1. INTRODUCTION

In a Convention, countries undertake legal commitments to the international community. Some are for built heritage: e.g. the Convention concerning the Protection of the World Cultural and National Heritage (or "World Heritage Convention")(1) Which dictates obligations toward built heritage in the same way that the Geneva Conventions do for prisoners.

The following are some commitments of adhering countries, as stated at Article 5 of the Convention:

- "To adopt a general policy which aims to give the cultural and natural heritage a function in the life of the cummunity" (2);
- "To integrate the protection of that heritage into comprehensive planning programs" (3);
- "To take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage" (4); and
- "To foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field" (5).

2. CONSEQUENCES

"Pacta Sunt Servanda": treaties are made to be observed. Adherence to the treaty created an opportunity for proponents of heritage in the Member States. UNESCO had formulated Recommendations on the proper contents of laws, plans and financial measures(6); furthermore, various countries have devised many ingenious techniques to create a positive legal climate for heritage. The Convention opens the door to further calls for domestic implementation of such proposals. However,

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1. The other is the Convention for the Protection of Cultural Property in the Event of Armed Conflict ("the Hague Convention"), 1954. See Conventions and Recommendations of UNESCO concerning the Protection of the Cultural Heritage. UNESCO, Paris, 1983.

2. Article 5(a). Emphasis added.

3. Article 5(a). Emphasis added.

4. Article 5(d). Emphasis added.

5. Article 5(e). Emphasis added.

6. See, for example Recommendation On International Principles Applicable to Archaeological Excavations, New Delhi, 1956, Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, Paris, 1962, Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritge, Paris, 1972, Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas, Nairobi, 1976. Reproduced in Conventions and Recommendaitons of UNESCO etc., op.cit.

the Convention's obligations are limited by two factors:

a) The obligations apply to a narrow range of heritage;
b) State action is compelled only where "possible" and "appropriate".

First, the focus is on sites "which are of outstanding universal value" (7). However, that does not limit the legal and procedural obligations: according to the wording, a Party would be obliged to enact "planning programs", "legal measures" and "financial measures" even if there were only one site affected. A country which fails to "integrate" heritage procedures into its comprehensive planning program is in breach of Art. 5(a) whether or not many sites are targeted. If the country has not taken any "legal" or "financial": measures at all for the "rehabilitation" of this heritage, it is in breach of Art.e 5(d) regardless of the number of sites which would have been eligible. In any event, the Convention leaves it up to individual States to decide which of their sites are of incipient "universal value"; in theory, the number of sites affected by the Convention could be unlimited.

Second is the limitation outlined at the beginning of Art. 5: each State is bound only to "endeavour, in so far as possible, and as appropriate for each country." That phrasing is commonly called a "best efforts clause". Would a State which failed to enact any plans or laws escape responsibility by merely claiming that such laws were impossible or even simply "inappropriate"? The answer is no. It is not uncommon for conventions to contain a "best efforts" clause: documents such as the Convention on the Elimination of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights or the United Nations' famous "Colonial Declaration of 1960" contain similar references. Delinquent countries have not escaped responsibility on the pretext of "inappropriateness": countries which fail to use their "best efforts" can be recognized as such by the international community.(8) Although a "best efforts" clause does dilute a treaty's obligations, it does not obviate them altogether any more than the U.N.'s famous decolonialization resolution was truncated by the comparable clause there.

3. ANTICIPATED DOMINO EFFECT AND ITS FAILURE

The above suggests that Art. 5 could become one of the most useful tools of public policy for the encouragement of better laws, plans and financial measures. However, effects presumably

7. Article 1.

8. For good measure, the World Heritage Convention's Art. 4 entrenches a "duty of ensuring the identification, protection, conservation, presentation and transmission (of this heritage)...(The State) will do all it can to this end, to the utmost of its resources...".

would exceed Art. 5's intrinsic value. They would presumably create a domino effect beyond the few sites "of outstanding universal value": once a government introduces a new "planning program", "legal measure" or "financial measure", it usually will do so for more than one or two sites. Otherwise, the exercise is hardly worth the trouble. For example, if a government adopts a new statute or planning procedure, there is an even chance that it will apply the new enactment to the entire national heritage (for the sake of consistency), not only to one or two sites. That is why planners and lawyers have been intrigued to see what would emanate from Art. 5.

