

## THE 1970 UNESCO CONVENTION: INSIGHTS, CIRCUMSPECTIONS, AND OUTLOOKS

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Mexico City is an appropriate, perhaps ideal location to discuss the 1970 UNESCO Convention<sup>1</sup> against illegal trafficking and how to make the Convention more effective. Not only is the city at the center of an extraordinarily rich cultural heritage constantly exposed to illegal trafficking, but it is the capital of the very country that, along with Peru, initiated specific legal efforts to combat illegal trafficking. It then helped lead those efforts, culminating in both the 1970 Convention itself and complementary bilateral instruments.

### I. INSIGHTS: A HISTORY OF THE 1970 CONVENTION

The Mexican and Peruvian proposals for international cooperation to protect cultural heritage were adopted by a Resolution at UNESCO's Eleventh General Conference in 1960.<sup>2</sup> The Resolution included the possibility of preparing an international instrument to combat illegal trafficking. In 1968, again on the initiative of Mexico, a General Conference authorized the drafting of a convention, to be based on a system of national export and import controls, as had been recommended in 1964.<sup>3</sup> Eventually the UNESCO Secretariat prepared a preliminary draft conven-

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<sup>1</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Property, Oct. 12-Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 I.L.M., 289 (1971). (hereinafter 1970 Convention). See generally, O'Keefe, Patrick J., *Commentary on the UNESCO Convention on Illicit Traffic*, 2nd. ed., 2007.

<sup>2</sup> *S. Exec. Rep.*, No. 29, 92nd Cong., 2nd Sess., 1972, 17.

<sup>3</sup> *Idem.* The 1964 recommendation followed a more general statement by the UNESCO General Conference on the desirability of preparing an "international instrument". UNESCO Res. 4.413, Records of the 12<sup>th</sup> General Conference, 1962, 51-52.

tion<sup>4</sup> and, after receiving comments from member States, a revised draft convention<sup>5</sup> applicable to a broad range of cultural property, from mineral specimens to fine art objects. As revised, the draft would have required States Parties to prohibit the importation of any item of cultural property exported from another State Party unless it was accompanied by an export certificate. Other obligations would have required States Parties to penalize museum personnel who knowingly added illicitly exported cultural property to their collections. Certain provisions appeared to require changes in the property laws of States Parties. In most cases the provisions allowed very little discretion to states. No reservations were permitted; instead, each State Party would have been required either to accept or reject the entire convention. Unfortunately, UNESCO had prepared the revised draft convention without adequate research and with only limited consultations. A leading participant in the drafting process who had to rely on UNESCO files concerning the drafting process concluded simply that “UNESCO files were slight”.<sup>6</sup>

Not surprisingly, the requirement that States Parties must enforce each other’s export laws proved to be controversial. In addition, the United States expressed two other concerns: its historic lack of export controls over cultural material and its incapacity to revise applicable property and commercial laws insofar as they are primarily those of the constituent states and not of the federal government. Museums and other institutions also objected to penalizing any of their officials and employees who may have been involved in acquiring illicitly imported material.<sup>7</sup>

It was evident that the proposed scheme was unacceptable to a substantial number of states whose cooperation would be essential.<sup>8</sup> Mexico and

<sup>4</sup> Preliminary Draft Convention Concerning the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property, UNESCO Doc. SHC/MD/3 Annex, 1969.

<sup>5</sup> Revised Draft Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO Doc. SHC/MD/5 Annex III, 1970.

<sup>6</sup> American Society of International Law, Draft Summary of a Meeting of the Panel on the Regulation of the International Movement of National Art Treasures, Oct. 20, 1969, at 4, remarks of Prof. Paul Bator, (on file with the author).

<sup>7</sup> See e.g. Letter from Kyran M. McGrath, American Association of Museums, to L. Arthur Minich, U.S. National Commission for UNESCO, Sept. 19, 1969 (on file with the author).

<sup>8</sup> Report of the United States Delegation to the Special Committee of Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 3, 4, July 27, 1970 (on file with the author) (hereinafter *Report of the U.S. Delegation*).

the United States therefore agreed on the need for a more balanced sensitivity to the values of a legitimate commerce in cultural objects and greater flexibility of implementation by prospective States Parties. The United States specifically recommended four substantive measures: a provision for the recovery and return of cultural materials stolen from museums and similar institutions in one country and removed to another; a mechanism to respond to crisis situations by prohibiting the importation of certain designated classes of archeological objects, general standards for museum acquisitions that would be legally binding on state institutions and would provide moral guidance to private ones, and an active, ongoing role for UNESCO in seeking effective responses to threats of illegal trafficking.<sup>9</sup> These measures were then refined as discussions progressed. For example, all stolen objects would be subject to seizure and forfeiture. An innocent purchaser or holder of valid title to such an object would be granted a remission of forfeiture, however, unless the country of origin agreed to pay compensation or would not itself require payment were the situation reversed.

