Combating trafficking in cultural property
The 1970 Convention: evaluation and prospects

Background paper
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for participants in the

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The *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the first ad hoc legal instrument to protect the international cultural heritage from trafficking-related crimes, is 40 years old. The "UNESCO 1970 Convention" was adopted by the General Conference of UNESCO in Paris on 14 November 1970 and entered into force on 24 April 1972. Its adoption had been preceded by that of two non-binding texts that were nonetheless crucial to the drafting of the Convention – the 1956 *Recommendation on International Principles Applicable to Archaeological Excavations* and the 1964 *Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property*, both of which attested to the States Parties' serious concern at the rise in cultural-property trafficking. The 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, known as the Hague Convention, may also be regarded as a precursor to the 1970 Convention.

Since 1970, UNESCO Member States have gradually acceded to the Convention and have incorporated it into their legislation. Today, 121 States have ratified or accepted the Convention, the most recent being Kazakhstan in 2012.

The 1970 Convention has been acknowledged as the first binding multilateral instrument designed directly and specifically to combat cultural-property trafficking and to lay down rules for legal transfer and restitution of cultural property in cases of illegal transfer or acquisition.

A ground-breaking text in its day, the Convention, four decades on, must now be analysed in the light of emerging forms of cultural-property trafficking. Instead of declining, trafficking has grown owing to increasingly elaborate and "refined" means that rely on the indulgent, even permissive attitude of many States, many of which are States Parties to the Convention. Although it is hard to admit, there can be no doubt that mafia groups make optimum use of new technologies to "commercialize" cultural property and mask their money-laundering operations. Most countries and international organizations know this, but very few States invest the human, financial and logistical resources required to unmask those networks. Radical steps must be taken to address this situation, from which traffickers seem to gain.

While the whole world has lauded some emblematic instances of restitution, the fact remains that irreparable damage has been done. This has been said at UNESCO, which has repeatedly stated that the tangible cultural heritage sharpens collective memory and takes forms that crystallize a culture's distinctive features and universal outreach.

The anniversary is, hopefully, an opportunity to pause and reflect on the life span of such an instrument and the need to review it from the standpoint of the twenty-first century, against the backdrop of current challenges and realities of cultural-property trafficking, namely profiteering, catastrophic losses, affronts to human dignity, slick operating practices, collusion by authorities, irresponsible blindness on the part of some States, a crisis of values, institutionalized corruption, and so on. As all present are aware, trafficking in cultural property amounts to an onslaught on peoples' lives, cultural rights, dignity and conscience, leaving them with nothing to transmit to their children and succeeding generations but a future without roots and, therefore, devoid of hope. Let it be said and understood that our peoples are not "exporters" of cultural property, any more than others are "importers". Viewing the situation in any other light would amount to legalizing cultural-property trafficking, cloaking that scourge in a veil of respectability, and downplaying its scale and seriousness because the terms "import" and "export" do not connote the pain and humiliation inflicted on a despoiled country or the indignity of a despoiling country.

Trafficking is a criminal activity involving millions of people and genuine mafia groups, and is now considered to be on a par with of arms, drug and human trafficking in its scope and gravity. It is therefore a global problem, affecting almost every State (whether signatories of the Convention or not), that must be tackled effectively and internationally. The adoption of the 1970 Convention 40 years ago was therefore a historic moment, but that first step must be followed by other steps

based on such criteria as relevance, contemporaneity, validity, continuous adaptation, ethical and professional commitment and collective will and action.

Despite the successes vaunted by some countries, I think that the Convention is more utopian than geared to practical applications: 40 years on, it remains to be implemented, and in many countries issues are yet to be resolved.

To take one example, States Parties are requested in Article 5 to set up national services responsible for protecting and maintaining an inventory of the cultural heritage by amending their national legislation. It should be emphasized that the Convention's reference to a "national inventory of protected property" implies selection part of each country's movable cultural heritage.

