

DOCUMENTS

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Guidelines for the Establishment and Conduct of Safe Havens as Adopted by the International Law Association at its 73rd Conference held in Rio De Janeiro, Brazil, 17-21 August 2008

Preamble

Recognizing the crucial need to rescue cultural material threatened by armed conflict, natural disaster, illegal excavation, or other insecurity;

Noting the uncertainty of standards and procedures for safekeeping and preserving cultural material that has been rescued by removal from the territory of one state to the territory of another state;

Noting also the uncertainty about requirements for returning cultural material after a threat necessitating its removal to the territory of another state has ended;

Observing the importance of engaging both governmental and nongovernmental bodies in safekeeping and preserving cultural material;

Convinced therefore of the need for and efficacy of international guidelines, engaging state authorities, for safekeeping, preserving, and returning cultural

material within the source state and after it has been removed from the territory of one state to that of another state;

Confirming therefore the following Guidelines for the establishment and conduct of safe havens for cultural material; and

Perceiving the efficacy of a model contract to formalize essential terms of the relationship between a source state or entity and a safe haven;

Hereby states the following Guidelines:

1. Definitions

- a) “Cultural material” includes all objects defined as cultural property in Article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

COMMENTS:

Instead of creating a new definition, the Guidelines adopt the most widely-accepted definition of “cultural property” in Article 1 of the 1970 UNESCO Convention. This definition has been only slightly modified in other instruments such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

- b) “Source state” is the state in which cultural material is in need of a safe haven, either in the state itself or in the territory of another state.

COMMENTS:

For the purpose of these Guidelines, the source state is the state in which cultural material is in need of a safe haven, whether that is the state of origin of the material—that is, where it was created—or a state to which the material has been later removed from the state of origin.

2. Safe Havens for Cultural Material

Safe havens are facilities created in order to care for cultural material that has been endangered by armed conflict, natural disasters, illegal excavation, or other insecurity and has therefore been removed for safekeeping and preservation from the territory of the source state to the territory of another state or to a place of safety in the source state.

COMMENTS:

There is often a critical need for safe havens when endangered cultural material is removed for safekeeping and protection from one state to another. There is also a need for safe havens to protect material within a source state—for example, material that is imperiled by calamities, has been seized as contraband, or is of unknown origin or suspect provenance. An example of international cooperation in establishing a safe haven involved the re-

moval and temporary storage of Afghan cultural material at the privately owned Afghanistan Museum and Library in Bubendorf, Switzerland (1999–2007).

3. Governmental Establishment and Supervision of Safe Havens

State authorities shall establish safe havens or supervise such havens within their territories as governmental or nongovernmental institutions may otherwise create.

COMMENTS:

3.1. *Under these Guidelines, safe havens are national and not international facilities that are established and managed under national law. The Guidelines provide for and help harmonize the obligations of these facilities (see Guideline 4).*

3.2. *Safe havens may be established as either nongovernmental or governmental facilities under national law.*

3.3. *Safe havens need not be specific organizations or institutions. They may be simply facilities within national museums or other institutions that receive cultural material for safekeeping, restoration, and preservation. One example involves the designation of facilities in national museums as trustees of material whose ownership is either unknown or disputed.*

4. Obligations of Safe Havens

- a) A safe haven shall be responsible for safekeeping and preserving cultural material that has been entrusted to its care. This general responsibility shall extend to the exceptional case of an unknown source state. A safe haven shall take all reasonable measures to avoid deterioration or endangerment of cultural material by applying the highest standards of care.
- b) A safe haven is governed by the law of the state in which it is located, but shall accord due respect to the laws and traditions of the source state of cultural material.
- c) A safe haven shall accept no cultural material received from another state in violation of its export provisions, unless it is satisfied that the material has left that country under circumstances precluding the issuance of an export certificate.
- d) A safe haven shall take all possible measures to make an inventory of all cultural material entrusted to its care and guarantee public access to the information in the inventory.
- e) A safe haven may exhibit cultural material in its care unless to do so would be inappropriate under the laws and traditions of the source state. All such material on exhibit shall be identified as safe haven material.
- f) A safe haven may not lend safe haven material without the consent of the source state or entity.

- g) Any proceeds from exhibition or loans may be used only for safekeeping and preserving safe haven material.
- h) A safe haven shall not engage in any activity the result of which would be to stimulate illegal trafficking in cultural material or other threats to it.
- i) A safe haven must return cultural material items as soon as the established owner or other established source of the material so requests, provided that the safe haven is satisfied with the conditions for safekeeping and preserving the material by the requesting state or entity.
- j) Nothing in these Guidelines shall require the safe haven to do or refrain from doing anything inconsistent with an order of a court of competent jurisdiction.

