

IMPLEMENTATION OF THE 1970 UNESCO CONVENTION BY AFRICAN STATES: THE FAILURE TO GRASP THE NETTLE

Background paper

by

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for participants in the

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INTRODUCTION: AN OLD STORY

I cannot resist beginning this study without repeating what I said in the introduction to my 2000 article in the UNIDROIT house journal *Uniform Law Review*. In the paper titled: “The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration”, I lamented that:

The majority of African countries that could benefit by becoming States Parties to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property are not States Parties. Since the Convention came into force on 24 April 1972, there have been only twenty African States Parties. ... the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ...1995 ... entered into force on 1 July 1998 ... Not a single African country is a State Party, although Burkina Faso, Cote d’Ivoire, Guinea, Senegal and Zambia are signatories to the Convention.²

Today, twelve years on, twenty seven African countries are now members of the 1970 Convention, while just two (Gabon and Nigeria) have joined the 1995 Convention. The African representation is therefore 50% and 4% respectively. The twenty seven countries who are members are: Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d’Ivoire, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Gabon, Guinea, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, South Africa, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe. Notable among the countries that are not States Parties are Ethiopia,³ Ghana and Kenya. Geographically, all five North African

² *Uniform Law Review*, NS –Vol. 5 (2000), 219.

³ Ethiopia ratified the 1970 Convention and the Decree was published in the National Gazette (Federal Negarit Gazeta) dated 28 October 2003 containing the proclamations number 373/2003 and 374/2003 of the ratifications of the 1954 Hague Convention and its First Protocol as well as of the 1970 UNESCO Convention). However, in the official UNESCO lists of States Parties to these two Conventions Ethiopia is missing. This means that the official

countries are States Parties. West Africa has a good representation, while Southern Africa is poorly represented. Linguistically, Francophone countries are better represented than Anglophone ones. The country survey - snapshots - that follows focuses first on States Parties before looking at the inadvertent efforts of non member countries.

COUNTRY SURVEY – MEMBER STATES

Algeria

Ordinance No. 67-281 of 1967 relating to the excavation and protection of Natural and Historic Sites and Buildings declare as state property all objects discovered during excavation or inadvertently, no matter the legal status of the building where the discovery is made. Likewise the ownership of movable objects discovered during excavation or inadvertently in Algerian territorial water belongs by right to the state.

Egypt

Egypt, of course, stands in a class of her own. She became a member of the Convention on 5 April 1973. Ten years later the country promulgated what can be called its implementation act with the enactment of the pivotal Egyptian Law on the Protection of Antiquities (1983), Law 117 as it is known. It declared that all antiquities are strictly regulated and considered to be the property of the state. It prohibited the possession of antiquities. It also prohibited trade in antiquities. All archaeological material, ancient art and artifacts of any kind that are discovered or found within the republic of Egypt are *regulated cultural property*. Any person who unlawfully smuggles an antiquity outside Egypt or participates in such an act shall be liable to a prison term with

instruments of ratification have never been deposited with the UNESCO Director General or the Director of the Office of International Affairs. Therefore, Ethiopia cannot be listed as a Party. I am grateful to Edouard Planche of UNESCO for drawing my attention to this situation.

hard labour and a fine. Through Law 117 and the vigorous application of it Egypt has been able to secure the return of thousands of antiquities smuggled out of the country. There is now a draft legislation that will strengthen Law 117, increase the penalties against looters and traffickers, and impose intellectual copyright controls on key Egyptian images and monuments, such as the pyramids.

Article 35 provides that all antiquities discovered by foreign archaeological missions are state-owned property. However, it can be decided to reward those missions that do particularly remarkable work in excavation and restoration by offering some of the movable antiquities recovered by the mission to a museum that it indicates so that they are displayed there on its behalf. This can occur if there are similar items recovered from the same excavations that have been studied and classified.

Cote d'Ivoire

Cote d'Ivoire joined the Convention in 1990. The Law of 28 July 1987 relative to the protection of Ivorian cultural heritage provides in Article 37 that all archaeological projects are subject to authorisation from the government. In Article 38 it is provided that the author of any discovery, fortuitous or not, resulting notably from officially authorised excavations or from public or private works, must declare the discovery to the Ministries of Cultural Affairs and Mines. The author of any discovery is personally and financially responsible for the safekeeping of the antiquities, which can in no event be sold, transferred, or distributed before the government decides upon their permanent status.

Madagascar

Madagascar became a member of the Convention in 1989. Article 2 of Madagascar's Order of 6 November 1982 on the Protection, Safekeeping and Preservation of National Heritage has an innovative provision not seen in any other cultural property law in sub-Saharan Africa to the

effect that: “*All citizens of the Democratic Republic of Madagascar are responsible for watching over the preservation of national heritage property.*” Specifically, however, Article 25 prohibits the export of antiquities. Article 39 stipulates that archaeological excavations cannot be undertaken without the authorisation of the Minister concerned, and Article 42 provides that the state has the right to ownership of all property discovered during excavations and as a result of research. Article 45 states that the finder of cultural objects as a result of excavation is obliged to notify the local authorities within three days following such a discovery. Article 49 stipulates unambiguously that any national heritage property acquired in breach of the Order will be confiscated by the state. Finally, article 56 provides that any person who destroys, damages, mutilates or knocks down classified or registered cultural property will be sentenced to a period of imprisonment ranging from one month to two years and to a fine.

