Implementing the 1970 Convention: The Caribbean in Review

Background paper

by

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for the participants in the

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Introduction

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property seeks to galvanize State Parties to combat illicit trade and misappropriation of cultural property. To date the Convention has been ratified by 120 state parties, most within the last decade. As most members are aware, the convention is non-retroactive and is only applicable at the time of its ratification by the State Party.

Article 1 of the Convention defines cultural property as property "which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

(b) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) Elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) Antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) Objects of ethnological interest;

(g) Property of artistic interest, such as:

(i) Pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) Original works of statuary art and sculpture in any material;

(iii) Original engravings, prints and lithographs;

(iv) Original artistic assemblages and montages in any material;

(h) Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) Postage, revenue and similar stamps, singly or in collections;

(j) Archives, including sound, photographic and cinematographic archives;

(k) Articles of furniture more than one hundred years old and old musical instruments."

The main focus of the Convention, as it is widely understood, relates to its focus on the cessation of an illicit trade in cultural property; and, in this specific case the discussion will centre on the illicit trade in artwork and archaeology and how the Caribbean region has either put preventive/enforcement mechanisms in place or addressed actual cases of illicit trading.

The International Council of Museums (ICOM) has explained that after drug and arms trafficking, the illicit trade in cultural objects is the next most prevalent form of international criminal activity.[2]

Before exploring the nature of the convention as it relates to the region it is important to have a geo-political understanding of the region as it provides the context under which the Convention is operationalized in the Caribbean. The Caribbean encompasses an area of 2,754,000 km² of which some 239,681 km² is land, home to some 39,169,962 persons. These comprise descendants of native peoples (Amerindians); enslaved persons from Africa; indentured European and Asian people; European, African and Asian inhabitants. They live amongst 30 states organized as sovereign states (English, Spanish, and American), overseas departments (Dutch and French), dependencies (English) and one commonwealth (Puerto Rico). The diversity of languages from official English, Spanish, Dutch, and French to local dialects *Creole*, *Krewol*, *Papiamento*, and *French Creole* illustrates the historical influences on the region which still resonate to the present day. Such resonance can also be found in the legislative structure of these island and continental states. The legal system is heavily influenced by the dominant colonial system, therefore within the region common law is based on English, French, Spanish, Danish, Dutch and American legal codes as appropriate to, and with modification for, the particular state or dependency. It is important to take note of this when assessing the Convention at work in the region.

[2] http://icom.museum/

The independent nation states of the regionthat have either signed or ratified the Convention are listed in Table 1 below, along with the relevant legislation. Those Caribbean nations that remain dependent territories are listed under their respective "Mother" countries. In these instances, one will find that the "Mother" countries have been quite participative in enacting mechanisms within their borders[3]. How well that has translated to their dependent territories in this region is as yet unclear. However, the legislation is in fact in place in these islands.

Article 5 of the Convention provides precise guidelines as to the methods employed by States Parties in order to implement the convention. It reads as follows:

> "To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, 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;

[3] Note the section below on "Enforcement".

(b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;

(c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property;

(d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research;

(e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;

(f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;

(g) seeing that appropriate publicity is given to the disappearance of any items of cultural property."

The following is a list of the relevant cultural property protection mechanisms that have thus far been enacted in the Regional States Parties, followed by a description on the methods they have taken to implement the mandate given them by the Convention. It must be noted that for the purpose of this presentation discussion will centre mostly on the islands in the region, with exceptions being the continental countries of Guyana, Belize and Surinam which are members of the Caribbean Community, CARICOM, a regional trade grouping comprised of former and present English speaking colonies in the region.

Table 1- Regional State Parties, Convention Ratification and local Legislation:

State Parties	Date of Deposit of Instrument	Type of Instrument	Local Legislation
Bahamas	09/10/1997	Ratification	• The Constitution of the Commonwealth of the Bahamas (10 July 1973) • Antiquities, monuments and museum Act (1998)
Barbados	10/04/2002	Acceptance	• The miscellaneous controls (exports restriction) (amendment) regulations (1981) • PENDING: Cultural Industries Bill (2011) • PENDING: Preservation of Antiquities and Relics Bill (2011) • Town and Country Planning Act • Coastal Zone Management Act • National Conservation Commission Act