COMMENTS:

4.1. Under 4 a), safe havens are responsible for safekeeping and preserving cultural material even if the material is owned by a foreign state or citizen or there are no prospects for compensation of attendant expenses by the owner. In keeping with the highest standards of care, any necessary restorative work should be planned and its cost discussed with the source state or entity before the work is done.

4.2. Under 4 b), safe haven authorities, in fulfilling their responsibilities for safekeeping and preserving cultural material of foreign origin, must respect the laws and customs of the source state and of customary international law. This means, for example, that safe havens ordinarily must store human remains with dignity and, whenever possible, preserve and restore religious objects according to the religious and cultural traditions and practices in the source state. Otherwise, local or national law applicable in safe havens governs the standard of care for the pertinent cultural material.

4.3. Under 4 c), states to which material is to be removed for safekeeping must respect the export laws of source states unless, under the often difficult circumstances that give rise to the need for removal, the issuance of an export certificate is impossible.

4.4. Guideline 4 d) requires safe havens to apply the general principle of transparency. Safe havens must inventory cultural material and guarantee public access to it. Because safe havens are trustees or custodians of material for the benefit of legitimate owners, they must ensure the rights of those owners. It is also imperative that safe havens ensure public access to all records and inventories of cultural material and, in response to return claims, to the cultural material itself.

4.5. Under 4 e), safe havens may exhibit entrusted material, but they must ensure that the material is clearly described and identified as “cultural material entrusted to the exhibiting institution as safe haven,” or other words to that effect. Such an exhibition has the added benefit of drawing public attention to the good offices of safe havens and the threats to cultural material in foreign countries. Cultural material should not be exhibited, however, when it would be inappropriate to do so under the legal rules or customs of the state or culture of origin.

4.6. According to 4 f), loans of entrusted cultural material should be strictly limited to instances where source states, private owners, museums, or other institutions, as appropriate, give their consent in writing or when the pur-

pose of the loan is to unite dismembered cultural material or to have it conserved in third countries for exhibition to the public. Such “functional” loans are compatible with the obligations and duties of conscientious trustees.

4.7. Guideline 4 g) makes clear that entrusted cultural material should not be used by safe havens to generate income. All proceeds from exhibitions, loans, and photographs must be used for safekeeping and preservation of the material.

4.8. Under 4 h), it is incompatible with the fiduciary duties of safe havens to engage in illicit trade in the cultural material for which they have assumed responsibility or to engage in any activity that might stimulate illegal trafficking, such as cooperating with thieves and smugglers in defiance of the very purposes and obligations of safe havens.

4.9. Guideline 4 i) makes clear that safe havens are only temporary homes for endangered cultural material. Therefore, they must return protected cultural material after the threat prompting its removal has come to an end and material can again be protected in the source state. It is expected that safe havens normally will agree to requests for the return of entrusted cultural material under applicable national law. Safe havens can also initiate an appropriate return in order, for example, to minimize the expenses of safekeeping and preservation.

4.10. Under 4 j), safe havens are generally bound by court decisions governing entrusted cultural material. Among courts with concurrent jurisdiction, courts in the territory of safe havens have the final word on what should be done or not done regarding safeguarded material.

5. Obligations of Source States or Entities

- a) A source state or entity of safe haven material shall give all information to the safe haven which is necessary to fulfill the safe haven's obligations.
- b) A source state or entity shall be expected to compensate the safe haven for reasonable costs of safekeeping, preserving, and returning cultural material.
- c) A source state or entity shall ensure that requested cultural material whose return it has requested will be secured and preserved after its return to that state or entity.

COMMENTS:

5.1. The obligation to give all information necessary to ensure the effectiveness of a safe haven includes facts concerning the material removed for safekeeping as, for example, the risk of its exposure to air, water, temperature, insects and other vermin. In addition, the required information should include such legal data as the identity of the titleholder or other interested parties so as to facilitate a return, if appropriate, to the correct person or entity and any relevant information concerning legal rules or customs of the source state or culture of origin that may affect how the cultural material is to be treated in the safe haven.

5.2. In principle, a source state is expected to compensate a safe haven for its reasonable expenses of safe-keeping and preservation. This principle is grounded in both fairness to the safe haven and the importance of over-

coming any reluctance, for financial reasons, on the part of a prospective safe haven to safeguard endangered material. However, the parties may stipulate conditions more favourable for the source state (see Guideline 6 and Annex). Normally compensation is due after material has been returned and the costs of safekeeping can be calculated precisely.