Mali

Under the impetus of Alpha Oumar Konare, Mali has a proactive legislative and management policy for the protection of Mali’s cultural heritage. Konare was head of the national historic and ethnographic heritage division from 1976 to 1978, Minister of Culture from 1978 to 1980. Later he became the President of ICOM and later still he became the President of Mali. Under his leadership a legal frame work was set up allowing for an effective campaign against looting and trafficking. Starting in 1985 a series of laws were passed, and two years later, in 1987 Mali ratified the 1970 Convention. On 26 July 1985 Law No. 85-40 concerning the protection and promotion of the national cultural heritage was passed. This was followed on 4 November 1985 by the enactment of the Decree No. 275 regulating archaeological excavations. Under Article 11 of this Decree all objects of a movable or fixed nature discovered in the course of excavations performed on or in the soil of the

public domain are the property of the state. On 26 July 1986 a specific legislation, Law No. 86-61 controlling traders in cultural objects was promulgated following France as one of the few countries controlling the activities of dealers in items of cultural heritage. Another Decree was promulgated on 19 September 1986 (Decree No. 999), regulating the excavation and marketing of cultural objects. Finally in the framework of the 1970 Convention, Mali and the United States signed an agreement in 1997 restricting the import of the Niger Valley's archaeological heritage and items from the tellem caves of Bandiagara.⁴

Mauritania

Mauritania became a member of the 1970 Convention on 27 April 1977. Earlier on 31 July 1972 Mauritania promulgated the Law relating to the Preservation and Cultural Promotion of the National Prehistorical, Historical and Archaeological Heritage. Article 1 boldly asserts that it is considered as state property all movable and immovable property of national interest from the viewpoint of prehistory, pre-Muslim history, Muslim history, philosophy, or art and archaeology, existing on and in the ground of real property belonging to the public or private domains of the state, of local authorities, or of public establishments, regardless of whether the said property has been subject to any kind of concession. *Such movable and immovable property is imprescriptible*, and can be neither disposed of nor destroyed without authorisation from the Ministry in charge of cultural affairs. By virtue of Article 2 *private individuals in ownership and possession of cultural antiquities remain undisturbed in their ownership and possession thereof, the state, however, reserves the right to establish servitudes over them on the grounds of public interest*, including the right of authorities to carry out investigations, visiting rights of the public, and obligatory upkeep. In the

⁴ See S. Sidibe, "Mali: When Farmers Become Curators", UNESCO's *Courier*, April 2001; http://www.unesco.org/courier/2001_04/uk/doss22.htm.

latter case state aid would be available in the case of large-scale repair work and/or restoration. The exportation of antiquities is forbidden.

Nigeria

Although Nigeria is the third member country of the 1970 Convention its ratification having taken effect from 24 January 1972, it has done precious little to implement the Convention. The current legislation for the protection of both moveable and immovable cultural heritage is the National Commission for Museums and Monuments Act 1979. The report of the Inter-Ministerial Committee on the Looting of Nigeria Cultural Properties in 1996, recommended, among others, various amendments to the 1979 Act but to date they have not been implemented.

South Africa

Surprisingly South Africa is a recent State Party to the 1970 Convention, its membership taking effect from 18 December 2003. That notwithstanding in 1999 she enacted perhaps the most comprehensive heritage legislation in Africa south of the Sahara. The introduction to the act says that it is being promulgated in order to introduce an integrated and interactive system for the management of the national heritage resources; and to empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations. The National Heritage Resources Act of 1999 establishes South Africa Heritage Resources Agency together with its Council to co-ordinate and to promote the management of heritage resources at all levels. It introduced the system of heritage inspectors whereby each member of the South African Police Services and each Custom Official is deemed to be a heritage inspector. He must therefore be able to identify antiquities about to be exported and confiscate them if a permit is not produced.

Zambia

Zambia ratified the 1970 Convention on 12 June 1985 and is signatory to the UNIDROIT Convention. The National Museums Act and the National Heritage Conservation Commission Act 1989 are the current law on illicit traffic and preservation of cultural property, but they are outdated and new legislation is required to combat illicit traffic in cultural property

Zimbabwe

Like Zambia, Zimbabwe has ratified the 1970 Convention and signed the UNIDROIT Convention. The National Museums and Monuments Act was enacted to, among other things combat the illicit traffic in cultural property. The National Museums and Monuments is the institution mandated to protect Zimbabwe's cultural heritage. The National Archives and National Art Gallery are the other institutions that have complemented museums in their cultural heritage protection mandate. At the 2011 UNESCO Windhoek , Namibia workshop on prevention and fight against illicit traffic in cultural property, the representative of Zimbabwe maintained that "Zimbabwe has lost more than eight million museum artifacts and objects and these ranged from ethnographic, historic, and archaeological to geology, paleontology as well as specimens from different categories of biological sciences."⁵

COUNTRY SURVEY – NON MEMBER STATES

Benin

Benin's Law No. 20 of 2007 on the Protection of Cultural and Natural Heritage declares in Article 2 as state property the result of archaeological excavations, regular or clandestine. Under Article 82, archaeological goods moveable or immovable, discovered in the territorial water of Benin are regarded as Beninese state-owned property.

⁵ Report on the Workshop of Prevention and fight against Illicit Traffic of Cultural Goods in Southern African Region: Current Situation and Way Forward, 14-15 September 2011, Windhoek, Namibia, p.15.

Botswana

At the 2011 Windhoek workshop the representative of Botswana admitted that her country did not subscribe to both the UNESCO and UNDROIT Conventions because membership was not priority. The country was also not involved in the work of the Intergovernmental Committee for the Return of Cultural Property. But an assessment of the amount of cultural heritage belonging to Botswana and currently found in foreign museums has made the two Conventions very critical she said, and which called for a change of approach. She went on to say that the recent adoption of the heritage concept makes it even more crucial and worthwhile to ratify the two Conventions because a lot of heritage in its different forms is being trafficked every day, even in the form of poaching in Botswana. Botswana is thus working on the ratification of the Convention

Democratic Republic of the Congo

Article 34 of DRC's law Concerning the Protection of Cultural Property of 1971 has a unique provision attempting to deter illegal export. It provides that no person resident abroad who habitually or occasionally purchases objects of antiquity for resale may collect in the DRC such objects of DRC's origin whether they are classified or not. Moreover, the same prohibition applies to any person acting as agent for some other person even if he resides in the DRC.

Kenya

In 1983 Kenya enacted two laws on the protection of the cultural heritage, namely, the National Museums Act, and the Antiquities and Monuments Act. Section 24 of the Antiquities and Monuments Act provides that "[a]ll antiquities which are lying or under the ground ... or ... objects of archaeological or palaeontological interest ... discovered in a part of Kenya ... shall be the property of the Government."