UNESCO organized a Special Committee of Governmental Experts, which met during April 1970,<sup>10</sup> electing the President of the Mexican Delegation, Ambassador Francisco Cueva Cancino, to serve as its chair. Having initially declared that the UNESCO draft scheme was unworkable,<sup>11</sup> the Special Committee turned to alternative proposals. Almost miraculously, it produced the 1970 Convention in just two weeks.<sup>12</sup> This happy outcome is attributable in no small measure to Mexican leadership. It was well-informed, sharply focused and, perhaps most importantly, shrewdly open to compromise so as to ensure a durable outcome by avoiding a diplomatic division between source and market countries. Throughout the deliberations, the Mexican delegation joined the United States, France and Germany, in particular, in leading the effort to create an acceptable new regime. The European Convention on the Protection of the Archaeological Heritage,<sup>13</sup> which had just been completed in 1969, helped animate the European leadership. The four countries also joined a broader coalition in proposing several crucial amendments to the initial drafts. In sum, Mexico's leadership

<sup>9</sup> *Ibidem* at 4.

<sup>10</sup> Report of the Special Committee of Governmental Experts, UNESCO Doc. 16C/17 Annex II (1970) [hereinafter *Report of the Special Committee*].

<sup>11</sup> *Report of the U.S. Delegation, supra* note 8, at 4.

<sup>12</sup> *Report of the Special Committee, supra* note 10.

<sup>13</sup> May 6, 1969, E.T.S. No. 66, 8 I.L.M. 736 (1969) (later revised with the same name. E.T.S. 143 (1992)). See O'Keefe, Patrick J., *The European Convention on the Protection of the Archaeological Heritage*, 67 *Antiquity* 406, 1993.

and its cooperation with the United States and other market countries during the ten-year run up to the 1970 Convention was indispensable.

Since the successful negotiations leading to the 1970 Convention, Mexico has continued to provide leadership of the resulting regime. In 1972 it became one of the first parties to the agreement. Forty years later its leadership was still apparent at the second meeting of the States Parties to the 1970 Convention (the first such meeting was in 2003) when Mexican Ambassador Carlos de Icaza was elected chairperson of the review process.

Mexico was regionally oriented from the start of the UNESCO drafting process. Indeed, its diplomatic leadership in Paris can be fully understood only in the context of concurrent bilateral initiatives with the United States, then the dominant market for illegally exported pre-Columbian material. A recap of Mexico's bilateral initiatives during the run up to the 1970 Convention is therefore instructive. Discussions in October 1967 between Presidents Gustavo Díaz Ordaz of Mexico and Lyndon B. Johnson of the United States highlighted the alarming increase in illegal archaeological excavations and smuggling of looted material from Mexico to the United States and Europe.<sup>14</sup> One is reminded of the famous observation that is attributed, albeit without much evidence, to President Porfirio Díaz, "Pobre México! Tan lejos de Dios y tan cerca de los Estados Unidos!"<sup>15</sup> (Poor Mexico! So far from God and so close to the United States). The White House promptly instructed the Department of State to study the problem and identify solutions even before UNESCO efforts to draft a convention began. Also in 1967 U.S. Customs began to play a more active role in interdicting looted pre-Columbian material. For example, in that year its Houston agents seized 32 fragments of Stela 30, one of the finest pre-Columbian monuments in Naranjo, Guatemala. The fragments had arrived in six cases that had been fraudulently marked "machinery parts".<sup>16</sup>

Just as importantly, by 1969 archaeologists, especially Clemency Coggins, then at the Peabody Museum of Harvard University, began to blow their whistles on the rampant destruction and theft of Mexico's pre-Columbian heritage.<sup>17</sup> Their accounts named names, linking specific looting of

<sup>14</sup> See S. *Exec Rep.* No. 1, 92nd Cong., 1st Sess., 1971, 1.

<sup>15</sup> See e.g., Fagen, Richard R., "The Realities of U.S.-Mexican Relations", 55 *For. Aff.*, 1977, 685.

<sup>16</sup> See Rogers, William D. and Cohen, Rosalind C., "Art Pillage - International Solutions", *Art Law: Domestic and International* 315, 324, Leonard D. DuBoff ed., 1975.

<sup>17</sup> See Coggins, Clemency, *Illicit Traffic of Pre-Columbian Antiquities*, 29 *ART J.*, 1969, 94; Coggins, Clemency, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, Smithsonian, Oct. 1970, at 8 (hereinafter *Maya Scandal*). See also Evans, Clifford, "Archaeology and Diplo-

sites with museum acquisitions and thereby reinforcing the UNESCO-based initiatives that Mexico and Peru had set in motion. The scholarly exposés, largely in the United States, also strengthened Mexico's primary strategy of gaining its neighbor's cooperation in stemming the hemorrhage of its pre-Columbian heritage rather than asserting claims against that neighbor.

Supported by these developments, Mexico persuaded the United States Department of State to do more than just study the problem of illegal trafficking and identify solutions. It must give priority to the problem. In 1969 State Department lawyers promptly accepted this responsibility by adopting two bilateral agreements as models for bilateral cooperation against illegal trafficking. The first of these agreements sought to protect migratory birds and mammals<sup>18</sup> and the second, on Mexico's insistence,<sup>19</sup> provided for the return of stolen motor vehicles, trailers, airplanes, and their component parts, primarily from Mexico to the United States.<sup>20</sup> The State Department also invited the American Society of International Law (ASIL) to prepare a comprehensive study of the problem of illegal trafficking and to put together a panel of experts to advise the Department on bilateral cooperation as well as the emerging UNESCO regime, centered on the ill-fated revised draft convention.<sup>21</sup> The resulting Special Lawyers' Committee proved to be instrumental in formulating both bilateral instruments between the United States and Mexico and provisions of the 1970 Convention.

