

The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration

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I. – INTRODUCTION

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.¹ Similarly, the majority of African States were absent from the full diplomatic Conference which, in Rome, adopted the text of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects in June 1995. Thirteen African countries sent representatives² and one sent an observer.³ The Convention entered into force on 1 July 1998 between China, Ecuador, Lithuania, Paraguay and Romania. Seven other nations including Italy have joined the Convention. Not a single African country is a State Party, although Burkina Faso, Côte d'Ivoire, Guinea, Senegal and Zambia are signatories to the Convention.

By all accounts, African States appear to be the most vulnerable of any group of countries to illicit trade in cultural property. Such recent volumes as *One Hundred Missing Objects – Looting in Africa*,⁴ *Illicit Traffic in Cultural Property in Africa*,⁵

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¹ Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Egypt, Guinea, Libya, Madagascar, Mali, Mauritania, Mauritius, Niger, Nigeria, Senegal, Tanzania, Tunisia and Zambia. There are fifty-three African member States of the United Nations Organisation.

² Algeria, Angola, Burkina Faso, Cameroon, Côte d'Ivoire, Egypt, Guinea, Libya, Morocco, Nigeria, South Africa, Tunisia and Zambia. Apparently, not all African States were invited to the diplomatic Conference, priority being given to those States that had joined the existing Conventions relevant to the subject: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

³ Ghana.

⁴ International Council of Museums, ICOM, Paris, 1994.

⁵ International Council of Museums, ICOM, Paris, 1995.

*Illicit Traffic in Cultural Property: Museums Against Pillage*⁶ and *Plundering Africa's Past*⁷ attest to this. The objective of this study is to sensitise the authorities in Africa to the advantages to be derived from joining both Conventions; particularly the recent UNIDROIT Convention.

Two issues occupy some space in this paper apart from its central theme. These are legal aid to cover costs of presenting claims in foreign courts to recover cultural objects, and what should be the conceptual framework of the arbitration regime permitted under Article 8(2) of the UNIDROIT Convention. It is if African States can be assisted to prosecute claims and the arbitration regime is user-oriented that full benefits can accrue to African States.

II. – MISPLACED PRIORITY

In the flush of independence, the focus of attention was on objects expropriated in colonial times. This explains why the twelve States that sponsored the first United Nations General Assembly resolution on the subject of cultural property – “Restitution of works of art to countries victims of expropriation” (Resolution 3187 of 1973) – were all African. The resolution in its preamble deplored “the wholesale removal, virtually without payment, of objets d’art from one country to another, frequently as 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.” In 1978, there followed “A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It”,⁸ issued by the then Director-General of UNESCO, Amadou Mahtar M’Bow, himself an African. He lamented that “the vicissitudes of history” had robbed many peoples’ “priceless portion” and “irreplaceable masterpieces” of their inheritance. In the meantime, while the anti-colonial initiatives of African States went ahead in the United Nations General Assembly,⁹ the large-scale theft and pillaging of cultural property in the continent continued apace. This is evidence that while much was lost during the colonial period, much remained to be protected with vigilance. Henrique Abranches, in his 1983 report (to the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation) on the situation in Africa, drew attention to this misdirection of focus. His conclusion was that the problem of protecting the cultural heritage against illicit traffic was “in most countries badly tackled.” He called on Governments and African intellectuals alike to come together

⁶ H.M. Leyten (ed.), Royal Tropical Institute, Amsterdam, 1995.

⁷ P.R. Schmidt / R.J. McIntosh (eds.), Indiana University Press, Bloomington / Indianapolis, 1996.

⁸ UNESCO Doc. SHC-76/Conf. 615.5, 3.

⁹ For a list of resolutions on the subject see *Return or restitution of cultural property to the countries of origin*, UN Doc. A/36/L.22/Rev.1 and Rev.1/Add.1 (1981). The debates on the series of resolutions are summarised in L.V. PROTT / P.J. O’KEEFE, *Law and the Cultural Heritage: Volume III – Movement*, Butterworths, London, 1989, 814-818.

and install a system that could effectively monitor the protection of the cultural heritage.¹⁰ If many works of African art in museums in Europe and North America are stolen or pillaged, much of what is left is in danger of going the same way. Both the UNESCO and UNIDROIT Conventions offer the legal means of recovering stolen, clandestinely excavated and illegally exported cultural objects that still remain in Africa. But not enough is being done to use the means available.