Lesotho

Lesotho has not ratified the 1970 Convention nor the 1995 Convention. This is not surprising because as was said at the Windhoek workshop there are no operational bodies such as heritage council or commission, which are meant to add support to the efforts of the department of culture in the preservation of the cultural objects. There is a lack of inventorying of cultural objects. Lesotho has only one museum called Morija Museum and the inventorying of the contents is not done regularly. Lesotho has the Historical Monuments, Relics, Fauna and Flora Act of 1967 and the National Heritage Resources Act of 2011. When it comes to the police, customs and immigration they lack knowledge on heritage matters.

Malawi

Malawi has not ratified the 1970 Convention or the 1995 Convention. It has however legislations that are aimed at fighting the illicit traffic in cultural property. They include Museums Act 1989 and Monuments and Relics Act 1990. The representative of Malawi acknowledged that there is need to speed up the process of the ratification of the Conventions as a means of fostering international law enforcement cooperation with those that have ratified them.

Namibia

Although Namibia the host of the Windhoek workshop is yet to ratify the 1970 and 1995 Conventions it has various legislations for the protection of cultural property and prevention of illicit traffic in cultural objects. The principal ones are the National Heritage Act 2004, National Art Gallery of Namibia Act 2007, National Arts Fund of Namibia Act 2005 and National Policy on Arts and Culture Act 2001. The National Heritage Act borrowed concepts from South Africa's National Heritage Resources Act of 1999. For example, it introduced the office of heritage

inspectors with police powers. In addition, Namibia like Botswana is working on the ratification of the Convention.

Swaziland

It was indicated at the Windhoek workshop that Swaziland has started moves to ratify the 1970 Convention. In the meantime the operative law for the preservation and protection of the country's natural and cultural heritage is the National Trust Commission Act 1971, as amended by the King's Order I Council of 1973.

SUMMARY OF COUNTRY SURVEY

It does not appear that any country in Africa that is a State Party to the 1970 Convention, whether south of the Sahara or not, has any implementing legislation for the proper operation of the Convention in their countries. But then looking at the issue globally, the United States is one of the few Member States with implementing legislation through the 1983 Convention on Cultural Property Implementation Act. Australia is another country that gives effect to the Convention through the Protection of Moveable Cultural Heritage Act 1986. Even Egyptian Law 117 is not expressly designated as implementation legislation. Some countries however have enacted laws that have inadvertently in a way *implemented* the Convention in their countries. It is interesting to note that it was in the same year 1983, that Kenya (a non-member) and Egypt (a member) declared state ownership of cultural property. Both Madagascar and Mauritania (States Parties) appear to have a firm grasp of the problem of tackling the scourge of looting and illicit trafficking. Madagascar in her legislation passed seven years before joining the Convention states that the law is an attempt *totally or partially* to stop looting and illicit trafficking. This is a most realistic appreciation of the intractable nature of the twin headache. Mauritania's legislation enacted five years before membership of the Convention talks about the

imprescribibility of cultural property, movable or immovable. In other words, the law recognizes that cultural objects are *res extra commercium*. The Mauritanian law was passed in 1972, and that of Madagascar in 1982. In some significant respects the provisions were ahead of their time and anticipated Kenya's Antiquities Act 1983, and Egyptian Law 117 also of 1983. These African examples illustrate the fact that States need not pass an act on implementation of the Convention. They may operate the Convention through another Act or a raft of legislative provisions. For example, the United States use of her Stolen Property Act and Archaeological Resources Protection Act and others have been utilised to combat illicit trafficking in cultural property. The United Kingdom has not passed new legislation since it became a member of the Convention but uses existing powers under other Acts and one new piece of legislation on criminal import of illicitly exported cultural objects [Dealing in Cultural Objects (Offences) Act 2003]. The danger in this approach is that if the relevant laws are not clearly spelt out anyone wishing to recover an object may have a difficult time establishing his case.

REASONS FOR NON-ACCESSION

The reasons why sub-Saharan African states have been slow to embrace the Convention include:

1. the failure of African lawyers to show interest in the intricate issues involved in the return and restitution of cultural objects, resulting in ignorance of the benefits to be derived from membership of the Convention;
2. the cost and duration of pursuing cases in foreign courts;
3. the failure of previous attempts to recover cultural objects in foreign courts;

4. erroneous belief that a good domestic legislation could be sufficient. Thus at the Windhoek workshop speakers from those countries (e.g. Botswana and Namibia) that have not ratified the Convention harped on the fact that they have legislations that protect cultural objects as if that amounted to membership of the Convention. Indeed the representative of Botswana claimed that it had “inadvertently implemented [the two Conventions] through the return and existing requests for restitution of some of the country’s heritage in foreign countries”!!!
5. the protracted nature of negotiation for the return of stolen or illegally exported cultural objects. Thus the negotiation between Tanzania and the Barbier Mueller museum in Switzerland for the return of the Makonde mask stolen from the National Museum of Tanzania took twenty years.

THE IMPERATIVE OF MEMBERSHIP

The remaining twenty seven African countries - all in sub Saharan Africa it is necessary to highlight - must do so immediately. As far back as 1981 African countries had been enjoined to do so. In the African Declaration read at the second session of the Intergovernmental Committee for Return and Restitution, African nations had declared that “the Conventions relating to the protection of cultural property should be ratified as a matter of urgency.”⁶ The representative of Malawi at the Windhoek workshop for one urged “the need to speed up” the process of joining on non-members.

⁶ IGC, Second Session (1981), UNESCO Doc. CC-811/CONF.203/10.

UTILISING UNITED STATES IMPORT CONTROL MECHANISM

An import control regime that enforces another country's export restrictions at the national level within narrow limits was one of Paul Bator's most significant proposal in his then seminal article,⁷ but it did not immediately receive the attention it deserved. Fortunately, the United States has now given the lead in the matter. The 1983 Convention on Cultural Property Implementation Act enables the United States to implement the 1970 Convention, and to enter into bilateral or multilateral agreements. "to apply import restrictions ... to the archaeological or ethnological material of [a] State Party the pillage of which is creating jeopardy to the cultural patrimony of the State Party." Such agreement is effective for five years and may be extended for additional periods of five years. The ultimate goal of this international framework of cooperation is to reduce the incentive for pillage and unlawful trade in cultural objects. The State Parties with which the United States has signed agreements include: Bolivia, Cambodia, China, Cyprus, El Salvador, Greece, Guatemala, Italy, Mali and Peru.