The Committee's first meeting in the seminal year of 1969 included a diverse representation of governmental and museum officials as well as ar-

macy in Latin America", *Foreign Service J.*, June 1968, at 35; Carley, William M., *Archaeological Objects Smuggled at Brisk Rate as Their Prices Soar*, Wall St. J., June 2, 1970, at 1. For a definitive bibliography of exposés and other commentary during this formative period of cultural heritage law (1968-72), see Meyer, Karl E., *The Maya Crisis: A Report on the Pillaging of Maya Sites in Mexico and Guatemala, and a Proposal for a Rescue Fund* 43, 1972.

<sup>18</sup> Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311, T.S. 912, 178 U.N.T.S., 309.

<sup>19</sup> "Mexico told us in fairly blunt terms that a similar arrangement should be considered for cultural material, or they might not be able to continue their law enforcement cooperation". "Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property", 4 *Syracuse J. Int'l L. & Com.* 97, 133, 1976 (Remarks of Mark B. Feldman, Deputy Legal Adviser, United States Department of State).

<sup>20</sup> Treaty for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Airplanes, or Component Parts of Any of Them, U.S.-Mex., Oct. 6, 1936, 50 Stat. 1333, T.S. 914.

<sup>21</sup> See Scandal, Maya, *supra* note 16, at 15; Szulc, Tad, "International Action Sought to Curb Art Smuggling, N.Y. Times, April 4, 1970; Illicit Trade in Pre-Columbian Art Subject of Study", *Harv. U. Gazette*, Feb. 27, 1970, at 2.

chaeologists and lawyers, including the Committee's chair, William D. Rogers, a prominent Washington attorney and Latin American specialist who had served as the first coordinator of the western hemispheric Alliance for Progress during the Kennedy Administration and would later serve as Assistant Secretary of State for Inter-American Affairs and Undersecretary of State for Economic Affairs. The Mexican government was represented by Ambassadors Alberto Becerra y Sierra and Emilio Oscar Rabasa as well as Dr. Ignacio Bernal, Director of Mexico's National Institute of Archaeology and History.<sup>22</sup>

During one of the meetings of the Special Lawyers' Committee, Mexican Ambassador Rabasa proposed that bilateral initiatives, rather than the UNESCO initiative, should be given priority.<sup>23</sup> As he no doubt knew, his advice would please the United States government, always more eager for bilateral and regional cooperation than global measures. This bilateral orientation expedited the work of the Special Lawyers' Committee. It made the problem of illegal trafficking seem far more immediate. It put the problem in the backyard of the United States. Even when the focus eventually turned to the UNESCO Secretariat's revised draft convention, the Committee's only specific appeal to the world community was to take global measures that would rescue threatened Mayan stone carvings.<sup>24</sup> Such has always been the substantial western hemispheric orientation of the United States.

Three months after the completion of the 1970 Convention, Mexico and the United States entered into the world's first bilateral treaty of inter-governmental cooperation and judicial assistance for the restitution of stolen archaeological, historical and cultural properties.<sup>25</sup> The treaty somewhat narrowly defines such properties as those which are of outstanding importance to the respective national patrimonies and are designated by agreement between the two governments or by an appointed panel of experts. Their decision is final. If requested, the government of the country in which the property is found must institute judicial proceedings for the recovery and return of stolen property. The treaty does not alter existing import laws

<sup>22</sup> American Society of International Law, Draft Summary of a Meeting of the Panel on the Regulation of the International Movement of National Art Treasures, May 28, 1969, at 1 (on file with the author).

<sup>23</sup> *Ibidem*, at 4.

<sup>24</sup> Letter from William D. Rogers, Chair of the Special Lawyers Committee, to William P. Rogers, Secretary of State, April 3, 1970, at 2 (on file with the author).

<sup>25</sup> Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeology, Historical and Cultural Properties, U.S.-Mex., July 17, 1970, 22 U.S.T. 494, T.I.A.S. 7088.

or empower law enforcement authorities to seize or recover properties in reliance on foreign law. It has served ever since as the framework for cooperation between the United States and Mexico as well as a model for other bilateral treaties.