III. – OLD OPTIONS

Prior to the adoption of the UNIDROIT Convention, there were (and are) four options available to any country that sought the return of its cultural property.

(a) *Litigation in foreign courts*

Any State is at liberty to seek redress in the courts of the country or domicile of a defendant who is alleged to have stolen or illegally removed its cultural property, whether or not the requesting State is a member of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. This option is bedevilled by two intractable problems. The first is that prosecution is often difficult with regard to stolen objects because of evidentiary problems.¹¹ The second difficulty relates to unlawfully exported objects in breach of export control and the widespread rejection or reluctance by foreign courts of legislative extraterritoriality well exemplified in *Attorney-General of New Zealand v. Ortiz*.¹² In any case, few African countries can afford the expense involved in foreign litigation.

(b) *UNESCO Convention*

If the requesting State and the holding State are Parties to the Convention, then the requesting State can have recourse to the provisions of its Articles 3 and 7, but the object must be inventoried. As we shall see, African States still have some ground to cover in the area of systematic inventories of their cultural property collections. Furthermore, even where both States are States Parties to the Convention, it is not always easy to succeed, as is demonstrated in *R. v. Heller*,¹³ in which the Government of Canada prosecuted a New York dealer who had imported into Canada a Nok terracotta sculpture illegally exported from Nigeria. Both Nigeria and Canada are Parties to the Convention. The prosecution failed on the technical ground that the Canadian statute implementing the Convention only applied to objects illegally

¹⁰ UNESCO Doc. CLT-83/COF.216/3.

¹¹ J.A.R. NAFZIGER, "The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property", 15 *New York University Journal of International Law and Politics* (1983), 789, 794.

¹² [1982] 2 *Weekly Law Reports* 10; [1982] 3 *Weekly Law Reports* 570; [1983] 2 *Weekly Law Reports* 809.

¹³ (1983) 27 *Alberta Law Reports* (2d) 346.

exported after the entry into force of the Canadian legislation. Expert witnesses had been flown in from Nigeria, but despite the spirited effort of the Canadian Government, Nigeria could not recover the unlawfully exported cultural property. And that was in spite of the fact that the judge in the case accepted that Heller and his co-defendant, Zango knew before the import into Canada that the object had been illegally exported from Nigeria. Accordingly, African States that do not have the resources in any case to prosecute claims in foreign courts have ignored this option.

(c) *UNESCO Intergovernmental Committee*

In 1964, the General Conference of UNESCO, at its thirteenth session held in Paris, adopted the *Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property*.¹⁴ Another recommendation on the same theme was adopted at the 20th session of the General Conference in 1978: *Recommendation for the Protection of Movable Cultural Property*.¹⁵ The purpose of both Recommendations is to protect the national cultural heritage of States by countering the illicit operations which threaten it. It was, however, 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 1978.¹⁶ The Committee held its first session at the UNESCO headquarters in Paris in 1980, and since then has met nine times. The body, composed of 22 UNESCO member States,¹⁷ is primarily a negotiating forum aimed at facilitating bilateral negotiations and agreements for the return or restitution of cultural property, particularly that resulting from colonisation and military occupation to its countries of origin either when all the legal means have failed or where bilateral negotiations have proved unsuccessful.

Surprisingly, 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. One explanation might be the difficulty of completing its Standard Form concerning Requests for Return or Restitution. But UNESCO assistance is always available to member States in this regard. It has been suggested that the lack of initiative is not due to lack of interest. "It is far more likely to be lack of resources, or a certain scepticism as to the likely effect of such initiatives in relation to the amount of

¹⁴ UNESCO, *Conventions and Recommendations of UNESCO concerning the protection of the cultural heritage* (Paris, UNESCO, 1985), 139-146.

¹⁵ *Ibid.*, 209-223.

¹⁶ For accounts of how the Committee came into existence, see PROT and O'KEEFE, *op. cit.*, *supra* note 9, 818-819; "A Brief history of the Creation by UNESCO of an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation", 31 *Museum* 59 (1979).