This approach has serious implications. Indeed,

(a) our past is far from coming to an "end", for archaeological discoveries, big and small, are made every day, and even if there is nothing left to discover at some point in the future, new technologies and methods of study will lead to new interpretations that would shed greater light on our origins. No country may therefore be said to know the totality of its movable heritage, and this would make the task of selection impossible;

(b) the very concept of "selection" contradicts that of protection: it implies leaving some cultural property unprotected; besides, selection is always subjective and entails the risk of overlooking contextually explanatory aspects; it would amount to a return to an elitist approach that reduces an individual object to its artistic value alone and erodes the entire history of one or several societies;

(c) what about heritage that has not yet been formally recognized, such as items in subterranean archaeological sites or inaccessible religious buildings, and cannot therefore be formally inventoried? What solutions does the Convention provide in such cases? None. Protection must be afforded in all settings and must not be confined to potentially incorrect, opportunistic, inadequate and highly risky selections. Cultural property is akin to a minor, in that it requires blanket protection that is neither discriminatory nor selective.

Registration is mandatory under the Convention, but what protection does the Convention provide for unregistered property? Is non-registration synonymous with a lack of protection? It is unacceptable to countries that have, since time immemorial, produced objects of great artistic value that are coveted by traffickers, unscrupulous dealers and thieves who dominate the international market that an instrument as important as the 1970 Convention distinguishes between "registered" objects and those unearthed through illicit or unofficial excavations – carried out right under the nose of the authorities, in defiance of any control mechanisms – that are not protected under the Convention because they have not been officially recognized. Countries of origin of such objects do not agree to discount unregistered objects because any cultural object lost constitutes impoverishment and a missing link in the chain that ensures a genuine and symbolic understanding of our history, regardless of whether the item is a known or registered object.

For some years now, most countries have attached greater importance to registering their cultural property – but what of the objects stolen in preceding decades? Are they to languish in obscurity, never to be retrieved? If so, we have forgotten the spirit in which the Convention was adopted. It is impossible to discern clear boundaries for the recognition of States' rights to claim their heritage. Such rights are inalienable and will never be extinguished.

Admittedly, 40 years ago, when the Convention placed the burden of proof on the country of origin and made the protection of cultural objects conditional on their registration, no one could have foreseen the extent of the damage now wrought by cultural-property trafficking, the growth of this illicit activity or the enormous difficulty encountered by countries that own and produce such

objects in establishing effective registration systems and adequate control mechanisms. In that connection, the International Institute for the Unification of Private Law (UNIDROIT) was commissioned to draw up a supplementary text (hierarchically inferior to the Convention) that would find a means of “including” and protecting unregistered objects, as many States could not produce registration documents as proof of origin and ownership, in particular, for archaeological objects unearthed through illegal excavations. What, however, does the adjective “illegal” mean? Is it the act of carrying out excavations without the knowledge or authorization of the State or the discoveries made during such excavations? In other words, would an object that is as important and as valuable to a people’s history and identity as a registered object be unprotected simply because it was not “registered”? Would the lesser wrong be punished for the greater wrong? Moreover, we have seen that it is extremely difficult, when a claim is made under the terms of the Convention, to prove that objects have been illegally exported on a specific date, let alone to prove that they have been stolen, because the Convention requires the submission of inventories, in other words, official registration.

The Convention, whose originality, interest, relevance and good intentions are not in question, was valid in its day. It was the product of its time, but it no longer stands up to rigorous analysis given the current climate, the seriousness of trafficking and the scale of the problem.

Furthermore an export certificate must be produced. Export certificates are generally issued for registered objects that have been recognized officially and have a legal owner. The stumbling block, which weakens the despoiled country and favours the despoiler engaging in illicit trade, is that no export certificates are issued for illicitly sourced cultural objects. Such certificates grant temporary authorization for objects that are deemed to be part of the heritage and an authorization for the free movement of those that are not. Would the Convention thus apply only to objects that existed “legally” and not to the plethora of objects of cultural interest that are unearthed daily in our regions and are placed almost immediately on the art market? That can be likened to saying that a child who has no birth certificate or is born of illegitimate relations does not deserve to be protected by law. This may seem to be somewhat exaggerated, but cultural heritage is like a minor and cannot fend for itself.

In practice, it is paradoxical to insist on a mandatory export certificate and then consider that failure to produce such a certificate may not be used as grounds for claiming a cultural object when it appears in another country. Logically, if a country regulates strictly the inflow and outflow of duly documented objects, the lack of such a certificate should constitute damning proof of the illegality of the operation. The refusal to accept the lack of official registration as proof of illegality constitutes a serious weakness in the Convention.