The bilateral agreement also set the stage for prosecutions against traffickers in United States federal courts under the National Stolen Property Act, including the landmark case of *United States v. McClain*,<sup>26</sup> which involved a claim for return of Pre-Columbian objects to Mexico. In Part I of that case a federal court applied Mexican law to define “stolen property” under the Act. In Part II, however, the court ruled that there was insufficient evidence to establish that the pre-Columbian objects had entered the United States after the critical Mexican law of 1972, which for the first time clearly established sovereign patrimonial ownership of the heritage, had come into force. In addition to the bilateral agreement and United States prosecutions under the National Stolen Property Act, the extradition treaty between the two countries was later amended to include the theft of cultural material as an extraditable offense.<sup>27</sup>

Just as importantly, during this same formative era of cultural heritage law, the United States Congress enacted an Act to Prevent Importation of Pre-Columbian Sculpture and Murals.<sup>28</sup> Under this law, no listed pre-Columbian stone carving or wall art from the Americas may enter the United States unless accompanied by sufficient documentation to show that its export either complied with the laws of the country of origin or occurred before 1972, when the statute came into force. The Secretary of the Treasury has the responsibility of preparing a list of designated protected items after consulting with the Secretary of State. Upon detention of listed objects by United States Customs, articles are placed in a storage facility or bonded warehouse at the risk of consignees until sufficient documentation is presented. If no certification of legitimate export is presented within 90 days, the item is to be seized, forfeited, and returned to the country of origin, so long as that country agrees to bear all expenses incident to the return. A bona fide owner or other successful claimant receives no compensation under this legislation.

<sup>26</sup> 593 F. 2d. 658 (5<sup>th</sup> Cir. 1979), *cert. denied*, 444 U.S. 918 (1979). The first such prosecution was *United States v. Hollinshead*, 495 F. 2d 1154, 9<sup>th</sup> Cir. 1974, (involving stolen Guatemalan objects).

<sup>27</sup> Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059, T.I.A.S. 9656, Appendix, no. 21.

<sup>28</sup> 19 U.S.C. §§ 2091-2095 (2008).

This bilateral focus of Mexico and the United States reflects the crucial role of their collaboration in formulating the 1970 Convention, full of compromises as it is. Their justifiable satisfaction in achieving mutual agreements and unilateral commitments to cooperate with each other animated their joint leadership and generated broader cooperation during the remarkably efficient negotiations in Paris of April 1970.

Since then, this regional orientation has had broader implications within the western hemisphere. In 1976 the General Assembly of the Organization of American States (OAS) unanimously adopted the San Salvador Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the Americas.<sup>29</sup> It has sought to identify, register, and safeguard the cultural heritage of the western hemisphere so as to prevent illegal trafficking and to promote cooperation among the constituent states to enhance mutual awareness and appreciation of their heritage. Although Mexico again assumed a leadership role in drafting the San Salvador Convention, neither it nor the United States became a party to it.

Instead, the two countries have focused on their bilateral cooperation and, along with their neighbors in the western hemisphere, on the 1970 Convention. Mexico became a party to it in 1972. Argentina, followed by Canada, then became the first market states and the United States the first major market state to become parties. Also, the majority of unilateral measures and bilateral agreements reached by the United States under Article 9 of the Convention have been within the western hemisphere, largely resulting in prohibitions on the importation of pre-Columbian material.<sup>30</sup> Moreover, it is often overlooked that the positive experience of the United States in cooperating with its neighbors in the western hemisphere, primarily to protect their common indigenous heritage, was instrumental in prompting the United States Congress to enact the Native American Graves Protection and Repatriation Act.<sup>31</sup> This enormously important and successful law seeks to protect the heritage of Native Americans, related as they are to their indigenous cousins in Mexico and elsewhere within North and South America, and to compel the return of indigenous human remains and material to them. It is an all-too-rare example of international law inspiring significant domestic or municipal law within the United States.<sup>32</sup>

<sup>29</sup> June 16, 1976, 15 I.L.M. 1350.

<sup>30</sup> For a list and discussion of these, see, *Cultural Law: International, Comparative & Indigenous* 387, Nafziger *et al.* eds., 2010.

<sup>31</sup> 25 U.S.C. § § 3001-3013, 2008 (hereinafter NAGPRA).

<sup>32</sup> *Cultural Law*, supra note 30, at 431.



## II. CIRCUMSPECTIONS: ESSENCE AND ISSUES

As we approach a half century since the 1970 UNESCO Convention was opened for signature, it is apparent that the regime it established is far from perfect. UNESCO'S approval in 2012 of a follow-up committee to review the 1970 Convention and consider new directions for it is therefore a most welcome development.

What, then, are the main strengths and weaknesses of the Convention? Its main strengths include, most obviously, the obligations it imposes variously on States Parties. A less obvious strength is the Convention's broad framework of alternatives for international cooperation and cherry-picking of provisions for national legislation. Still another strength is in providing a model and a vocabulary for public education concerning the importance of protecting the cultural heritage and in instilling a sense of responsibility in both public and private sectors. As a result, the world takes the problem of illegal trafficking far more seriously than it did before the Convention. Most of the principal art market countries have become parties, notably in recent years.<sup>33</sup> It is no exaggeration to identify the Convention with the emergence of a new international legal order of cultural heritage.

The Mexican government, in particular, knew from its collaboration with the United States that an ideal regime dependent on a mutual enforcement of national antiquities laws and export laws and uniform acceptance of other obligations was impossible. Instead, a tolerance for widely varied commitments among the parties to the Convention was simply a concession to reality in the formative era of cultural heritage law. The resulting competence of parties to enter reservations, understandings and declarations has helped maximize commitments to the Convention of various sorts. But the resulting patchwork of commitments has also weakened the Convention by defeating uniformity.<sup>34</sup>

Not surprisingly, when the United States ratified the 1970 Convention in 1983, it submitted one reservation and six understandings. All of these qualifications were expected because they had been announced in 1972 when the United States Senate gave its advice and consent to the treaty. Several simply reflected principles of reciprocity or constitutional exigencies of little concern to other States Parties. Mexico responded, also not surprisingly, by issuing a statement three years later that the United States' qualifications of the treaty's requirements were incompatible with the treaty

<sup>33</sup> 123 States are parties to the Convention, as of January 2013.