¹⁷ The original figure was twenty. It was increased to twenty-two by the General Conference of UNESCO at its 28th session in Paris in 1995. UNESCO Doc. CLT-96/CONF.201/INF.4.

work required.”¹⁸ African countries can point to the fact that Greece’s request for the return of the Parthenon marbles, 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 marbles at all subsequent meetings of the Committee in spite of the regular negative British response. Indeed, the fourth Committee session convened at Athens and Delphi and the seventh in Athens, in 1985 and 1991 respectively, at the invitation of the Greek Government. This leads us to say that the African inaction is due to lack of stamina for the necessary follow-up, as Salah STETIE has suggested.¹⁹

It is exasperating to hear that on some occasions, African diplomatic missions have contacted either UNESCO or UNIDROIT on some matter or other and after being told what to do, have failed to follow this up. Are they waiting for UNESCO to do their work for them? A case in point is the “*affaire du Nègre empaillé*”, as a communiqué issued by the Senegalese Ambassador to Italy described it.²⁰ The case concerned the body of an African which was taken from a desecrated grave in Bechuanaland (now Botswana) in 1830, stuffed and put on exhibition at the Musée Darder de Banyoles in Spain. Representations about this grave insensitivity to the entire African continent were made to several authorities, including the Government of Spain and the President of Senegal as acting Chairman of the Organization of African Unity (OAU), which in due course discussed the matter at its Ministerial Conference meeting in Tripoli, Libya, from 24-28 February 1997. The exhibition of the “Stuffed Negro” was deplored as an unacceptable violation of African dignity. The Secretary General of the United Nations, Kofi Annan, and the then Director General of UNESCO, Federico Mayor, were informed of the incident. The “stuffed Negro” was eventually withdrawn from display, but by that time postcards and small sculptured copies of the exhibit had gone on sale.

The OAU’s objective was to recover the “Stuffed Negro” for re-burial in a final resting place. Upon UNIDROIT’s receiving the communiqué, the Senegalese Ambassador was told how the matter could be referred to UNESCO’s Intergovernmental Committee and what additional steps could be taken. It comes as a matter of great surprise that an issue that generated so much outrage in the councils of the OAU has not been taken further. The “stuffed Negro” remains at the museum, the postcards and sculptured copies have presumably now travelled around the world.

(d) *Bilateral agreement*

In the context of bilateral negotiations some outstanding examples of restitution have taken place since de-colonisation. This includes the return of objects by Belgium to the Democratic Republic of Congo, by the Netherlands to Indonesia and by Australia and New Zealand to Papua New Guinea. It is noteworthy that countries which have

¹⁸ PROT / O’KEEFE, *op. cit.*, *supra* note 9, 860.

¹⁹ *Ibid.*, 860.

²⁰ Communiqué dated 6 March 1997, and signed by the Ambassador.

achieved important return programmes have done so with the entire goodwill of the former holding States.²¹

In the area of illicit trafficking in cultural property, both UNESCO and the International Council of Museums (ICOM) have been of great assistance to developing countries in recovering stolen cultural property. The first step is to notify the international community of these thefts in co-operation with INTERPOL. To cite a famous example: in May 1987, UNESCO reported the theft of nine objects from the Jos National Museum in Nigeria. One of these objects, a 15th century Benin bronze head, was subsequently identified at an auction in Switzerland and returned.

In 1983, the United States Congress passed the Convention on Cultural Property Implementation Act to give effect to the 1970 Convention. The Act enables the President of the United States to enter into bilateral co-operation treaties pursuant to the UNESCO Convention to apply import restrictions on cultural property from nations that request such co-operation from the United States. So far, the United States has entered into such a treaty with Mexico and has made similar executive agreements with Bolivia, Canada, Ecuador, El Salvador, Guatemala, Peru²² and lately, with Cambodia and Cyprus. Mali is the only African nation to benefit from such protection. This exceptional measure was taken in the wake of the rampant pillaging of archaeological sites in the Niger River Valley. It is once again a matter of surprise that Mali should be the only African State that has entered into the special bilateral agreement with the United States. It is as though it were the only African country troubled by the scourge of plundering of cultural property. Admittedly presenting a request to the United States Government is a highly technical and formidable challenge. However, that should not constitute an insurmountable obstacle. A request seeking the protection of import controls is submitted to the Director of the United States Information Agency (USIA), which carries out the President's decision-making functions and determines whether a request merits the imposition of United States import restrictions. Fortunately, the USIA is represented in many African countries and there is no doubt that the local branch of the USIA would be only too willing to assist in the difficult task. The important thing is for African States to take the initiative that is too often lacking in matters of cultural property rescue.