It is a matter of surprise that of the twenty seven African States Parties to the Convention only Mali has entered into the special bilateral agreement with the United States. Admittedly presenting a request to the United States Government is a highly technical and formidable challenge. However, that should not constitute an insurmountable obstacle. Given the pivotal position of the United States as an art importing nation, sub-Saharan African countries like Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Niger and Nigeria who are also on ICOMS "Red List" like Mali may think of going through the rigor of negotiating a bilateral treaty with the United States. Admittedly, as it has been pointed out by Patrick O'Keefe in his commentary on the 1970

⁷ P. Bator, "An Essay on International Trade in Art", 34 (1982), *Stanford Law Review*, p.275.

Convention, demanding bilateral agreement to implement Article 9 of the Convention was not intended by its drafters.⁸ However, the United States example has now been followed by Switzerland and Japan.

PARTICIPATION IN INTERGOVERNMENTAL COMMITTEE FOR RETURN OR RESTITUTION

The first United Nations General Assembly resolution (Resolution 3187 of 1973) on the subject of cultural property has the title: “Restitution of works of art to countries victims of expropriation”. The twelve States that sponsored it were all African. The resolution in its preamble deplored “the wholesale removal, virtually without payments, of objects d’art from one country to another, frequently a result of colonial or foreign occupation”; it went on to maintain in the first substantive paragraph that “the prompt restitution to a country of its works of art, monuments, museum pieces and manuscripts and documents by another country, without charge”, will constitute “just reparation for damage done.” It was reaction within UNESCO to UNGA Resolution 3187 of 1973 that led to the establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in 1978.

African countries whose agitation at the United Nations General Assembly led to the establishment of the Intergovernmental Committee have made little use of the Committee’s good offices in the recovery of their expropriated cultural property. At the fifth session of the Committee in April 1987, “a member of the Committee remarked that few complaints were received from Africa”.⁹ One explanation might be the difficulty of completing its Standard Form concerning Requests for

⁸ P. J. O’Keefe, *Commentary on the 1970 UNESCO Convention*, 2nd edition, 2007, Institute of Art and Law, pp.110-113.

⁹ IGC, Fifth Session (1987), UNESCO Doc. 24/C/94

Return or Restitution. But UNESCO assistance is always available to Member States in this regard. Tanzania is the only African country that has filed a case in connection with her stolen Makonde mask. Botswana in her report of the application of the Convention in its country stated that Botswana is not involved in the work of the Intergovernmental Committee. African countries can point to the fact that Greece's request for the return of the Parthenon Sculptures, which goes back to 1984, remains unrequited. But Greece offers African countries an object lesson in determination and persistence, for it has never failed to raise the return of the sculptures at all subsequent meetings of the Committee in spite of the regular negative British response. Indeed, the fourth Committee session was convened at Athens and Delphi and the seventh in Athens, in 1985 and 1991 respectively, at the invitation of the Greek government.

COMBATING ILLICIT TRAFFICKING: MEASURES, ACTIONS AND PROBLEMS

In response to the looting and illicit traffic in cultural property in sub-Saharan Africa, a group of African museum directors, met with European and American museum professionals in Amsterdam, 22-24 October 1997, to discuss ways and means of protecting Africa's cultural heritage.¹⁰ It is sufficient for our purpose here to note that the conference recommended the recognition of a periodically revised "Red List" of categories of objects particularly and presently vulnerable to looting. Thus was born Africa's Red List in 1998. The first edition of ICOM's *One Hundred Missing Object – Looting in Africa* had come out in 1994, to be followed in the following year by ICOM's *Illicit Traffic in Cultural Property in Africa*. Other similar publications followed

¹⁰ H.M. Leyten, "African Museum Directors Want Protection of their Cultural Heritage: Conference on Illicit Trade in Cultural Heritage, Amsterdam (22-24 October 1997)", 7 (1998) *International Journal of Cultural Property*, 261, 264-265.

including: *Illicit Traffic in Cultural Property: Museums against Pillage* (1995) and *Plundering Africa's Past* (1996).

Effective combat of illicit trafficking of cultural property require resources in the form of money, trained manpower, facilities and logistics.

In 1992, the then Director-General of the National Commission for Museums and Monuments of Nigeria told a story at a conference in Italy how his commission was expanding its activities by establishing federal museums all over the federation. He added that the expansion was “being done when the resources available to the National Commission have become *very meager*”¹¹ (emphasis supplied). But why expand at a time of dwindling resources? The story is repeated here however to illustrate that in Africa the money available for the culture sector sometimes, or perhaps we should say is often, not enough. I may add that the situation in Nigeria has not changed. The lack of money of course impacts on everything else in the fight against illicit traffic in cultural property.

The picture that emerges at the Windhoek workshop is typical enough of the situation in sub-Saharan Africa. The recurring issues are need for proper legislation, adequate security of museums, capacity building of museum professionals, inadequate database, promoting public awareness and training of law enforcement personnel.

Strengthening and Upgrading Legislations

The legislation of several countries in sub-Saharan Africa for the protection and preservation of cultural property has many defects. There is the need therefore to review the existing legislation in individual countries which, in many cases, is very much inspired from European laws and is not always adapted to the present African realities. It is important to bear in mind that certain basic provisions are indispensable

¹¹ The story is fully told in F. Shyllon, “Cultural Heritage Legislation and Management in Nigeria”, 5 (1996) *International Journal of Cultural Property*, 235, 248.

for the successful protection of Africa's cultural property, having regard to the present administrative inadequacies, the related problems of looting of archaeological sites, and stealing and smuggling of cultural objects. The following provisions are necessary:

1. all archaeological objects belong to the state;
2. antiquities cannot be owned by private individuals;
3. cultural objects being *res extra commercium* (non-tradeable property) trade in them must be prohibited;
4. all possessors of antiquities must register them with the state;
5. export of cultural objects without the state's licence should be prohibited;
6. clear guidelines on lending of antiquities for exhibition abroad;
7. sanctions and penalties must be deterrent in scope and depth;
8. rescue archaeology programmes must be guaranteed;
9. close supervision of archaeological excavations;
10. coordination of the work of the national police, customs and immigration;
11. compilation of inventories of heritage in and out of museums and the need of visual documentation;
12. prompt communication of precise details of losses to INTERPOL, ICOM and other organisations;
13. educating the public and school children of the harmful effects of illicit traffic;
14. local government authorities to be involved in cultural heritage management in their areas;
15. acquisition and de-accessioning must conform to ICOM standards;
16. obligation to enter into beneficial bilateral and multilateral co-operation agreements with other countries; and
17. establishment of sound administrative machinery to supervise the implementation of the legislation.