5.3. Parties may stipulate their own necessary special conditions regarding the security of safeguarded material, however difficult it may be to enforce those conditions (see Annex). If a safe haven has valid reason to believe that in case of return the objects will not be protected properly, it may decline to return material until the safe haven is satisfied that the requesting source state is able to protect it. The requirement of 5 c) may further encourage source states to take measures to protect their material. Conversely, the failure of a source state to preserve its own cultural material may discourage other states from returning material.

6. Party Autonomy

A safe haven and a source state or entity may stipulate conditions of care which are different from those in these Guidelines. Whenever possible, such conditions shall be expressed in the form of a written agreement.

COMMENTS:

These Guidelines are not legally binding. Parties to a contract for the establishment of a safe haven (see Annex) may therefore stipulate other conditions for safekeeping and return of cultural material besides those contained in these Guidelines. Such stipulations should be in writing.

7. International Instruments

Nothing in these Guidelines shall be interpreted so as to affect the application of any international agreement or other instrument.

COMMENTS:

These Guidelines do not abrogate binding international agreements or other instruments otherwise applicable and are not intended to affect mandatory national laws.

8. Assistance of UNESCO and Other International Bodies

- a) A safe haven state is encouraged to request the United Nations Educational, Scientific and Cultural Organization (UNESCO) for assistance in maintaining the safe haven.
- b) States in need of assistance are encouraged to request UNESCO to help coordinate their cooperation with states that are ready to provide such assistance for safekeeping and preserving cultural material.

- c) Safe havens of cultural material and source states are also encouraged to seek the assistance of other international and regional bodies that are engaged in the protection of cultural material.

COMMENTS:

As a specialized organization with an excellent international network, UNESCO is in a good position to facilitate communication between the source state and the state on whose territory a safe haven is or will be established. The parties are urged, therefore, to contact UNESCO and other international organizations such as the International Council of Museums (ICOM) and the International Council on Monuments and Sites (ICOMOS) to ask for assistance and help.

9. Implementation

- a) These Guidelines are intended to be integrated into the rules and practices of museums, archaeologists, ethnologists, other professionals including state authorities, and pertinent professional organizations.
- b) Whenever possible, responsible states and entities are encouraged to call upon the International Council of Museums (ICOM) and other organizations and institutions for technical assistance in support and implementation of these Guidelines.
- c) These Guidelines are also intended to serve as a basis for the development of rules and policies of governmental and nongovernmental bodies.
- d) If a dispute arises between the source state or entity and the safe haven concerning a request for return of cultural material, the parties shall attempt to resolve it whenever possible by good-faith negotiations and consultations before proceeding to more formal means of dispute resolution such as those provided for by UNESCO.
- e) These Guidelines encourage the source state or entity and the safe haven to formalize their relationship within the terms of the annexed Safe Haven Model Contract

COMMENTS:

9.1. Museums and other institutional users of these Guidelines should incorporate them into their rules of ethics or practice and interpret them broadly and purposefully. The Guidelines also afford institutions a model for drafting their own guidelines or rules.

9.2. Users of the Guidelines should review them periodically and modify them as may be appropriate.

9.3. Users of these Guidelines should consider adopting the Safe Haven Model Contract and, in particular, provide for a method to resolve any dispute under the contract.

Rio de Janeiro, 21 August 2008

Safe Haven Model Contract

The Source State or Entity _____
and the Safe Haven _____
agree that the items

- 1) _____
- 2) _____

or the Collection _____, consisting of the items
in the inventory or catalogue, as follows: _____
shall be removed for safekeeping and preservation to _____.

Special conditions for safekeeping:

- 1) _____
- 2) _____

The items may be exhibited, but may not be lent without the consent of the Source State or Entity.

The items will be returned at the request of the Source State or Entity provided that the Source State or Entity reasonably can ensure that the items will be kept safely and preserved properly after their return.

The Source State or Entity will compensate the Safe Haven for any reasonable expenses, including cost of restorative work done in order to preserve the entrusted objects.

This contract is governed by the law of the state in which the Safe Haven is located. The parties will seek to resolve any dispute under the contract or related to it by recourse to a court in the territory of the Safe Haven, UNESCO dispute resolution procedures, arbitration, or other dispute resolution procedures as the parties may so agree.

Signed _____ Date _____ Place _____

Signed _____ Date _____ Place _____