrument of this type would be to bring to the Hemisphere states’ attention the relevance and desirability of taking into account and applying the Operational Guidelines when designing their respective domestic and international policies and strategies in the cultural area, and when evaluating their legal frameworks and developing new legislation.

In addition, a User’s Guide to the Operational Guidelines would highlight good regional practices for protection, recovery, and restitution of protected cultural property and give states a frame of reference for proposing regional cooperation mechanisms, and for closer coordination of the states in applicable international forums in order to promote and sustain Hemispheric initiatives.



The circumstances and challenges faced by the OAS member states in the area of protection of cultural assets, fighting the trafficking in cultural property, and recovering of heritage assets transcend the Hemisphere boundaries and require a global approach.

Therefore, a User's Guide to the Operational Guidelines would also contribute to encourage and strengthen inter-regional cooperation to afford protection to cultural property, attack trafficking, and facilitate restitution to states of origin.

#### **4. CONCLUSIONS**

- 4.1 The preceding analysis shows clearly the existence of international instruments that cover the most complex aspects of protection of cultural property.
- 4.2 The protection of cultural property has global dimensions because of the wide geographical distribution of possible relevant "markets" for it, especially when it has been transferred illegally.
- 4.3 The specialized organizations, specifically UNESCO, have developed the most extensive regulations to ban the illegal transfer of cultural property. More recently, UNESCO adopted Operational Guidelines for the application of the 1970 Convention.
- 4.4 A contribution by the region could be the preparation of a User's Guide to the Operational Guidelines to highlight the regional experience on the subject and propose a mechanism for regional cooperation. This Guide could help the states to strengthen their own domestic legislation.
- 4.5 All international regulations are only effective to the extent that there is international cooperation. The Hemisphere states should continue to work for universal application of the binding instruments and call for compliance with them.

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TABLE OF MEMBER STATES OF THE OAS THAT ARE PART OF TREATIES  
RELATING TO THE PROTECTION OF CULTURAL PROPERTY ASSETS

Inter- American		UNESCO							
Roerich	San Salvador Convention 1976	The Hague Convention 1954	Protocol 1 of the Hague Convention 1954	Protocol 2 of the Hague Convention 1999	Cultural Property 1970	World heritage	Underwater Cultural Heritage	Intangible Cultural Heritage	Cultural Diversity 2005
						01/11/1983	25/04/2013	25/04/2013	25/04/2013
	27/05/2002	22/03/1989	10/05/2000	07/01/2000	11/01/1973	23/08/1978	19/07/2010	09/08/2006	07/05/2008
			7	2		09/10/1997	15/05/2014	15/05/2014	29/12/2014
		09/04/2002	02/10/2000	02/10/2000	10/04/2002	09/04/2002	02/10/2008	02/10/2008	02/10/2008
			8	8		26/01/1990	06/11/1990	04/12/2007	24/03/2015
	17/01/2003	17/11/2004			04/10/1976	04/10/1976		28/02/2006	04/08/2006
05/08/1936		12/09/1958	12/09/1958	23/09/2000	16/02/1973	01/09/1977		01/03/2006	16/01/2007
		11/12/1998	29/11/2000	29/11/2000	28/03/1978	23/07/1976			28/11/2005
08/09/1936		11/09/2008	11/09/2000	11/09/2000	18/04/2014	20/02/1980		10/12/2008	13/03/2007
20/02/1937		18/06/1998	18/06/1999	24/11/2001	24/05/1988	24/05/1983		19/03/2008	19/03/2013
15/04/19	14/05/198	03/06/1998	03/06/1999	09/12/2000	06/03/19	23/08/197		23/02/20	15/03/20

35	0		8	3	96	7		07	11
26/08/19		26/11/1957	26/11/195		30/01/19	24/03/198	26/05/200	29/05/20	29/05/20
35			7		80	1	8	07	07
						04/04/199		05/09/20	07/08/20
						5		05	15
	31/08/197	02/10/1956	08/02/196	02/08/200	24/03/19	16/06/197	01/12/200	13/02/20	08/11/20
	8		1	4	71	5	6	08	06
05/01/36	27/06/198	19/07/2001	27/03/200	27/03/200	20/02/19	08/10/199		13/09/20	02/07/20
	0		2	2	78	1		12	13
07/13/35		13/03/2009			02/09/19	07/12/197			
					83	3			
					10/09/19	13/08/199	15/01/200	15/01/20	15/01/20
					92	8	9	09	09
09/16/36	24/10/197	02/10/1985	19/05/199	04/02/200	14/01/19	16/01/197	03/11/201	25/10/20	25/10/20
	9		4	5	85	9	5	06	06
						20/06/197	28/04/201		14/12/20
						7	4		09
	28/10/198				08/02/20	18/01/198	09/11/200	17/09/20	08/02/20
	3				10	0	9	09	10
10/02/36	15/04/198	25/10/2002	25/10/200	26/01/200	19/03/19	08/06/197	23/07/201	24/07/20	31/08/20
	3		2	3	79	9	0	06	10
						14/06/198	09/08/201	27/09/20	04/05/20
						3	1	10	07
		07/05/1956	07/05/195	07/10/200	04/10/19	23/02/198	05/07/200	14/12/20	05/07/20
			6	3	72	4	6	05	06
	06/02/198	25/11/1959	25/11/195	01/06/200	19/04/19	17/12/197		14/02/20	05/03/20
	0		9	1	77	9		06	09
	10/05/197	17/07/1962	08/03/200	08/03/200	13/08/19	03/03/197	20/05/200	20/08/20	22/01/20
	8		1	1	73	8	3	04	07
	20/06/190	09/11/2004	09/11/200	09/11/200	09/11/20	27/04/198	07/09/200	14/09/20	30/10/20

6		4	4	04	8	6	06	07
28/11/1979	21/07/1989	21/07/1989	24/05/2000	24/10/1979	24/02/1982		23/09/2005	16/10/2006
11/02/36	05/01/1960	21/03/2002	03/03/2009	07/03/1973	12/02/1985		02/10/2006	24/09/2009
					10/07/1986	03/12/2009	15/04/2016	26/04/2016
					14/10/1991	01/02/2007	01/02/2007	01/02/2007
					23/10/1997			
					03/02/2003	08/11/2010	25/09/2009	25/09/2009
					16/02/2005	27/07/2010	22/07/2010	26/07/2010
	24/09/1999	24/09/1999	03/01/2007	09/08/1977	09/03/1989		18/01/2007	18/01/2007
11/11/36	09/05/2005			21/03/2005	30/10/1990		12/04/2007	28/05/2013