It is important in our present predicament to declare and create state ownership of all antiquities. Such a pivotal provision has been of immense help to Egypt whose 1983 Law on the Protection of Antiquities has helped her to secure return of stolen antiquities. Egyptian Law 117 prohibits private ownership, possession or trade in antiquities, and imposes sanctions for violations including prison terms with hard labour. Even a person who “accidentally defaces” an Egyptian antiquity faces imprisonment. In the celebrated Frederick Schultz case¹² when asked who owns all recently discovered antiquities, one of the witnesses, Gaballa Ali Gaballa, then Secretary General of Egypt’s Supreme Council of Antiquities, responded “the Egyptian government, of course”, and he added that a finder of an Egyptian antiquity could never legally keep it. The Federal District Court for the Southern District of New York held that a foreign law declaring state ownership of antiquities can make an object “stolen” for the purposes of U.S. law¹³ – even if the object was not “stolen” in the traditional sense. The case is a first for New York in basing a criminal conviction on a foreign “patrimony” law claiming state ownership of antiquities. Accordingly, the court ordered the return to Egypt of an antiquity stolen from Sakkara, and the object was duly returned. On appeal, the U.S. Court of Appeals for the Second Circuit affirming the decision concluded that Egyptian law is “clear and unambiguous” and that the objects Schultz received¹⁴ “were owned by the Egyptian government.”¹⁵

It has long been argued by the art trade and many collectors, that “nationalisation laws” are somehow not legal, and that the courts in the West, particularly those in the two main market countries, the U.S. and

¹² *United States v. Schultz*, 178 F.Supp, 2d 445(S. D. N.Y. 2002)

¹³ National Stolen Property Act, 18 U.S.C. section 2314.

¹⁴ From Jonathan Tokeley-Parry who was himself convicted in the Crown Court in London which conviction was affirmed by the Court of Appeal.

¹⁵ Frederick Schultz, the former President of the National Association of Dealers in Ancient, Oriental and Primitive Art, served a 33-month sentence for receiving stolen Egyptian antiquities at a Federal prison in New Jersey.

the U.K. should disregard them. The Schultz case and the conviction of Tokeley-Parry appear to reject that thinking. The trial judge in the Schultz case opined that “Law 117 on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation.” The judge went on to say : “In effectuating this policy, why should it make any difference that a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archaeological importance, rather than leaving them in private hands.” The Crown Court in London in the Tokeley-Parry case went further, and expressed its understanding of the scale of the problem for loser countries, and in sentencing Tokeley-Parry, the court stated that there had to be a deterrent factor in the length of sentence for this type of crime. The comments of the court and the length of sentence¹⁶ were later endorsed by the Court of Appeal.¹⁷

The proposed revised law should make it clear and unambiguous that the government owns her antiquities.¹⁸

Towards Harmonisation of African Cultural Property Laws

The next stage should be the harmonisation of laws through the African Union, (or initially through sub- regional groupings like ECOWAS, the Economic Community of West African States), as is

¹⁶ He was jailed for six years for dishonestly handling antiquities and another count of making a false statement to procure a passport.

¹⁷ Richard Ellis, “The Fred Schultz Case – An Example of International Cooperation Between Police, Archaeologists and Legal Experts.” Paper presented at *International Expert Meeting on the Return of Cultural Property and the Fight Against its Illicit Trafficking*, Korean National Commission for UNESCO and Cultural Properties Administration of the Republic of Korea, 30 September – 3 October 2002 at pp.161-165.

¹⁸ It must be added that UNESCO and UNIDROIT have just prepared with selected experts, and made available to the public the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects. They are aimed at facilitating the application of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Each State is encouraged to implement the Model Provisions for a standardised understanding of State ownership of cultural property and better focused effort at its protection. The Model Provisions however do not constitute a binding legal instrument. <<http://www.unesco.org/new/en/culture/themes/moveable-heritage-and-museums/restitution-of-cultural-property/standards-for-ownership/>>

being done in the European Union, for example, through the Council Regulation and Directive.¹⁹

AWARENESS

Nonetheless, no legislation no matter how well crafted will of itself end the looting of archaeological sites and illicit traffic in cultural property. It can however minimize and reduce these damaging and nefarious activities. It must be complimented by education and public awareness programmes. The local people can be educated as to the existence of law prohibiting looting of sites and their attention drawn to the irreparable damage being done to their heritage. This could raise the awareness of the local people and encourage them to get involved in protecting their heritage. In other words, the locals can become the curators of their treasures. The general public should be sensitized too. At the Windhoek workshop one speaker was of the view that looting and trafficking is done in the rural areas where most of the prized objects are and the locals are convinced or bribed into selling, sometimes for a very small fee.

