UNESCO and UNIDROIT for the fight against illicit trafficking of cultural property

The Model Provisions on State Ownership of Undiscovered Cultural Objects

Sub-regional Symposium for the Prevention of Illicit Traffic in Cultural Heritage in Southeast Asia

19-21 November 2014
UNESCO and UNIDROIT

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I. CONTEXT
Many countries regulate and monitor archaeological excavations but recurrent problem of illicit/clandestine excavations
Cultural object stolen or unlawfully exported - the State victim may want to recover it if found in another country

⇒ procedure needed

⇒ need to have a legal system giving it the best possible arguments for return, i.e. an ownership right to be recognised by the courts in the requested country

Particularly important when an unknown object is removed from the ground and taken out of the country. The State needs a basis on which to claim the return other than the mere fact that it was found on its territory.
Protection of archaeological objects - A shared vision and a joint responsibility
8th session (May 1994) – The ICPRCP recommended that the Director-General of UNESCO be invited to have specialized studies made by experts to clarify issues in cultural objects that are disputed or unclear.


30th Anniversary (2008) – Prof. O’Keefe invited ICPRCP to work on the topic of State ownership of antiquities which may well be crucial in claims for repatriation + J. Sanchez Cordero (terminology)

15th session (2009) – support expressed by ICPRC + request to UNIDROIT to cooperate

16th session (2010) - REC No. 3 – encourage establishment of a working group of independent experts + 88th session UNIDROIT Governing Council
UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, 1956

General principle that each State should ensure the protection of its archaeological heritage.

States should « define the legal status of the archaeological subsoil and, where State ownership of the said subsoil is recognized, specifically mention the fact in its legislation. »

ECOSOC 2008/23 Resolution

« need, where appropriate, to strengthen and fully implement mechanisms for the return or restitution of cultural property […] »

« 4. Encourages Member States asserting State ownership of cultural property to consider means of issuing statements of such ownership with a view to facilitating the enforcement of property claims in other States; »
Preventive measures

What UNESCO does to assist States Parties?

- Educational campaigns
- Inventories
- Ethical principles
- Specific national units
- Export certificates
- Appropriate legislation
- Promotion scientific institutions
- Sanctions
The **1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property** but also implementing national laws are necessary for national authorities of States Parties wishing to request return / restitution of cultural property from their country.
Article 5

[...] the States Parties [...] undertake, as appropriate for each country, to set up within their territories one or more national services, [...] , for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;

Article 13

The States Parties to this Convention also undertake, consistent with the laws of each State:

(a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;

... 

(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.
Illicit excavation = theft

......, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place (Article 3(2))

The possessor of a cultural object which has been stolen shall return it (Article 3(1))
SEAsia countries - Ownership of archaeological objects

Brunei-Darussalam – All discovered antiquities …, where lying on or hidden beneath the surface of the ground or in any river or lake or in the sea shall be deemed to be absolute property of the Government of his Majesty (Antiquities and Treasure Trove Act, Part II, Art. 3(3))

Cambodia – All archaeological movables originating in the territory of Cambodia, still in the ground or found by chance or as a result of excavations, whether legal or illegal, after the date of this decision, are public property (Section 34A - Decision on the Protection of the Cultural Heritage, February 1993). If privately owned at the date of decision, shall be notified .. and registered ..

Lao PDR – All movable assets discovered during any search are the ownership of the State (Art. 22 Decree 1997)

Malaysia – All undiscovered antiquities …, whether lying on or hidden beneath the surface of the ground or in any river or lake or in the sea, shall be deemed to be the absolute property of the Government (Part II, 3(3) – Antiquities Act 1976)

Vietnam – All cultural heritages under the ground, in the mainland, on islands, in the inland waters, territorial waters, exclusive economic zones and continent shelf of the Socialist Republic of Vietnam are under the entire population’s ownership (Art. 6 of the Law on Cultural Heritage, 2001)
Has the legislation claiming State ownership really the effect claimed, in particular for undiscovered archaeological objects?
Iran vs Barakat (2007) – Iran sued the Barakat Gallery Ltd. in the English courts to recover antiquities it claimed had come from South East Iran.

High court – although Iran had a body of law regulating the discovery and handling of antiquities, there was no law specifically indicating Iran was the owner of these antiquities.

Court of Appeal – found that Iran’s rights were so extensive and exclusive that they should be regarded as giving ownership.

- A clear piece of legislation would have made all this unnecessary or at least reduced the expenditure.
II. PROCEEDURE

- Mandate
- Composition
- Meetings
Mandate

“[A]cknowledging the obstacles faced by many countries in applying for restitution of cultural property, especially when it comes to materials from cultural sites where there is no inventory or provenance documentation, in particular objects coming from illicit excavations” the Intergovernmental Committee recommends “the preparation of model provisions with explanatory guidelines to be made available to States to consider in the drafting or strengthening of national laws”

(Recommendation N° 3, 16th session ICPRPCP, Paris 2010)
Composition

Co-chairs - Dr. Jorge Sánchez Cordero (Mexico) and Prof. Marc-André Renold (Switzerland)

Members - Folarin Shyllon (Nigeria), Thomas Adlercreutz (Sweden), James Ding (China), Manlio Frigo (Italy), Vincent Négri (France), Patrick O’Keefe (Australia) and Norman Palmer (United Kingdom)

Both the UNESCO and UNIDROIT Secretariats

Expert Committee
on State Ownership of Undiscovered Cultural Objects
Meetings

The Expert Committee met formally on three occasions in Paris (September 2010, March 2011 and June 2011). Several exchanges among the members of the Committee also took place.