State Parties	Date of Deposit of Instrument	Type of Instrument	Local Legislation
Cuba	30/01/1980	Ratification	• Law No.1 on the Protection of the Cultural Heritage (1977) • National and Local Monuments Law No. 2 (1977) • Decree No. 55 on Regulations for the Enforcement of the National and Local Monuments Law (1979) • Decree 118 on the Regulation for the enforcement of the Act on the Protection of the Cultural Heritage (1983) • Decreto N. 77 de 1980 (1980) • Decree 118 on the Regulation for the enforcement of the Act on the Protection of the Cultural Heritage (1983) • Ley N. 62 de 29 de diciembre de 1987: El condigo penal (1987) • Resolucion 4/89: declaracion de bienes culturales (1989) • Resolucion 3/89: declaracion del Patrimonio cultural (1989) • Resolucion 57/94 sobre la exportacion de bienes culturales no declarados (1994) • Resolucion 5/96 (1996) • Resolucion 11/97 (1997)
Dominican Republic	07/03/1973	Ratification	• Regimen Consitucional • Convencion sobre la proteccion del patrimonio mundial, cultural y natural (UNESCO, 1972) (1972) • Resolucion N.416 (1972) • Convencion sobre las medidas que deben adoptarse para prohibir e impedir la importacion, la exportacion y la transferencia de propriedad ilicita de bienes culturales (1972) • Ley N.564 para la proteccion y conservacion de los objetos Etnologicos y Arqueologicos Nacionales (1973) • Decreto N.2310 (1976)

State Parties	Date of Deposit of Instrument	Type of Instrument	Local Legislation
France • Guadeloupe • Martinique • St. Barthelemy • Saint-Martin	07/01/1997	Ratification	• Heritage Code (2004) • Decree n°75-432 modified on 02/06/1975 establishing in the Minister of the Interior a Central Fighting Office against the Traffic of Cultural Goods (1975) • Decree n° 79-1040, modified on December 1979, related to the Safeguard of Private Archives with an historical public interest (1979) • Loi n°94-926 du 26 octobre 1994 autorisant l'approbation de la convention européenne pour la protection du patrimoine archéologique (révisée) (1994) • Décret no 95-1039 du 18 septembre 1995 portant publication de la Convention européenne pour la protection du patrimoine archéologique (révisée) signée à Malte le 16 janvier 1992 (1995) • Decree no 97-435 (25 April 1997) on the convention concerning measures to be taken in order to prohibit illegal importation and exportation and illicit traffic of cultural properties (1997) • Loi 2001-44 du 17 Janvier 2001 modifiée relative à l'archéologie préventive • Décret n° 2006-746 du 27 juin 2006 portant abrogation de dispositions relatives au contentieux en matière d'archéologie préventive (2006) • Décret 2007-487 du 30 mars 2007 modifié relatif aux monuments historiques et aux zones de protection du patrimoine architectural, urbain et paysager (2007) • Arrêté du 12 août 2009 portant modification de l'arrêté du 8 février 1996 relatif aux biens culturels maritimes -version consolidée au 27 /août 2009 (2009)
Grenada	10/09/1992	Acceptance	• National Heritage Protection Act N.18 (1990)

State Parties	Date of Deposit of Instrument	Type of Instrument	Local Legislation
Haiti	08/02/2010	Ratification	• The Constitution of the Republic of Haiti (1987)
Netherlands • Bonaire • Curacao • Saint Maarten	17/07/2009	Acceptance	• Cultural Heritage Preservation Act (1984)/ with a 1985 amendment • The monuments and historic buildings act (2012) • Implementation of specific articles in the 1999 Second Protocol to the Hague Convention in the Netherlands through the 2003 international Crimes Act (2003) • Act of 8 March 2007 containing rules on the taking into custody of cultural property from an occupied territory during an armed conflict and for the initiation of proceedings for the return of such property (Cultural Property Originating from Occupied Territory (Return) Act) (2007) • Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (1970 UNESCO Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (Implementation) Act (2009) • Approval of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted in Paris on 14 November 1970 (2009)