New and surprising discoveries, some of which reframe our historical discourse, are made every day in our countries and those discoveries are merely the tip of the iceberg. Many more escape official notice despite the States’ efforts, and it is that hidden universe that we can and must defend by ensuring that it is protected by international instruments. It is those objects that attract the greatest attention, and although the Convention could not have provided for current developments, it must do so now, through amendments by insertion to ensure that the Convention remains a bulwark for the protection of all cultural property.

Forty years on, it is therefore worthwhile to reflect on the following questions: is the world the same as in 1970, when the Convention was adopted? What is and should UNESCO’s role be in evaluating new situations that pose a challenge to instruments that are, in principle, acknowledged as invaluable to the majority of States, but must be updated if they are to be genuinely effective? How can we talk of peace and cooperation if we do not say loudly and clearly that we must respect and defend our heritage? How can we speak of peace and governance in a world that is plundered and despoiled? What technical assistance and expertise does UNESCO desire and what must it contribute? What ethical foundations must be laid to meet the need to implement more modern protective mechanisms so that the Convention can be interpreted anew as genuinely protecting

cultural heritage? Must our countries continue to do nothing about the plundering of their wealth, the losses sustained, trafficking and the abominable thefts?

Only a few years after its adoption, it became clear that the 1970 Convention did not cover the full range of forms and circumstances of cultural-property trafficking. For that reason UNIDROIT was invited to draft the Convention on Stolen or Illegally Exported Cultural Objects. It was adopted on 24 June 1995 at a diplomatic conference in Rome to protect all cultural objects, regardless of the owner's position, and to resolve the issues of good-faith purchases and the restitution of cultural objects together with compensation. At present, only about 30 countries have signed the Convention. As further proof of the low level of its recognition, the Convention has not yet been issued in Spanish even though it should be readily available to Spanish-speaking countries, which are constantly plagued by pilfering and theft.

The UNIDROIT Convention contains a number of interesting ideas, notably that a cultural object "which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen". This provision seems to have been designed to offset a grave omission from the 1970 text, but as the provision is not binding on signatory States, it is rarely applied internationally.

In many countries that produce cultural objects and are beset by trafficking, the recurrent problem is that cultural items obtained through illegal and prohibited excavations are treated in the Convention and in "importing" countries' rules and regulations as if they were part of registered collections, and the intractable difficulties thus created are associated, surprisingly and contradictorily, with the wealth of "exporting" countries. It must be acknowledged as a matter of urgency that this illegal activity, constantly combated and clearly decried in national laws, must be taken into account in the much-needed updating of the 1970 Convention. As priceless cultural objects that form part of our history are not protected under the Convention when they are unearthed through unlawful excavations, it can only be understood that UNIDROIT's contribution is insufficient.

The question is not one of having equally hierarchical texts. The UNIDROIT Convention provides that cultural objects must be "inventoried or otherwise identified", which could provide an opening for the 1970 Convention to be applicable to uninventoried cultural objects, but the UNIDROIT instrument applies to some thirty States only.

Attentive to the concerns of many States Parties, the Director-General of UNESCO has welcomed the idea of in-depth reflection on the 1970 Convention in the light of the needs and demands of those countries which consider that it must be updated. It has already been acknowledged publicly that, in addition to reaping scandalously huge profits, trafficking in cultural objects involves mafia networks, impoverishes our countries, mutilates our culture, is an affront to our dignity and offends the civilized world that seeks to establish trade and cooperation and put an end to theft and destruction.

Stating that the 1970 Convention must be examined from the standpoint of the fast-paced twenty-first century, is tantamount to setting for UNESCO a challenge that befits its role and objectives, to affording an opportunity to engage in an fruitful critical review that will shed light and yield answers and suggestions to ensure effectiveness and modernity in an area of importance to the Organization, to inviting UNESCO to take the lead that everyone hopes that it will retain, to calling on the 121 States Parties to review their registers and standards and reaffirm their will, and to spurring the despoiled countries to put an end to a situation that creates disputes and conflicts of interest and reduces cultural objects to commercial products of mercantile value only.