From 22-24 October 1997, a group of African museum directors met with European and American museum professionals in Amsterdam to discuss ways and means of protecting Africa's cultural heritage. 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 that are presently particularly vulnerable to looting. For the moment, this "Red List" includes the following categories:²³

²¹ PROT / O'KEEFE, *op. cit.*, *supra* note 9, 860.

²² L.J. BORODKIN, "The Economics of Antiquities Looting and a Proposed Legal Alternative", 95 *Columbia Law Review*, 377 at 389-390 (1995). The agreement with Canada made in 1997 relates to archaeological and ethnological materials of Canada's First Nation peoples.

²³ 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 *International Journal*

- Nok terracotta statuettes from the Bauchi Plateau in the Katsina and Sokoto regions (Nigeria)
- Terracotta and bronze heads from Ife (Nigeria)
- Stone statues from Esie (Nigeria)
- Terracotta statuettes, bronzes and pottery (so-called Djenné) from the Niger Valley (Mali)
- Terracotta statuettes, bronzes, pottery and stone statues from the Bura system (Niger, Burkina Faso)
- Stone statues from the North of Burkina Faso and neighbouring regions
- Terracotta statuettes from the Koma region (Northern Ghana) and Ivory Coast
- Terracotta statuettes (so-called Sao) from the Cameroon, Chad, Nigeria regions.

Apart from Mali, six other countries – Burkina Faso, Cameroon, Chad, Ghana, Niger and Nigeria – feature in the red alert list, with Nigeria listed in four out of eight categories identified. Given the pivotal position of the United States as an art importing nation, the lack of initiative on the part of African countries like Nigeria to take advantage of the United States scheme is an illustration of the failure of African museum professionals to take measures to protect their cultural heritage.

It is not surprising, therefore, that at the Amsterdam Conference some “Western experts demand[ed] that Africa first put its house in order.”²⁴ The evidence adduced so far shows that the African States have not diligently pursued the options available to them for the protection of their cultural heritage. It is understandable if they stay away from litigation, but there is absolutely no excuse for not aggressively utilising the other options.

IV. – A NEW OPTION – ARBITRATION

Article 8(2) of the UNIDROIT Convention offers the avenue of arbitration for the recovery of stolen or illegally exported cultural objects. It provides that “[t]he parties may agree to submit the dispute to any court or other competent authority or to arbitration.”

The provision for recourse to arbitration no doubt reflects the influence of Professor Pierre LALIVE, a distinguished international arbitrator who was not only a member of the UNIDROIT Study Group, but indeed Chairman of the four meetings of governmental experts on the draft Convention and Chairman of the Committee of the Whole at the diplomatic Conference. Mention should also be made of the contribution in this regard of Professor Georges DROZ, the then Secretary-General of the Permanent Bureau of the Hague Conference on Private International Law. The Hague Conference

of Cultural Property, 261 at 264-265 (1998); “Africom’s Red List”, ICOM News, Issue 2, 1998; cf. also ICOM website: www.icom.org/redlist/.

²⁴ *Ibid.*, 264.

has always subscribed to the use of arbitration in private international law. Professor Droz was a member of the Study Group, and also participated in the meetings of governmental experts and at the diplomatic Conference as an observer.

The use of arbitration for the settlement of cultural property disputes first came up in discussion at the third session of the UNESCO Intergovernmental Committee (IGC) held at Istanbul, Turkey, 9-12 May 1983. Salah STETIE, Chairman of the first three sessions of the IGC, had emphasised that according to procedures defined by the Committee it could only intervene when bilateral negotiations between nations had failed. He recalled that it was decided at the second session that once a request had been submitted to the Committee and transmitted to a holding country, the latter would be given one year to react to the claim. "If at the end of the one year period the Committee felt that the position of the holding country was unjustified, it could extend its good offices or perhaps even *arbitrate*²⁵ in order to find an acceptable solution." Several members then took the floor to stress that the method of bilateral negotiations must be respected absolutely. One member stated that it was impossible for his country to accept the idea of "arbitration" on the part of the Committee, for the latter's role was one of mediation only. "To arbitrate would be to support the position of a particular country"; it was not for the Committee to pass judgment in such a manner but rather to analyse the reasons for the failure of an attempt to obtain a return or restitution through bilateral channels. The Chairman was quick to respond that he had used the word 'arbitration' "in a general way". The Committee could only bring together people of good will eager to find workable solutions: "its path was that of mediation and moral pressure."²⁶