State Parties	Date of Deposit of Instrument	Type of Instrument	Local Legislation
United Kingdom • Anguilla • British Virgin Islands • Turks & Caicos Islands	01/08/2002	Acceptance	• Historic Buildings and Ancient Monuments Act 1953 (1953) • Protection of Wrecks Act 1973 (1973) • Torts (Interference with Goods) Act 1977 (1977) • Ancient Monuments and Archaeological Areas Act (1979) • Sale of Goods Act 1979 (1979) • Customs and Excise Management Act 1979 (1979) • National Heritage Act (1980) • Limitation Act 1980 (1980) • National Heritage Act (1983) • Areas of Archaeological Importance (Notification of Operations) (Exemption) Order (1984) • The Operations in Areas of Archaeological Importance (Forms of Notice Etc.) Regulations (1984) • The Protection of Military Remains Act 1986 (Guernsey) Order (1987) • The Planning (Listed Buildings and Conservation Areas) Regulations (1990) • Council Regulation N.3911/92 on the export of cultural goods as amended by Council Regulation N.974/2001 • Council Regulation (EEC) N°3911/92 of 9 December 1992 on the export of cultural goods (1992) • Return of Cultural objects Regulations (1994) • Protection of Wrecks (designation N.1) Order (1994) • Historic Monuments and Archaeological Objects (Northern Ireland) Order (1995) • Export Control Act (2002) • National Heritage Act (2002) • Dealing in Cultural Objects (Offences) Act (2003) • Protection of Wrecks (Designation) (England) (N.1) Order (2006) – there are 4 others • Protection of Cultural Objects on Loan Regulations (2008) • Protection of Wrecks (Designation) (England) 2008

State Parties	Date of Deposit of Instrument	Type of Instrument	Local Legislation
United States • Puerto Rico • U.S. Virgin Islands	02/09/1983	Acceptance	• American Antiquities Act of 1906 as amended (16 USC 431-433) (1906) • National Historic Preservation Act (1966) (1966) • Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, Public Law 92-587, 19 USCA sections 2091ff (1972) • Implementation of the 1970 UNESCO Convention on the Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (19 USC 2601) (1972) • Archaeological and Historic Preservation Act of 1974 as amended (16 USC 469-469-2) (1974) • Archaeological Resources Protection Act of 1979, as amended (16 USC 470aa-mm) (1979) • National Stolen Property Act- Sections 2314 and 2315 of US Code, title 18-Crimes and Criminal Procedure (1983 as amended in 1987) (1983) • Native American Graves protection and Repatriation Act of 1990 (1990) • Native American Graves Protection and Repatriation Act: Final Rule (1995) • Protection of Archaeological Resources (43 CFR 7) (1997)

Enforcement

The following enforcement measures have been taken by various States:

- legal structures and measures for dealing with offences against cultural property (Netherlands, United Kingdom and United States) [4],
- creation of inventories and databases for the management of cultural objects accessible to trained staff who are responsible for their protection (United Kingdom),
- adoption of specific provisions in relation to the spoliation of cultural property during the Second World War in order to facilitate the identification and restitution of the property concerned (United Kingdom),
- inventories of public or private objects and of ecclesiastical heritage (Netherlands),
- the protection of archaeological heritage by identifying archaeological sites and findings (United Kingdom),
- generally, as regards the export of cultural property, requirement of permits (United Kingdom) and controls ensured (United States), notably in airports, ports and customs checkpoints,

[4] The report in relation to France, the United Kingdom, the United States and the Netherlands has been taken from UNESCO doc. 187EX/20 Part III.

- specialist police units (United Kingdom) and customs units (United States) have been trained to identify and protect cultural property that is imported and exported, particularly that of museums or of an archaeological nature, and to suppress trafficking (Netherlands),

- provision to heritage services or specialist police catalogues and databases of stolen objects (United Kingdom),

- as regards the sale of cultural property on the Internet, growing awareness in some States of the importance of combating this new form of trafficking through signing agreements with virtual auction platforms (United Kingdom),

- Training programmes and advertising campaigns, on the radio and television (United Kingdom and United States); one State (Netherlands) has developed a set of cards raising awareness about the protection of heritage and the implications of trafficking in cultural property.

- Adoption of specific directives for museums, libraries and archives in order to better fight trafficking in cultural property (United Kingdom)

- With regard to the 1995 **UNIDROIT Convention**, some States reported that they were in the process of ratifying the instrument and others indicated that they have incorporated certain provisions for it in their legislation (Netherlands for example) while not ratifying it.

The lack of data available on the trafficking of art and archaeological objects within the region is problematic. One is left to interpret anecdotal stories of misappropriation and trafficking in art, antiquities and machinery. For in the last decade, for example, the industrial heritage of the region has been under threat from persons trading in scrap metal. Looting abandoned sugar factories and selling the machinery as scrap metal has resulted in the irreconcilable loss of the industrial heritage of the region. Illegal salvage of the marine environment continues to be cause for concern as is the trade in illicit art.