Great efforts made to come to a short text, with only six provisions, which aims, in line with the 1970 UNESCO and the 1995 UNIDROIT Conventions, to encourage the protection of archeological objects and to favour their restitution to the State where illicit excavations took place + explanatory guidelines
II. CONTENT
UNESCO – UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects

- Provision 1 – General Duty
- Provision 2 – Definition
- Provision 3 – State Ownership
- Provision 4 – Illicit excavation or retention
- Provision 5 – Inalienability
- Provision 6 – International Enforcement
Provision 1 – General duty

The State shall take all necessary and appropriate measures to protect Undiscovered Cultural Objects and to preserve them for present and future generations.
Provision 2 – Definition

Undiscovered cultural objects include objects which, consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the subsoil or underwater.
Provision 3 – State Ownership

Undiscovered Cultural Objects are owned by the State, provided there is no prior existing ownership.
Provision 4 – Illicit excavation or retention

Cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects.
Provision 5 - Inalienability

The transfer of ownership of a cultural object deemed to be stolen under Provision 4 is null and void, unless it can be established that the transferor had a valid title to the object at the time of the transfer.
Provision 6 – International enforcement

For the purposes of ensuring the return or the restitution to the enacting State of cultural objects excavated contrary to the law or illicitly excavated but illicitly retained, such objects shall be deemed stolen objects.
II. STATUS
Those provisions are made available to States to consider in the drafting or strengthening of their national legislations.

Model offered to States which might need it in order to succeed in the recovery of their undiscovered cultural property, to be completed and adapted by each State.

Not formally adopted by States – the ICPRCP took note of their finalisation (17th session in 2011)

Not a binding legal text

UNESCO – UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects
Sent to all UNESCO and UNIDROIT Member States by a joint letter signed by Ms Bokova and Mr José Angelo Estrella Faria (April 2012)

UNESCO Convention and the 1995 UNIDROIT Convention. In developing or strengthening their national legislations, States are encouraged to incorporate the provisions of these Model Provisions into their own bodies of law, or to adapt them nationally, as appropriate.

Accept, Sir/Madam, the assurance of our highest consideration.

Irina Bokova
Director-General of UNESCO

José Angelo Estrella-Faria
Secretary-General of UNIDROIT
VII. PERSPECTIVES
UNESCO and partners’ operational tools

UNESCO - WCO Model Export Certificate

UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects

Basic Actions concerning Cultural Objects being offered for Sale over the Internet (UNESCO, INTERPOL, ICOM)

ICOM Code of Ethics for Museums

UNESCO Rules of Procedure for Mediation and Conciliation
ICPRCP

DECISION 19.COM 4 (ICPRCP/14/19.COM/4)

The Committee,

1. Having considered …
2. Welcoming the …,
3. Taking note of …………..
4. Considering that it is necessary to focus on its essential tasks as defined in the Article 4 of its Statutes,

5. Decides to:

   a. further promote the tools previously created under its auspices, in particular the ‘International Code of Ethics for Dealers in Cultural Property’, the ‘Model Export Certificate for Cultural Objects’, ‘the UNESCO-UNIDROIT Model Provisions on State ownership of Undiscovered cultural property’ and also promote the Recommendation concerning the international exchange of cultural property;
Operational guidelines and best practices

Within the framework of the Subsidiary Committee,

a) To **promote the purposes** of the Convention
b) …
c) To **exchange best practices**, and prepare and submit to the Meeting of the States Parties recommendations and **guidelines** that may contribute to the implementation of the Convention;
d) To **identify problem areas** arising from the implementation of the Convention, including issues relating to the protection and return of cultural property;
e) To initiate and maintain **co-ordination with the ICP RCP** in relation to capacity building measures combating illicit traffic in cultural property;
f) …. 

► **Operational guidelines**

► **Best practice** = comes from lessons learnt, built up from actual experience
National reports

Importance of States’ reports on the implementation of the 1970 Convention

Reports submitted in 2011 show new developments in national implementing laws such as the recognition of the State’s ownership of cultural objects originating from archaeological excavations (e.g. Angola, Botswana, Burkina Faso and Germany)

(C70/13/1.SC/INF.2/REV2)
International conventions exist,
Operational tools multiply,
International cooperation intensifies,
Training workshops are organised

UNESCO and UNIDROIT are involved in the fight against illicit traffic in cultural objects

**Capacity-building** (June 2012-May 2014) – 19 workshops in more than 70 countries involving 600 participants

(ICPRCP/14/19,COM/3, Report of the Secretariat)
Best practice is thinking carefully about the subject matter, the type of protection and the consequences of protection. In other words, careful planning of a comprehensive scheme is best practice.

- Importance of having a **sound and comprehensive set of legislative measures for protection** = best approach
- Importance of the **UNESCO’s Cultural Heritage Laws Database**
- **Ratification of international conventions** to give an international dimension to those national legislations (harmonisation / unification)
1970 UNESCO Convention - Contact

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1995 UNIDROIT Convention - Contact

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