What is responsible for the current unfortunate situation is the breakdown in the old social constraints. When Leo Frobenius the intrepid German explorer visited Ibadan in South West Nigeria in 1910, he found to his dismay that the people could not be cajoled into parting with their cultural and spiritual objects; “a man most decidedly runs the risk of being jeered at everywhere for selling what is sacred to others, but belongs to him alone.” In one place he had marked down “a fine lot of ceremonial furniture in the temples, but not a soul had any idea of selling.” And whenever he found anyone willing to sell, one of two things happened: either such a price was asked “as to place them beyond

¹⁹ European Council Regulation on the Export of Cultural Goods (the “Council Regulation”) of 9 December 1992, and the European Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (the “the Council Directive”) of 15 March 1993.

the reach of acquisition for museums, or rich relatives offered poor relatives willing “to part with a good antique ... substantial sums in order to retain the family possessions.”²⁰

SENSITIZING ENFORCEMENT AGENCIES

Law enforcement agencies particularly the Police and Customs must be able to identify historical artifacts. This means training them to be able to identify what are and what are not antiquities. At the Windhoek workshop of 2011 speakers for South Africa and Namibia who have introduced the system of heritage inspectors with police powers emphasized the need to train them. The contribution by the representatives of South Africa shows that she has perhaps the most sophisticated training scheme worthy of emulation by other countries. There are training seminars about illicit trafficking at the University of Pretoria and Police officers are made aware of the importance of combating heritage related crimes. The training includes how to identify, handle and store heritage objects, and the list of contact details of experts is distributed to the police. This is to ensure that, should the police find a possible stolen heritage object, they could be in immediate contact with an expert who could identify the object and advise on correct handling and storage. Other initiatives include a brochure containing reporting procedures; the purpose of the brochure is to create awareness of reporting procedures within the heritage community. This will ensure museums and other custodians of heritage objects follow correct procedures after thefts, which could expedite police processes. When it comes to national cooperation, the National Forum for the Law Enforcement of Heritage related matters (NALEH) has been established to create a platform for a working relationship between law enforcement and heritage officials. This allows for the dissemination of information

²⁰ L. Frobenius, *The Voice of Africa: Being an Account of the Travels of the German Inner Africa Expedition in the Years 1910-1912*, translated by R. Blind (Murray, London, 1913), 2 volumes, Vol. 1, pp. 50-51.

and the sharing of ideas regarding the protection of cultural property and since its inception in 2005, NALEH has had a number of success stories. Members of NALEH include the South African Police Service, Customs, Interpol, South African Heritage Resources Agency, ICOM-South Africa and the University of South Africa.

SENSITIZING THE LOCAL COMMUNITIES

There is certainly the need to educate “source” communities in the fight against illicit trafficking of cultural property not to dispose of their cultural objects to dealers. Also they must be educated to spurn the allure that could be derived from illegal archaeological digging. As Klena Sanogo has revealed with regard to Mali, the actual looters (the first link in the chain), are local people who are completely unaware of the notion of cultural patrimony and are concerned only with problems of survival, and they do not come into direct contact with the art market.²¹ The speaker from Botswana at the Windhoek workshop spoke in the same vein. The people of the “source” communities have a low understanding of trafficking. To them as long as there is money given in return for what is taken, they regard it as a legal transaction. Therefore most of the looting and trafficking is done in the rural areas where most of the prized objects are and the locals are convinced or bribed into selling, often for a very small fee. On the other hand, the most worrying category of looters, though, are the organized groups, who as Sanogo writes are recruited and supported by the antiquities dealers. There is therefore an urgent need to call for public education aimed at building capacity of communities. Sanogo in his article on the situation in Mali discloses that the attitude of local people changes radically when their cultural relations with archaeological sites are established. For example, although the inland delta of the Niger is the area where looting is most

²¹ K. Sanogo, “The Looting of Cultural Material in Mali”, Translated from the French by Katie Boyle, 4 (1999) *Culture Without Context*,

severe, a site such as Toguere Somo is completely protected simply because it is accepted that it sheltered Sekou Amadou, the founder of the Peul Empire of Macina, just before one of his battles. Affinity to the local people is the best guarantee for the protection of cultural material since it is ensured by the people themselves. This confirms the practical experience of the West African Museum Programme (WAMP) which asserts that in the preservation of the cultural heritage of the community, the main responsibility fall more on the local museums than on the centrally-controlled national museum.²²

SECURITY OF MUSEUMS

The representative of Zimbabwe at the Windhoek workshop warned that museum buildings should not be the weakest link in the fight against illicit trafficking in cultural property. This is an important point to make. Unfortunately, in sub-Saharan Africa, subject to few exceptions, South Africa, for example, the museums lack adequate security. At the Windhoek workshop, the representative of Malawi admitted that security measures in museums need to be tightened to prevent theft of objects. Lesotho frankly admitted the “absence of a museum structure” in the country having as a consequence that “the objects are not well documented. This can lead to easy trafficking of them.” With regard to Nigeria, I wrote in 1996: “At the moment, national museums across the country lack critical security infrastructure namely, well trained security personnel, electronic burglary alarm systems and close circuit television monitoring systems.” After sixteen years the situation has not changed. Small wonder then that at the Conference on the Protection of African Cultural Heritage held in Amsterdam in 1997, some Western experts demanded that Africa should first put her house in order. Appropriately, the speaker on behalf of Zimbabwe at Windhoek suggested that museum

²² C.D. Ardouin and E. Arinze, *Museums and the Community*, James Curry Publishers, London, 1994.

professionals should not allow unauthorized access through break-ins, and “museum buildings that exist need strengthening by prioritizing physical security.” He concluded on this issue that: “Electronic systems to assist more effective monitoring of movement; entry and exit into and from different security areas of the museum building should be installed.” This passage is gently also hinting at the issue of corruption among some of Africa’s museum professionals. Professor Frank Willet, a specialist in Benin art, was reported in the London *Times* of 7 December 2001 as saying that “the bronzes could not go back to Nigeria while there were allegations of corruption and museum staff selling items.” The management of museums must ensure that the game keepers do not become poachers.