However, it should be noted that the majority of countries, even non-Party States, do cooperate with INTERPOL which maintains a database of stolen artworks. In addition, other lists such as ICOM's Red List serve as a watch-list for archaeological objects or works of art that are in danger of being illicitly trafficked, especially in areas most vulnerable to such a trade. For instance, the only nation in the Caribbean region that is currently on ICOM's Red List is Haiti. The List warns of the trafficking in Haitian cultural property such as Pre-Columbian art, ceramics, shell ornaments, wooden objects, historical documents, coins, medals, stamps, equipment and tools, crafts, architectural items and fine arts. In fact, Haiti is the prime example in the region of the need for enforcement action to be taken to combat the illicit trade. The region, as a whole, needs to become more proactive in this respect.

However, it should be noted that there are other mechanisms by which a State Party (or Non-Party, as listed below) can enforce the same import/export controls called for in the Convention. That it is often by the participation of heritage-related national entities in groups such ICOM which adheres to its own Code of Ethics. For instance, article 2 of the Code stipulates:

> "Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production."[5]

This is known as the due diligence and provenance provision. The Code also provides further protective mechanisms under articles 6.2, 6.3 and 6.4. Museums within the region are eligible to join ICOM and thereby be guided by ICOM's Code of Ethics. In this way, a policy of cultural property protection may be enacted (and has been in certain cases) without actual government intervention. However, legislation and government regulated enforcement mechanisms are the best mode by which to protect cultural property.

[5] ICOM Code of Ethics for Museums, 2006

The section below lists an example of Caribbean nations which have not yet signed on to the Convention. They contain within their legislative frameworks laws which can form the foundation of future protective mechanisms.

Profile of Existing Legislation and Enforcement Mechanism in Regional Non-Party Countries:

Trinidad

Legislation:

- Heritage and Stabilisation Fund Act 2007
- Forgery Act (chap. 11:13) 2004 Rev.
- Protection of Wrecks Act (chap. 37:04)

Guyana

Legislation:

- Export and Import (Special Provisions) Act 1986
- Export and Import (Special Provisions) (No.2) Act 1991
- National Cultural Centre Ordinance (CAP 204) 1953 Rev.
- Trade Act (CAP 91:01) 1973 Rev.

Jamaica

Legislation:

- Institute of Jamaica Act 1978
- Jamaica Cultural Development Commission Act 1980
- Jamaica National Heritage Trust Act 1985- note policy document re review of the legislation (2010)
- Tax Collection Act 1973 Rev.
- Wreck and Salvage Law CAP 419

None of the above speaks explicitly to implementation of the Convention because, for one thing, they are not signatories to the Convention. However, it does not mean that they do not have policies in place that achieve the same end as the Convention. For instance, the Jamaica National Heritage Trust Act 1985 has within its ambit the protection and preservation of cultural property. This Act is currently under review and will become more cohesive in its effort to protect all aspects of cultural heritage. Therefore, though the majority of the laws listed above do not directly relate to the implementation of the Convention within these nations states (nor do they, as yet, seek to achieve the same goals), they may nevertheless serve as the foundation which has already been laid by these countries upon which to build a legislative and enforcement regime with which to protect cultural property.

Conclusion

The Caribbean region, as a whole, has not taken action to enforce the concepts contained within the Convention though it is rife with the requisite cultural property; the exceptions being States Parties such as the Bahamas, Cuba, Trinidad, Jamaica and Barbados. However, the legislative framework from which these nations can enact their cultural property protective mechanisms is in place and exists in the form of their written constitutions, their heritage, tax, import/export and other such forms of legislation. The situation in the region is not homogenous as it relates to the implementation of the Convention; rather it is heterogeneous as a result of myriad historic and political factors. The challenge of the committee is to assist those states, both signatory and non-signatory, to embrace the concept of non-participation in the illicit traffic and implementation of cultural policy. Robust capacity building programmes are urgently needed in the region across national and language borders and barriers to effectively combat the trade in art and archaeological artefacts both terrestrial and marine. UNESCO can champion the funding for the growth of Heritage Studies in the region as a supplement for regional workshops. Further it is imperative that the draft model legislation commissioned by UNESCO in the 1990s, by Donna Scott Motley, be revisited and actioned. There is need to revisit past initiatives, identify their shortcomings so as to build on a more meaningful engagement of the convention in the region. That time is now.