The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century

Edited by

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GENERAL REPORT

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PART II—NATIONAL LEGAL FRAMEWORKS

Introduction / Prologue

Cultural heritage has come to be viewed as a shared common interest of humanity, to be kept safe and protected under the auspices of international law. From the early interest of the international community in protecting cultural properties and masterpieces during periods of armed conflict, this interest has expanded and evolved to include the properties and tangible materials of peoples during peaceful times as well as the very people who embody, create and recreate these cultures—the living, breathing heritage,

culminating in the latest point of interest of international cultural heritage protection and preservation: intangible cultural heritage.

Safeguarding efforts have also extended to cultural heritage underwater and the campaign against the illicit trade of cultural objects. Moreover, other cultural values have come into play. These include the protection of natural heritage, closely linked to environmental issues, or the respect for human dignity and the human rights of individuals and communities, particularly those of indigenous peoples and minority groups.

In general, the development of approaches to safeguarding cultural heritage at the international level has been quite slow and fragmented. Initially, there seemed to be little awareness about the safeguarding of cultural heritage. More recently, however, one can see that—though still fragmented—the trend in global thinking is moving towards a more comprehensive regime of cultural heritage protection and preservation, expressed through the various conventions established at the international level and grounded on the principles of cultural internationalism while reaffirming cultural nationalism.

Cultural property internationalism is a rather new phenomenon whereby everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated and from whatever cultural or geographic source it derives.[1] Cultural property is viewed as the 'collective cultural heritage of all people.'[2] Thus, the international community considers the privileges of the common global interest and the right to intervene and ensure its protection as paramount over the rights of any particular nation. This view is, however, tempered by *cultural nationalism*, which is the view that 'cultural property is a part of the cultural heritage of the nation in which it is found or the nation which contains the cultural descendants of its creator.'[3] The principle of state sovereignty underlies this perspective. A state has the jurisdiction and the right to exercise control over matters within its territorial boundaries. This position is generally taken by source nations. Thus, the various international and supranational laws will continue to be influenced by domestic legislation and *vice versa*, and any level of uniformity of such national laws will shape the future international norms on cultural heritage protection and preservation in the 21st century. Combining both international and national cultural heritage protection into one study also means taking into account both movements, the concept of *cultural property internationalism* as well as the

[1] J.H. Merryman, 'Cultural Property Internationalism', 12 *International Journal of Cultural Property* (2005) p. 11 at p. 11.

[2] J. Warring, 'Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review* (2005) p. 227 at p. 247.

[3] Warring, loc. cit. n. 2, at p. 247.

concept of *cultural nationalism*, as both interact with each other and cannot be regarded as totally separate concepts.

The idea of writing this report was born on the occasion of the 1st Intermediate Congress of the International Academy of Comparative Law in Mexico concerning 'The Impact of Uniform Law on National Law. Limits and Possibilities', which took place in November of 2008.[4] Zweigert and Kötz define the term *unification of law*—deriving from the latin terms *unus* ('one') and *facere* ('to make')—, the fundamentals of *uniform law* deriving from the latin terms *unus* and *forma* ('form')—, as 'a discipline of legal policy which aims at settling or removing differences of national legislation through a consensus in international legal principles within the limits of desirability and possibility.'[5] They go on to define the international procedure used for the unification of national laws as 'being of the kind that an *Einheitsgesetz* (*loi uniforme*, *uniform law*) will be drafted by experts in the field of comparative law and put into a collective treaty which mandates its states parties to implement and transform this *uniform law* into national law (note: as long as the international tool is not self-executing[6]).'[7] Fox expressively refers to the work of the international community defining the term *unification of laws* as 'efforts by a number of international organizations to make the municipal laws of the countries of a region or the entire world as uniform as possible, thus, eliminating conflicts of laws problems',[8] while Black's Law Dictionary defines the term (note: United States) *uniform law* as a '...law proposed as legislation for all the states to adopt exactly as written, the purpose being to promote greater consistency among the states.'[9]

It should be noted that the concept of international and national cultural heritage protection and preservation is a very broad concept touching issues related to public law as well as private law, both on an international level as well as on a national level. Thus within the scope of this report, the term *uniform law* shall be understood in a broader and less strict meaning, leading to a kind of *soft* uniform law. In particular obligations arising from international public law tools cannot unify national laws completely. They can however express the concerns of the international community and provide a model which national legislation should follow. Hence, international cultural

[4] Information about this congress can be found online at http://www.iuscomparatum.org/offres/gestion/menu_141_perso_141_1837/mexico-congress-2008.html (last visited on December 31, 2008).

[5] K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* [Introduction to Comparative Law], 3rd edn. (Tübingen, J.C.B. Mohr 1996) at p. 23.

[6] For the question of self-execution see *infra* I.5.3.