DATABASE

If inventories and accurate descriptions of cultural objects do not exist, it will be very difficult subsequently to establish where the object came from and to whom it really belongs. Successful law suits for the return of cultural objects generally occur where the objects are documented and their ownership is clear. The critical role of adequate registration and documentation in the fight against illicit traffic in cultural property has been emphasized again and again in discussions at every session of the Intergovernmental Committee to date. At the Committee’s inaugural session held at the UNESCO headquarters in Paris in May 1980, “several delegates and observers brought up the question of inventories of cultural property, stressing the fundamental importance of such instruments.”²³ And at the tenth session in Paris in January 1999, it was concluded that: “documentation is of crucial importance for the protection of cultural property, since, without a precise description and photographs, it is difficult for the legitimate

²³ IGC, First Session (1980), UNESCO Doc. 21 C/83.

owner to recover it.”²⁴ Botswana’s report at the Windhoek workshop is not encouraging. The collections at the Botswana National Museum have been documented manually, but electronic documentation is lagging behind. Without a proper electronic documentation and inventorying system, the collections are not well organized. Therefore in the case of theft, it is not easy to pass information to the law enforcement agencies, let alone posting information on the internet for the international audience. Lesotho said inventorying in the only museum in the country, the Morija Museum is done regularly. Namibia confessed it had inadequate inventory system. Swaziland too did not indicate any satisfactory inventorying system. Her inventorying system appears to be done manually. “Objects, photographs, artworks etc. kept in the national museum and the national archives are securely kept and marked to be easily detected for the purpose of protecting them from would be smugglers and thieves. They are marked and these marks cannot be easily removed,” Swaziland’s report optimistically said. An indication of the sophistication of South Africa’s system has already been given. Most museums in the country establish and update their own inventories independently. A major challenge is the lack of a centralized national database. The South African Heritage Resources Agency (SAHRA) is in the process of identifying and inventorying state owned collections and objects, especially focusing on those at risk. The medium and long term outcome of the project was to establish the South African Heritage Resources Information System (SAHRIS), which will serve not only as a digitized inventory of cultural resources, but also as a management tool to effectively and efficiently monitor cultural property. It is obvious that South Africa is forging ahead in establishing a first rate inventorying system. The same cannot be said, for example, about

²⁴ IGC, Tenth Session (1999), UNESCO Doc. 30/C/REP.4.

Nigeria that failed to embrace electronic and digitised inventorying system. Many other countries are in the same league as Nigeria.

HARMONISATION OF OBJECT IDENTIFICATION USING *OBJECT-ID*

The *Object ID* project, was originally created and coordinated by the Getty Information Institute, but now managed and promoted by ICOM was the outcome of collaboration among UNESCO, the Organisation for Security and Cooperation in Europe (OSCE), the Council of Europe, the European Union, ICOM, INTERPOL and the United States Information Agency (USIA). The General Conference of UNESCO at its 30th session in November 1999, recommended that all Member States use and promote Object-ID following its endorsement by the Intergovernmental Committee at its 10th session as the international core documentation standard for recording minimal data on moveable cultural property and for identifying cultural objects with a view to combating illicit traffic in cultural property. Object-ID is also compatible with other existing databases, as well as with the CRIGEN-ART form used by INTERPOL to collect information on stolen cultural property. Its adoption by all African countries is therefore strongly recommended. Thus at the Windhoek workshop Karl-Heinz Kind, Coordinator Works of Art Unit at INTERPOL emphasized that Object-ID is regarded as an important strategy for the recovery of stolen objects. African sub-Saharan countries participation is seriously hampered by the very inadequate inventorying systems of several countries. Thus Kind reported that sub-Saharan African representation in its database is almost nil. He said INTERPOL's "most important tool" against trafficking in stolen cultural property is its database currently holding c. 38,000 records of which only 0.5% is from African countries.

THE FLEDGING ART MARKET – LICIT TRADE

John Henry Merryman, once suggested that until recently retentive nationalism dominated thinking about the international movement of cultural property, while the international interest in active licit trade has been ignored.²⁵ In fact an African had, before Paul Bator suggested it,²⁶ felt that a licit internal trade in cultural objects was one sure way of stemming the outflow of antiquities. At the 1972 University of Ibadan, Institute of African Studies, symposium on Nigerian Antiquities, the issue of a licit trade was the centre piece of Bamisaiye's paper. "There should ... be a legal outlet for the sale of Nigerian antiquities. A branch of the Department of Antiquities can be set up solely for the purpose of collecting and selling antiquities." The licit market, he argued, will ensure that the country no longer loses "invaluable art objects without monetary compensation for them." The proposal had nothing to do with "cultural nationalism" or "cultural internationalism." It was borne out of the practical necessity of obtaining a fair price for what is left. As he put it: "It's a purely monetary deal, no sentiments."²⁷

While the Nigerian proposal remains on paper, the Chinese government now conducts a semi-official policy under which excess archaeological materials are channeled to the free market.²⁸ As Gimbere has observed, a normal international traffic of objects which are not of outstanding cultural importance to a particular culture is desirable. This

²⁵ J.H. Merryman, "Two Ways of Thinking About Cultural Property", 80 (1986) *American Journal of International Law*, pp.831-853, 835-836; J.H. Merryman, "A Licit Trade in Cultural Objects", 4 (1995) *International Journal of Cultural Property*, p. 13; C.C. Coggins, "A Licit International Traffic in Ancient Art: Let There be Light", 4 (1995) *International Journal of Cultural Property*, 61. J.H. Merryman, "The Retention of Cultural Property", 21 (1988) *U. Cal. Davis L.R.*477.

²⁶ P. Bator, "An Essay on International Trade in Art", 34 (1982), *Stanford Law Review*, p. 275.

²⁷ A. Bamisaiye, "Investment Possibilities in Nigerian Art", (1972) Special Number, *African Notes*, Journal of the Institute of African Studies, University of Ibadan, pp. 92-94, 93.

²⁸ J.D. Murphy, "The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?", 3 (1993) *International Journal of Cultural Property*, pp. 227-242, 236; J.D. Murphy, "The Imperilment of Cultural Property in the People's Republic of China", (1995), Special Number, *U.B.C.L. Rev.*, pp.91-118.

has been going on for centuries.²⁹ A licit international trade will only be meaningful to Africans, however, if it reverses the present derisory sums trickling into the local economy. If it stops the present inadequate prices being obtained in the underground markets by the dealers it would be worthwhile. The Chinese example is therefore recommended for adoption by African states such as Nigeria and Mali still rich in archaeological materials.