<sup>34</sup> See Forrest, Craig, *International Law and the Protection of Cultural Heritage*, 2010, 37.

and could possibly threaten Mexico's cultural heritage. It is important, however, to understand that this statement was of a political nature, not a legal nature. To be sure, Mexico's statement clearly did not encourage mutual-ity under on the 1970 Convention, but by the same token it did not rule out such cooperation.<sup>35</sup> Indeed, shortly after Mexico's statement, a long-standing claim by its National Institute of Art and History for the return of Teotihuacán murals from the Fine Arts Museums of San Francisco relied on an interpretive study by ICOM of the 1970 Convention that had been commissioned by UNESCO.<sup>36</sup>

Perhaps most importantly, the two countries do not normally rely on the 1970 Convention because of their bilateral agreement as well as the Pre-Columbian Monuments Act of the United States and a network of private arrangements for return and restitution of material. It should also be noted, significantly, that Mexico herself has not enacted implementing legislation beyond provisions of its antiquities law of 1972, the same year that the country became a party to the 1970 Convention. This anomaly helps explain why, during the Teotihuacán-related negotiations, Mexico, unhampered by implementing legislation, demanded compensation to cover the cost of returning the murals notwithstanding that Article 7(b) of the 1970 Convention imposes that cost on the requesting state. On the basis of that provision Mexico later withdrew its demand.<sup>37</sup>

Many countries, of course, have limited their obligations under the 1970 Convention. Japan, for example, confines its treaty obligations, under Article 7(b), to prohibiting the importation of "specifically designated foreign cultural property". Elsewhere in the world, national models for implementing the Convention are remarkably diverse in both the letter and practice.<sup>38</sup> Different margins of appreciation and administrative models nevertheless

<sup>35</sup> *But see* Forrest, *supra* note 34, at 38, 191 (suggesting that the 1970 Convention is not binding between Mexico and the United States).

<sup>36</sup> International Council of Museums, "Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritage", in *Return and Restitution of Cultural Property* (special issue), 31 *Museums*, no. 1, at 62 (1979). For a commentary on the Study, see Nafziger, James A.R., "The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property", 15 *N.Y.U. J. Int'l L. & Pol.* 789, 1983, 803. For the story of the Teotihuacán murals, see Seligman, Thomas K., "The Murals of Teotihuacán: A Case Study of Negotiated Restitution", in *The Ethics of Collecting Cultural Property*, 73, Phyllis Mauch Messenger ed. 1989, 80-81.

<sup>37</sup> Seligman, *supra* note 36.

<sup>38</sup> See Gerstenblith, Patty, "Models of Implementation of the 1970 UNESCO Convention: Can Their Effectiveness Be Determined?" in, *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* 9, Lyndel V. Prott, Ruth Redmond-Cooper & Stephen Urice eds., 2013, 20.

enhance global cooperation. The best strategy for compliance, therefore, may be not so much to indulge our impulses for global uniformity as to expand commitments built on existing models. If we were to turn our attention to records of compliance and the efficacy of various models, we would then have a better idea of what works and what doesn't work.

The lack of uniform practice among States Parties reflects a diversity not only of commitments by States Parties, but also of their interpretation of specific provisions in the Convention. Ambiguous language in the 1970 Convention is partly responsible for the unsettled interpretations. We therefore need to clarify such language. Take, for example, three of the Convention's ambiguities. These are not necessarily the most important ones, but they are ambiguities that should be and can be effectively resolved under UNESCO leadership.

The first of these ambiguities involves language that arguably pertains to undiscovered heritage. Article 4 defines the term "cultural heritage" to include, among other material, that which is "found within the national territory". The controlling verb "found" has been interpreted variously to include, on the one hand, undiscovered material that may be found in the future but has not yet been actually discovered, or, on the other hand, only material that has been physically found in the sense of having been discovered or has otherwise specifically come to light.<sup>39</sup>

There is room for compromise and eventual consensus in clarifying this language. United States courts have adopted the common law requirement of an immediate right of possession in order to vest property ownership. This might seem to bar ownership claims by States Parties to undiscovered material. But the common law requirement of actual possession can be overcome insofar as national antiquities laws imply a delivery of all heritage into the possession of national authorities or otherwise explicitly provide that both the immediate right of possession and ownership of cultural material are vested in the State.<sup>40</sup> For example, although the United States generally defines the word "found" to require discovery, it is perhaps unique among States Parties in not requiring specific designation of foreign cultural material within the scope of its cooperation under the 1970 Convention,<sup>41</sup>

<sup>39</sup> For a discussion of legal issues related to undiscovered objects, see Palmer, Norman, "Fetters and Stumbling Blocks: Impediments to the Recovery and Return of Unlawfully Removed Objects", in *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* 97, Lyndel V. Prott, Ruth Redmond – Cooper & Stephen Urice eds., 2013, 98.