This moment should be a milestone for future generations. We want history to show that we were capable of shouldering our responsibilities, finding solutions and, as our countries' delegates and representatives, of being the voice and hope for our peoples whose culture is being whittled down every day. Trafficking in cultural objects must be combated, as a bounden duty, ruthlessly and

relentlessly. Furthermore, as the burden of proof under the 1970 Convention lies almost entirely on the State claiming a cultural object, objects not officially registered are arguably treated in an inconsistent, even highly discriminatory, manner because they are not afforded the advantages conferred by the Convention.

It may also be argued that the concept of “museum” has changed in the last 40 years and institutions dubbed “museums” at the time fall short of present-day standards.

Another difficult area in the implementation of the Convention is the date from which illicitly exported property is protected. For example, an inventoried and internationally recognized Peruvian object that was taken out of the country illegally (as is often the case) after 24 October 1979 (date on which Peru acceded to the Convention) and into Kazakhstan, for example, before 9 February 2012 (date on which Kazakhstan acceded to the Convention) may not be recovered or even claimed by Peru because the importing country was not a State Party to the Convention on the date on which the item was imported.

This has serious consequences that undermine the very principles that the Convention seeks to uphold.

Furthermore, some of the definitions contained in the Convention must be revised because they are now out of date or seem restrictive or detrimental in current circumstances (because the Convention cannot be applied to them). Article 1 of the Spanish version provides that cultural property means “los objetos que hayan sido expresamente designados por cada Estado como de importancia ...” [property which [...] is specifically designated by each State as being of importance]. This is perhaps merely a syntactical, editing or translation problem, but as currently worded, this article means that many objects are not protected under the Convention.

At informal meetings of representatives of the cultural sectors of many countries, all participants have voiced concern and have highlighted the pressing need, experienced daily, for a legal instrument adapted to our times.

Four decades may seem to be but a short time. However, owing to the pace of change and information exchange today, the 1970 Convention is obsolete, as it portrays a vision of a bygone world.

All of these factors – and the list is not exhaustive – lead to the conclusion that for countries producing cultural property, whose cultural heritage is being stolen and who are wrongly called “exporting countries”, the 1970 Convention is no longer the same instrument that, 40 years ago, expressed the hope of a universal agreement to defend and protect the movable cultural heritage and eradicate the scourge of trafficking.

As this statement, expressed in various fora and substantively acknowledged by the Director-General, is ascertainable, the time has come to propose that the Convention be updated or that a new protocol or legal instrument, consistent with specific legislation currently in force, be adopted as a safeguard for States that can no longer watch their cultural heritage disappear, while they take the timid measures that lie within their power. The document should cover the circumstances of the purchase, including the nature of the parties, the purchase price, reasonably accessible register of stolen cultural objects and other relevant information checked by the possessor, competent bodies consulted by the possessor and other steps that a reasonable person would have taken in the circumstances.

Close attention should be paid to some other “details” in order to:

(1) demonstrate that the 1970 Convention, a pioneering and highly visible instrument, no longer meets the needs of countries that produce cultural objects that are traded illegally worldwide;

(2) ensure that UNESCO is the only organization that conducts this analysis so that it will adopt the protocol revising the Convention;

(3) adapt content and procedures to current conditions;

(4) show that, at present, the 121 States Parties have no available tool for complying with the requirements of the Convention;

(5) acknowledge that, far from decreasing, trafficking in cultural objects has actually increased since 1970 – owing no doubt to higher and ever quicker information flows – and that the Convention is not the legal instrument that can eradicate this worldwide scourge.

To achieve these goals and ensure that UNESCO, strengthened in the implementation and definition of its founding missions, retains its original role, the States Parties must be heard in a specific session, and not perforce during sessions of the General Conference or Executive Board. Each State Party has a substantial contribution to make and, as Parties to the Convention, must be heard so that the analysis will yield a good result and so that the new document will not, like the UNIDROIT Convention, be of little use owing to insufficient ratification by States. A further possibility would be to propose that UNESCO commission independent experts to draw up a questionnaire for distribution to the States Parties in order to identify the most significant aspects of problems encountered regarding the relevance and usefulness of the Convention.