The licit trade however should be governmental and not be linked to auction houses and dealers. This is because as Simon Mackenzie has explained, there is no black trade and white trade in the antiquities market. The interpenetration of illicit into the licit market (a form of “laundering”) is substantial, and the whole market is grey. Auction houses and dealers cannot be relied on to accept only materials that are legally acquired. Mackenzie’s conclusion is uncompromising:³⁰

A study of the antiquities market reveals the interface between illegitimate and legitimate as paramount in allowing crime to profit in the market. The grey market nature of the antiquities trade, where illicitly obtained objects become effectively laundered by insertion into the legitimate streams of supply, allows them then to be sold at high prices they would not command were it indisputable they were illicit.

In Cote d’Ivoire, Mali, Nigeria, Senegal and South Africa art markets have started emerging and some even flourishing. There is Dakar African Art Biennial, and Johannesburg Art Fair. Lagos has ArtHouse Contemporary. They deal mostly in contemporary art and the arrival of auctions have turned this *modus operandi* into a preferred venue for the sale of art works. The public nature of auctions encourages

²⁹ S. Gimbrere, *Illicit Traffic in Cultural Property and National and International Law*”, in Leyten (ed.) *Illicit Traffic in Cultural Property*, pp. 53-60, 59-60.

³⁰³⁰ S. Mackenzie, “The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market”, in S. Manacorda and D. Chappell (eds.), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (New York, Springer, 2011), 69-85, 79.

greater transparency of pricing. ArtHouse in Lagos has held eight auctions since it started in 2008.

The auction houses now constitute new stakeholders in the struggle against illicit traffic in cultural property. Thus they must be invited to future UNESCO workshops on the matter. At one level they have to be inducted into the ethics of their profession as far as the sale of genuine items is concerned. They must subscribe to the various code of ethics enjoining art dealers and auctioneers not to acquire, buy or handle objects of doubtful provenance. At another level, with the proliferation of fake Djenné (Mali), and Nok and Ife (Nigeria) terracottas, they must not be involved in the sale of forgeries. They also have responsibility to cooperate with the law enforcement agencies.

CAPACITY BUILDING FOR MUSEUM PROFESSIONALS

Inadequate conservation capacity was the bane of moveable and immovable heritage management in sub-Saharan Africa three decades ago. Thanks to the ICCROM (International Centre for the Study of the Preservation and Restoration of Cultural Property) programme *Prévention dans les Musées Africains* (PREMA) the situation of movable heritage has drastically changed.

When the first PREMA actions were launched in 1986, the situation of museums in Africa south of the Sahara was more than worrying. Entire collections witnessing African cultures disappeared without adequate reaction from the personnel on site. ICCROM published at the time an *International Directory of Training in the Conservation of Cultural Heritage*, and could easily note the gulf between conservation needs and training opportunities for African museum personnel. A survey was carried out in 1988 to study the contours of the problem. On the basis of the survey results, the PREMA 1990–2000 programme was launched with the following objectives: to ensure the conservation of

sub-Saharan African museum collections; and to establish a network of African professionals who can assume the responsibility of conservation of movable property and future training. After ten years, the primary results were:

- (a) an active network of more than 400 well trained museum professionals from 46 countries of sub-Saharan Africa;
- (b) created a group of teachers, whose percentage of Africans went from 5% in 1986 to 80%;
- (c) a periodical for African museum professionals, the *PREMA Newsletter*;
- (d) the mounting of 8 exhibitions to sensitize the public to the preservation of its heritage; and
- (e) conducted extensive emergency conservation campaigns on national collections of Benin, Cote d'Ivoire, Ethiopia, Ghana, Guinea Konary, Madagascar, Malawi, Zambia and Zimbabwe.

The PREMA programme came to an end in 2000, and was succeeded by the *École du Patrimoine Africain* (EPA) for French-speaking African countries in 1998, and the Programme for Museums Development in Africa (PMDA), for English-speaking African countries in 2000. In 2004, PMDA was renamed CHDA – Centre for Heritage Development in Africa, based in Mombasa, Kenya. EPA, based at Porto-Novo in Benin, is the result of the union between PREMA and the National University of Benin, and created jointly by ICCROM and the National University of Benin.³¹ Both CHDA and EPA share coverage of Portuguese speaking sub-Saharan Africa. CHDA provides quality and innovative training and development support programmes and activities to professionals and institutions responsible for movable and immovable heritage in sub-Saharan Africa. EPA likewise is for training and researching, and specialises in the conservation and development of

³¹ ICCROM *Newsletter* No. 25, July 1999, 8; ICCROM *Newsletter* No. 26, October 2000, 30; PREMA *Newsletter* No. 8, 3–5.

moveable and immovable cultural property. The countries which have benefited from CHDA thus far are: Angola, Botswana, Djibouti, Ethiopia, Eritrea, The Gambia, Ghana, Kenya, Lesotho, Liberia, Namibia, Nigeria, Malawi, Mauritania, Mozambique, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

ANOTHER PLEA

I started this paper by repeating the opening paragraph of my 2000 article: “The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration”. The narrative since the opening of this study has not been particularly elevating on this important matter. I therefore find myself ending this study with a plea just in the same manner that I ended the 2000 article. At the Amsterdam conference on the Protection of African Cultural Heritage in 1997, some Western experts demanded that Africa should put her house in order. African States must indeed do so. Becoming a Party to the UNESCO 1970 and UNIDROIT 1995 Conventions is an important step towards inclusion in the community of States combating the rising tide of theft and pillage of cultural objects all over the world. The twenty seven African countries that have not joined the UNESCO Convention, and the fifty-two African nations that are yet to become States Parties to the UNIDROIT Convention are hereby enjoined to ratify or accede to the Conventions as a mark of their determination to fight a major scourge of our time – trafficking in cultural property. The moral impact of fifty four-African countries acceding to both Conventions should not be under-estimated. It would be a clear signal to the community of nations that Africans are saying that something grave is happening to their cultural heritage, so grave that they are collectively calling in aid the concept of the comity of nations,

which the Judge in the English case of *Bumper Development Corp. Ltd v. Commissioner of Police of the Metropolis*³² used, inter alia, to justify his decision that the idol “Siva Nataraja” should be returned to India.

³² [1991] 4 *Weekly Law Reports*, 638, at 647.