<sup>40</sup> See Palmer, *supra* note 39, at 99.

<sup>41</sup> Article 1 of the 1970 Convention, *supra* note 1, defines "cultural property" as "property which, on religious or secular grounds is specifically designated by each State as being of

except in terms of broad categories of objects, under Article 9.<sup>42</sup> A federal appeals court has confirmed this interpretation in *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*.<sup>43</sup> It is a fascinating case full of important procedural rulings that upheld federal seizure and forfeiture of illegally imported coins from Cyprus and China even though the “find spots”—that is, the exact geographical origins of the coins—were never proven. To be sure, Article 7 (b) of the 1970 Convention limits the prohibition on importation of stolen cultural property from museums, public monuments and similar institutions to inventoried material.<sup>44</sup>

A second, related ambiguity involves Article 13’s recognition of the inalienability of “certain cultural property”.<sup>45</sup> But how certain does it have to be? Is it acceptable to claim blanket inalienability of all cultural heritage that may exist or does the word “certain” limit national claims of inalienability to specifically designated material? And how mandatory is a State’s declaration of inalienability? Does it overcome statutes of limitation otherwise governing claims for return or restitution of material? Does inalienability deny all international transfers of ownership? Again, there would seem to be room for compromise and consensus in clarifying the language.

UNESCO’s 2012 Model Provisions on State Ownership of Undiscovered Cultural Objects<sup>46</sup> forthrightly address the ambiguities in Articles 4 and 13 involving undiscovered objects. The Model Provisions were designed to be brief, approachable and intelligible. They are so broadly worded, however, that even in the light of helpful commentary, they may be difficult to enact without further elaboration or detail, let alone serve to harmonize international custom, given the statutory and judicial variations on the theme of ownership. It may have been enough to confirm either state ownership or, alternatively, what might be called a permanent sovereignty (short of ownership) over undiscovered cultural resources so as to subject them to effective state supervision and regulation. Nevertheless, the Model Provisions

importance (to various categories of objects)”, emphasis added.

<sup>42</sup> See Gerstenblith, *supra* note 38, at 23.

<sup>43</sup> 698 F. 3d 171 (2012).

<sup>44</sup> Art. 7 (b) (i), 1970 Convention, *supra* note 1.

<sup>45</sup> Art. 13, 1970 Convention, *supra* note 1. On the civil code tradition’s concept of inalienability, see Forrest, *supra* note 34, at 173.

<sup>46</sup> See UNESCO, Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, 17<sup>th</sup> Sess., July 1, 2011, CLT-2011/CONF. 208/com.17/5; Frigo, Manlio, “Model Provisions on State Ownership of Undiscovered Cultural Objects: Introduction”, NS 16 *Unif. L. Rev.*, 2011, 1024.

do provide readily accessible, useful guidance for consideration by governments.

Yet a third ambiguity involves the term “museum”, whose meaning has expanded greatly in the digital era. Also, national laws have broadened the meaning of the term, at least in specific regulatory enactments. For example, in 1970 as well as in 1983, when the United States became a party to the 1970 Convention, the term “museum”, as used in Article 7(a), was generally limited to places of exhibition whose acquisition policies were under the control of the federal government.<sup>47</sup> Today, the legal definition of a museum has expanded greatly as a term of art in United States practice. NAG-PRA, for example, defines a museum very broadly to include all public and private institutions, not just repositories for collection and exhibition of material, that benefit from even indirect governmental support. For example, federally guaranteed loans to students in private universities are sufficient to characterize a private university as a “museum” whether it actually has a collection of objects or not.

So-called escape language also merits attention. Is such language uniformly applied? Does it swallow up obligations? For example, Article 7 (a) imposes an obligation on States Parties to take the necessary measures “consistent with national legislation”<sup>48</sup> to prevent museums and similar institutions from acquiring illegally exported material. Does this mean that national legislation can always trump any provisions to the contrary in the Convention? Article 8 offers another example of escape language requiring States Parties to “undertake”<sup>49</sup> to impose penalties or administrative sanctions on irresponsible persons. Is that just a vague aspiration?<sup>50</sup> Or perhaps a good faith commitment to do something, somehow, sometime in the future? Or does the word “undertake” imply an immediate commitment to impose penalties and sanctions?

Besides the rather bewildering diversity of national commitments and the ambiguity of some provisions in the Convention—both understandable in view of the negotiating history and aspirations to maximize the number of States Parties—another weakness in the 1970 Convention results from

<sup>47</sup> See, e.g., Letter from William P. Rogers, Secretary of State, to William D. Rogers, Dec. 8, 1970 (on file with the author).

<sup>48</sup> Art. 7 (a), 1970 Convention, *supra* note 1.

<sup>49</sup> Art. 8, 1970 Convention, *supra* note 1.