Events unfolded differently. Canada, which became a Party to the Convention in 1976, is illustrative. Observers awaited the "planning programs", "legal measures" and "financial measures" which would be part of new procedures in Canada. However, the Government of Canada never produced a single public document outlining its legal obligations under the Convention. On the contrary, the Canadian negotiator wrote that "no special additional obligations will be incurred for such properties other than the requirement to submit an annual report to UNESCO on their maintenance."(9) In that respect, Canada is little different from the international community generally. Monumentum published a Special Issue(10) exclusively devoted to the World Heritage Convention; but that publication, throughout 119 pages, made only one oblique reference to the legal obligations which member states had undertaken.(11)

4. DISTORTION OF THE CONVENTION

How could the crux of a treaty be so overlooked? The answer is found elsewhere in the Convention. After outlining the countries' legal obligations, the Convention provides for an international committee with a pleasant task: to study the world's foremost heritage sites and compile a list of those with "outstanding universal value". What ensued was the eclipse of the treaty's legal components, as various officials competed for the prestige of having their own country's sites named to the List or of sitting on the Committee. It is not the purpose of this paper to downgrade the Committee or its fine work: one must merely remember that one is dealing with a Convention which is a legal document. Although the List and its draftsmen have no domestic legal status, an inversion took place: it was the List which was labelled as the legal crux of the treaty.

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9. Peter H. Bennett, in Canadian Geographic, Dec.-Jan.'77-8, p. 28.

10. World Heritage Convention Issue, 3-16, United Kingdom 1984.

11. That is not even to Article 5. At p. 58, there is a passing reference to Article 4's "duty" clause (see footnote 8 above).

That is an absurdity: by definition, a Convention exists to outline legal obligations; if it were only intended to assemble officials for educational purposes, it would not be a "Convention" in the legal sense at all.

However, such legal considerations have not stood in the way of a flood of documents, alleging that the Convention is nothing more than an excuse for the committee to work on its List. For example, Parks Canada (which handles Canada's role under the treaty) drafted a UNESCO World Heritage Briefing Book, stating the following:

PRIME OBJECTIVES (of the Convention):
a) Establishment of a World Heritage Committee
b) Compilation of a World Heritage List.

Nowhere is there mention of the legal components. It would be analogous to saying that the Geneva Convention was not about countries' obligations to their prisoners of war, but about meetings of the International Red Cross in Switzerland.

5. IS "MORAL SUASION" ENOUGH?

Some argue that the very fact that the List is being compiled is enough of an accomplishment, and that anyone who expected the Convention to equal a real treaty would be pressing his luck. At UNESCO headquarters itself it has been noted that Art. 5 does not have a "sanctions" clause: the Convention does not explain how to penalize a country for failing to live up to those obligations. The List, on the contrary, does come with a sanctions clause, and countries which ruin listed sites can be reprimanded. Furthermore, UNESCO is reputed to have used the List as moral suasion: countries which flunked the test on Art. 5 have sometimes had their nominations to the List delayed, whereas nomination to the List is often credited with having triggered positive effects on decision-makers, including an indirect impact on local legislation and plans.

As laudable as that may be, is "moral suasion" the only effect of the Convention on domestic legislation? That contradicts the plain wording of Art. 5, and the absence of a sanctions clause is irrelevant to that. However, some treaty negotiators argue that regardless of what Art. 5 said, that is not what they meant. That argument would fail in a court of law; but there are still some observers who hold that Art. 5 was merely meant as a pious wish.

That theory was refuted by at least one national supreme court(12). The issue was whether the Australian federal government was obliged by the Convention to enact "legal

12. 46 Australian Law Reports p. 625.

measures" for the protection of heritage.(13) The Australian state of Tasmania argued in opposition that the "the Convention imposes no real obligation and confers no real benefit; the Convention is said to be no more than a statement of aspiration or political accord."(14) If the crux of the Convention were merely the creation of a committee and of a List, Tasmania would have been right; but that is not what the Court said. "Article 5 itself imposes a series of obligations on parties to the Convention", said Judge Mason, "one of which is the obligation dealt with in paragraph (d) which includes the taking of legal measures. The imposition of this obligation is an element in a general framework...Article 5 cannot be read as a mere statement of intention. It is expressed as a command requiring each party to endeavour to bring about the matters dealt with."(15) Judge Murphy added his opinion: "(The Convention) contains obligations which the heritage statutes tend to carry out. The Convention, in particular Article 5, imposes a real obligation."(16)

The Court thereby restored the Convention to proper focus. Party states were legally obliged toward heritage; and the various components of Art. 5 (integration in planning programs, legal measures for protection, financial measures for rehab etc.) do constitute binding objectives.

6. POLITICAL CONSIDERATIONS

Some suggest that the downplay of the Convention's legal aspects is based on a fear of alerting unsympathetic officials of the Convention's legal impact until it is too late. Some countries may never have signed the treaty if they thought they would be held to enact laws, planning programs etc.; nor would certain Listed sites have been nominated if the States expected anything more than promotional consequences. However, now that most countries have adhered to the Convention, is it time to invoke the Convention to pressure governments for better legislation and plans? For example, Art. 5(a) states that governments must "adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community". The U.S. government adopted a law which gave heritage buildings first option on government office space: officials would have to look at such buildings before they

13. If so, it might have constitutional jurisdiction to enact the legislation, which otherwise would be beyond its powers. The state government in Tasmania opposed such legislation, because it would block a dam which the state wanted but which would flood a heritage area.