[7] Zweigert and Kötz, op. cit. n. 5, at p. 23.

[8] J.R. Fox, *Dictionary of International and Comparative Law*, 2nd edn. (Dobbs Ferry/New York, Oceana Publications Inc. 1997) at p. 325.

[9] B.A. Garner et al., eds., *Black's Law Dictionary*, 7th edn. (St. Paul/Minnesota, West Group 1999) at p. 1531).

protection law cannot be regarded as being a typical exponent of uniform law, rather it is a genuine form of international uniform law.

This report consists of two main parts: the first part will deal with seven major international conventions related to the issue of protection and preservation of cultural heritage.[10] It will provide the reader with a comprehensive, up-to-date outline of the most important instruments, illustrating the drafting processes and ideas behind the conventions and summarizing the core regulations important both at the international level and also at the national level in terms of the implementation process. Thus, it will be a good addition to the framework of recently published specific literature on single areas.[11]

The second part of this report will be an analysis of 16 national legal frameworks in relation to cultural heritage, evaluating—among other things—national concepts in this field, specific national regimes and the impact of the discussed international tools on national laws. It will also point out convergences and divergences in the implementation process among the following countries: Canada, Croatia, the Czech Republic, Denmark, France, Germany, Italy, Japan, Mexico, the Netherlands, New Zealand, Spain, Switzerland, Taiwan, Tunisia and the United States.

The 16 contributing countries reflect various, sometimes opposing national approaches. With the exception of Taiwan, which is not recognized as a politically independent country by UNESCO and UNIDROIT and thus is not a state party to any of the conventions outlined in Part I of this report, all contributing countries are involved in the international cultural safeguarding process, with their national legislation influenced by and influencing

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[10] See infra I.2.: 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict; infra I.3.: 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;
infra I.4.: 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage;
infra I.5.: 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;
infra I.6.: 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage;
infra I.7.: 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage;
infra I.8.; 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
I should refer to J. Nafziger and T. Scovazzi, eds., *Le patrimoine culturel de l'humanité/ The Cultural Heritage of Mankind* (Hague Academy of International Law, 2008) (Leiden/ Boston, Martinus Nijhoff 2008) as the most recent and comprehensive work, which covers these international instruments, relevant soft-laws and related issues.

[11] F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention—A Commentary* (Oxford, Oxford University Press 2008); J. Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (Leiscester, Institute of Art and Law 2006); S. Dromgoole, ed., *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* 2nd edn. (Leiden, Martinus Nijhoff Publishers 2006).

the international framework. Some countries have been influenced more, others less. The contributing countries represent a balanced mixture of older and newer national cultural heritage legislation. Some are quite active at the international level while others are passive. They also represent various geographical, historic and cultural differences as well as differing overall national concepts and perceptions of cultural heritage protection and the balancing of state and private interests and questions related to indigenous group and community rights.

The realization of this report would not have been possible without the help of a network of people: We would like to thank Steven van Uytsel, Marose Pereira, Margaret Uy and Paulius Jurčys for their research support in drafting this report, Ruben Pauwels, Oliver Galindo, Sean Michael McGinty, Brian Luke Goh and Concetta Frano Grimm for their language assistance, and Robert K. Paterson, Igor Gliha, Tatjana Josipović, Pavel Šturma, Ditlev Tamm, Anne Østrup, Marie Cornu, Kurt Siehr, Federico Lenzerini, Yoshiaki Ishida, Hideto Takagi, Jorge Sánchez Cordero, Ernesto Becerril, Katja Lubina, Paul Myburgh, Sofía de Salas, Eva Maria Belser, Eva Rüegg, Eva Molinari, Ming-Yan Shieh, Chung-Hsi Lee, Monia Ben Jémia, and James A.R. Nafziger for their commitment and invaluable contributions to this general report. We also would like to thank the International Academy of Comparative Law for supporting the idea behind this report. We hope that this report will support the understanding of international and national legal tools in the field of the protection and preservation of cultural heritage and foster its development for the sake of future generations and cultural enjoyment.

Let us now take you on a journey through the history and development of national and international frameworks of cultural heritage protection and preservation law and their future.

Fukuoka, Japan, January 2009

Toshiyuki Kono,
Stefan Wrbka

Note: As far as possible, national and international developments in the field of cultural heritage protection and preservation up and until December 31, 2008 have been taken into account and were incorporated in this report.

Moreover, the authors of the General Report have referred to an English translation of an unpublished French-language version of the Tunisian National Report (written by professor Monia Ben Jémia). However, this Tunisian National Report has not been included in the present volume. This means that the analysis of the national legal frameworks conducted in the General Report is based on 16 National Reports (including the Tunisian one), while the present volume contains the full versions of 15 National Reports.

PART I—INTERNATIONAL LEGAL FRAMEWORK