<sup>50</sup> See, e.g., *Medellin vs. Texas*, 552 U.S. 491, 508 (2008) (interpreting “undertake” narrowly as it defines the obligations of United Nations members under Article 94 of the United Nations Charter “to comply with the decision of the International Court of Justice in any case to which it is a party”).

gaps in it. Early on, the need for rules of private international law to supplement the Convention became apparent, leading to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,<sup>51</sup> setting forth the criteria and certain procedural requirements for returning illegally exported material and restituting stolen material to countries of origin. It richly deserves more States Parties.<sup>52</sup>

### III. OUTLOOKS: THE FUTURE OF THE 1970 CONVENTION AND ITS REGIME

#### 1. *General Considerations*

It is apparent that the 1970 Convention was never a perfect instrument. Nor has it been uniformly implemented by States Parties. How can we make it more effective? Amending it, even by a limited protocol, may be risky, but clarifying and supplementing it by interface legislation or other soft law in order to fill gaps between domestic and international obligations is worth exploring. Model laws such as the Model Provisions on State Ownership of Undiscovered Cultural Objects are promising even if states may not rush to adopt them. Although it is unlikely that such projects will achieve universal acceptance, they can help clarify and enlighten national law and policy. Their reiteration can also help develop new community norms, highlight noteworthy issues only hinted at in the 1970 Convention, and offer frameworks for negotiation.

The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material,<sup>53</sup> adopted by the International Law Association in 2006, though soft law, may help fill another gap by defining good stewardship for caring and sharing of cultural heritage. The instrument's Preamble emphasizes the need for a guiding spirit of partnership among private and public actors through international cooperation, and is intended to be used by a broad range of interested parties, governments, museums, other institutions, individual persons and groups of persons. To facilitate the desired

<sup>51</sup> Final Act of the Diplomatic Conference for the Adoption of the Draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I. L. M., 1995, 1322.

<sup>52</sup> 33 states are parties, as of January 2013.

<sup>53</sup> International Law Association, *Report of the Seventy-Second Conference* 338, 2006; See James A. R. Nafziger, "The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material", 8 *Chi. J. Int'l L.* 147, 2007, 159 (hereinafter I.L.A. Principles). For commentary on the Principles, see *idem, passim*.

spirit of partnership among such a broad range of actors and potential issues, the Principles, like the Model Provisions on State Ownership, are quite simple and specific, subject as they are to all external rights and obligations.<sup>54</sup> Each one of the I.L.A. Principles is followed by a set of comments and notes.

The Principles cover eight topics: (1) requests and responses to requests for the transfer of cultural material; (2) alternatives to the transfer of cultural material; (3) cultural material of indigenous peoples and cultural minorities; (4) human remains; (5) requests for return or restitution of cultural material; (6) notification of newly found cultural material; (7) considerations for negotiations concerning requests; and (8) dispute settlement. In helping resolve disputes, UNESCO's Intergovernmental Committee for Promoting the Return of Property to its Countries of Origin or its Restitution in Cases of Illicit Appropriation, despite its unwieldy name, offers mediation and conciliation facilities.<sup>55</sup>

Since 1970, another form of soft law—ethical codes—has become prominent and surprisingly effective.<sup>56</sup> In 1986, the International Council of Museums (ICOM) adopted a Code of Professional Ethics.<sup>57</sup> As amended in 2001 and revised in 2004, the Code establishes basic expectations about the responsibility of museums to communities. It also sets minimum standards of conduct and performance to govern museum staff and collection management. The guidelines also seek to deter doubtful acquisitions that might be subject to such requirements. Derivative guidelines have been adopted by many museums, other institutions and professional associations, generally promoting compliance with the legal requirements for return and restitution of material. In the United States, for example, ethical guidelines originated during the renaissance of cultural heritage law in the 1970s.

<sup>54</sup> Principle 10, *idem*, provides that “[n]othing in these principles should be interpreted to affect rights enjoyed by the parties or obligations otherwise binding on them”.

<sup>55</sup> The Intergovernmental Committee was entrusted with the task of promoting bilateral agreements for the return or restitution of cultural property. Originally it focused mostly on issues resulting from colonization and military occupation, but today, in the post-colonial era, it has a much broader focus. The Committee seeks to assist countries in building representative collections of cultural property, to prepare national inventories, to inform public opinion, to help develop museum personnel, to implement the recommendation on international exchange and to advise UNESCO on pertinent issues. See, Vrdoljak, Ana Felipa, *International Law, Museums and the Return of Cultural Objects*, 2006, 213, 234.

<sup>56</sup> On the educational role and other efficacy of ethical codes see Prott, Lyndel V., “UNESCO Celebrates Thirtieth Anniversary of its Convention on Illicit Traffic”, 9 *Int'l J. Cultural Prop.*, 2000, 247, 248.

<sup>57</sup> International Council of Museums, ICOM Code of Ethics for Museums, 2004, available online at <http://icom.museum/ethics.html#intro>.

UNESCO's International Code of Ethics for Dealers in Cultural Property, by synthesizing some of the rules in these codes, offers a composite model applicable to dealers.