14. Op. cit. p. 769.

15. Op.cit. p. 698.

16. Op.cit. p. 734-5.

could locate in new construction. Although this law(17) was probably enacted independently of the Convention, it promotes the goal outlined at Art. 5(a). Some observers have wondered a) whether other countries will move in the direction of the U.S. precedent, and b) whether proponents would invoke the Convention as authority to do so. The prevailing view is that the Convention still does not have the required political influence. *"Pacta Sunt Servanda"* has not sunk in, largely because of the failure to identify the treaty for what it is.

7. THE ONGOING CHALLENGE

The legal components of the Convention are in danger of being treated as a dead letter outside the courts; and without those legal components, it is questionable whether the document can be accurately labelled a "Convention". Treaties do not exist to exert merely "moral suasion", but to outline binding legal commitments. If the Geneva Conventions confined their impact to moral support of the Red Cross, they would still have some value, but they would obviously fall short of being the safeguard of human rights that they are today. The World Heritage Convention must be viewed in the same light.

Countries which adhered to the Convention must decide what to do with it. The List can be used as a vehicle of moral suasion; but the treaty can do far more, particularly at Art. 5. Proponents of heritage can insist on proper laws, financial measures, plans, training programs etc. One need not either trivialize the treaty, or hide its legal components in the closet. This is almost the only international legal document on the subject: it should be used for everything it's worth.

Professionals in the heritage field make it their business to capitalize on resources; the Convention is itself a resource which should be treated in the same way.

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17. Public Buildings Cooperative Uses Act, 1974, 40 U.S.C. s.606 et seq. Major states in the U.S.A. have comparable legislation: see A Handbook on Historic Preservation Law, C.J. Duerken, ed. National Trust for Historic Preservation, Washington, 1983. P. 165.

"PACTA SUNT SERVANDA"
Reinterpreting the World Heritage Convention

Marc Denhez, B.A., B.C.L.*

A B S T R A C T

Art. 5 of the World Heritage Convention says States must adopt laws, plans and financial measures (to give heritage sites a function, to integrate them in comprehensive planning, to foster identification and rehabilitation, training centres etc.). Such commitments are legally binding: *pacta sunt servanda*.

The fact that the Convention applies to sites of "universal value" does not obviate these commitments; nor does the fact that States need only use their best efforts. However, these obligations are overlooked: attention focussed on the World Heritage Committee and its List. That is like saying that the Geneva Conventions are not about prisoners but about Red Cross meetings. The notion that the Committee and its List are the legal crux of the Convention (i.e. Art. 5 merely constitutes "moral suasion") is inconsistent with legal principles and was refuted by at least one national supreme court. However there has been political reluctance to invoke the Convention to press for better legislation. This paper urges a reinterpretation of the Convention: the legal obligations of adhering States should not be trivialized, but used as the basis of proposals for better domestic laws, plans and financial measures.

"PACTA SUNT SERVANDA"
La réinterprétation de la Convention sur le patrimoine mondial

Me Marc Denhez, B.A., B.C.L.+

RESUME

L'art. 5 de la Convention sur le patrimoine mondial oblige les Etats à adopter des lois, des plans et des mesures financières (afin d'assigner des fonctions aux sites, de les intégrer aux plans d'aménagement, de promouvoir leur identification et leur réanimation, d'établir des centres de formation etc.). Ces engagements sont des obligations juridiques: *pacta sunt servanda*. L'application de la Convention aux seuls sites "de valeur universelle" n'infirme pas ces engagements, non plus que le fait que les Etats soient obligés seulement à se servir de la diligence raisonnable. Cependant, ces obligations sont négligés: l'intérêt des Etats est axé sur le Comité du patrimoine mondial et sa Liste. C'est analogue à la supposition que les Conventions de Gèneve ne portent pas sur les prisoniers mais plutôt sur les réunions de la Croix Rouge. L'hypothèse présumant que le Comité et sa Liste sont le noyau juridique de la Convention (*ergo* que l'art. 5 ne représente qu'une déclaration de bonne volonté) est démentie par la doctrine et par au moins une cour suprême nationale. Cependant, une répugnance politique retarde l'invocation de la Convention comme source d'une meilleure législation. L'auteur revendique une reinterprétation de la Convention: les obligations juridiques des Etats ne sont pas des banalités, mais des sources légitimes de meilleures lois, plans et mesures financières au niveau national.

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* Barrister and Solicitor, Ottawa, Canada. Counsel to six governments on heritage legislation.

+ Avocat, Ottawa, Canada. Conseiller auprès de six gouvernements, au sujet de la législation portant sur le patrimoine.