## 2. *New Directions*

In seeking to improve the Convention and the international legal regime that it established, we can learn from past experiences. Several lessons are apparent:

1. Despite its imperfections and ambiguities, the 1970 Convention has unquestionably shaped laws and decisions of both States Parties and non-States Parties.<sup>58</sup> It has also raised the public conscience and inspired the preparation of well-respected ethical codes and guidelines. A case in point is the establishment by the Association of Art Museum Directors in the United States to adopt the year 1970, thanks to the Convention, as the effective cut-off date for acceptable acquisitions whose provenance is insufficiently documented.<sup>59</sup>

2. Mexico's initiatives and diplomatic leadership were instrumental in drafting and gaining acceptance of the 1970 Convention. It is reasonable to conclude that there would be no 1970 Convention without Mexico's leadership and its carefully managed cooperation with the United States, both of which continue. A hallmark of Mexico's approach has been compromise. In today's world, incentives to compromise might include the enlistment of private support by non-state actors, essentially private support. Even in 1970, the compromises worked out between the United States and Mexico were complemented by a private Mayan Rescue Project conceived and directed by the Chair of the American Society of International Law's influential Special Lawyers' Committee.<sup>60</sup> Today, UNESCO's Intergovernmental Committee might play a more active role in developing capacity-building measures to combat illicit trafficking and facilitate returns and restitution of cultural material.

3. Bilateral and regional regimes of cooperation, often involving compromises to ensure the participation of States Parties, have been instrumen-

<sup>58</sup> On the importance of reducing demand by a variety of techniques see O'Keefe, Patrick J., *Trade in Antiquities: Reducing Destruction and Theft* 61, 1997, 103.

<sup>59</sup> See AAMD "Revises Guidelines for Acquisition of Antiquities – Again", 10 *IFAR J.*, No. 1, 2008, at 4. For an earlier version of the 1970 cut-off provision, as found in the Code of Ethics of the Archaeological Institute of America, see, *Cultural Law*, *supra* note 30, at 419.

<sup>60</sup> *Maya Scandal*, *supra* note 16, at 15.



tal in global efforts to deter and respond to illegal trafficking in cultural material. Article 15 of the 1970 Convention supports the conclusion of such agreements, as does the influential 1979 ICOM Study for UNESCO, which emphasized the importance of bilateral negotiations to accomplish return and restitution, clearly a departure from earlier, unconditional resolutions that called for automatic return or restitution to countries of origin. Several UNESCO reports have also expressed a “marked preference for bilateral negotiations...to resolve claims for the restitution of cultural objects removed prior to the operation of the 1970 Convention”.<sup>61</sup> Similarly, the guidelines of UNESCO’s Intergovernmental Committee presuppose bilateral negotiations and provide for intervention by the Committee only when such negotiations break down.<sup>62</sup>

4. Greater uniformity of commitments by States Parties and greater agreement on interpretation of ambiguous language in the 1970 Convention would help make it more effective. But complete uniformity is unnecessary so long as there are stable expectations about a particular State Party’s implementation of whatever commitments it has assumed, an openness of governments to expanding their commitments, and efforts by UNESCO to achieve greater uniformity, as well as a general consensus on the meaning of terms and qualifying language in the Convention. The margins of appreciation among divergent national approaches can help guide international responses and shape the growth of a more effective regime of cultural heritage law.<sup>63</sup>

<sup>61</sup> See, *Vrdoljak*, *supra* note 55, at 215, n. 100.

<sup>62</sup> *Ibidem.*, n. 101.

<sup>63</sup> Palmer, *supra* note 39, at 99.

[T]hose who seek to understand the interplay between international law and the cross-border recovery of art and antiquities might find it instructive to look more searchingly at the civil law operating ‘on the ground’: that is, in the country in which the object is located, or within the legal system before the courts of which a remedy is sought. Important cases involving the return of looted cultural objects can turn on the minutiae of the law of personal property in the particular forum. An outstanding example in England is the decision of the Court of Appeal in *Government of the Islamic Republic of Iran v. Barakat Galleries Ltd* [2009] QB 22, which hinged in part on a detailed examination of such arcane points as the distinction under both common law and statute between proprietary and possessory interests, the efficacy of immediate rights of possession to support claims in conversion, the effect of foreign statutes on the prior ownership of undiscovered antiquities and the proper interpretation of an elderly Court of Appeal decision involving not antiquities but (of all things) bathroom fittings.<sup>7</sup> Cross-border litigants, and indeed, the drafters of cross-border instruments, should take heed of these margins of appreciation.

5. Comprehensive reform of the 1970 Convention or even scattered amendment of its provisions does not seem advisable, given the risk of opening a Pandora's box of issues and thereby threatening the evolving regime under the treaty. Instead, interface legislation or other soft law offers a better means to mediate between new models for legislation and new principles of international law are promising as well. The I.L.A. Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material and the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects are two such initiatives.

6. Public education is essential. Consider, for example, the influence of revelations in the late 1960s concerning the plight of pre-Columbian heritage. It is apparent that accessible data on threats to the global heritage can have a powerful impact, both in reducing demand for cultural material in market environments and in fueling the growth of a more comprehensive regime of control.

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The 1970 UNESCO Convention is a centerpiece of international cooperation to protect and regulate not only the cultural heritage, but also the integrity of its inevitable movement and relocation around the world. Efforts to improve it and strengthen commitments to it will necessarily take different forms. After all, law is a language. It is part of the intangible heritage of national and global cultures. And it is a never-ending process.