At the diplomatic Conference that adopted the UNIDROIT Convention, the arbitration provision was relatively uncontroversial.²⁷ Harold S. BURMAN, the United States representative, agreed with the need for Article 8(2), arguing that recourse to arbitration might facilitate resolution of the problem and should therefore be supported. In this perspective, for States not parties to the two major Conventions on Recognition and Enforcement of Foreign Arbitral Awards, the New York and Panama Conventions, a statement in the future UNIDROIT Convention allowing parties to enter into arbitration could be a sufficient basis for the enforcement and recognition of their arbitration agreement.²⁸ The representative of Kuwait, AL NOURI, opined that if the parties were States, they could opt for arbitration solely in public international law, that is, *ad hoc*

²⁵ Emphasis added.

²⁶ IGC, Third Session, UNESCO Doc. CLT-83/CONF. 216/8.

²⁷ L.V. PROTT, *Commentary on the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995, Institute of Art and Law, Leicester, 1997, 72. The provision on arbitration lacks the specificity and detail of the arbitration provisions in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. I am grateful to Frédérique MESTRE for drawing my attention to the arbitration provisions of the Basel Convention.

²⁸ Acts and Proceedings of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Rome, 7-24 June 1995, 230.

arbitration, or institutional arbitration in the context of the International Court of Justice.²⁹ But the representative of Portugal felt that “arbitration” should be understood essentially as private law arbitration.³⁰ The Chairman, Professor Pierre LALIVE, disagreed with this view, emphasising that in the situation envisaged by what is now Article 8(2) of the Convention, the parties, if they are both States, could, if they so agreed, bring their claims before public international law jurisdictions. He noted that two situations should be distinguished. Under Chapter II of the Convention, the claimant would as a rule be a private person and consequently any public international law jurisdiction, and in particular that of the International Court of Justice, would be excluded. Recourse to such a jurisdiction was, however, possible under Chapter III, as only States would be involved, and if they so wished they could agree to go to international arbitration.³¹

The Executive Secretary of the diplomatic Conference, Marina SCHNEIDER, has remarked that the 1995 Convention “seeks to establish an international co-operation mechanism ... Its approach ... is a pragmatic one, an affirmation that however real the conflict, there is yet concrete ground for co-operation, including the legal mechanism to make it work.”³²

It is fitting, therefore, that the Convention has an arbitration provision, since arbitration is a civilised method of settling disputes introducing, as it does, ideas of charity and fairness in dispute resolution. The major characteristics of arbitration are as follows: it is a method not of compromising disputes but of deciding them; it is resorted to only by agreement of the parties; the dispute is resolved by a third and neutral person or persons (the arbitrator(s)); the arbitrator(s) are expected to determine the dispute in a judicial manner – this does not necessarily mean strictly in accordance with the law, but rather giving equal opportunity to the parties to put their case and by weighing the evidence put forward by the parties in support of their respective claims; the person making the decision has no formal connection with the system of courts; the solution or decision of arbitrator(s) (the award) is final and conclusive and puts an end to the parties’ dispute; the award is binding on the parties by virtue of their implied undertaking when agreeing to arbitration that they will accept and voluntarily give effect to the arbitral decision; and the arbitration proceedings and award are totally independent of the State: the ordinary courts will only interfere – and then strictly within the confines of their *lex fori* – to give efficacy to the arbitration agreement, to regulate the arbitration proceedings or to give effect to the award where it has not voluntarily been carried out by the parties.

There are other known forms of dispute settlement besides litigation and arbitration. These include negotiation, conciliation and mediation. What distinguishes

²⁹ *Ibid.*

³⁰ *Ibid.*, 231.

³¹ *Ibid.*, 230-231.

³² M. SCHNEIDER, “The UNIDROIT Convention on Cultural Property: State of Play and Prospects for the Future”, *Uniform Law Review* 1997, 494 at 496.

arbitration from these is its decisional nature, which gives it an air of formality that brings it closer to the judicial process.³³ It should be stressed, however, that it is not all arbitration proceedings that end in an award. As the parties in a dispute present their case, the weakness in the case of one party or the other may become apparent, creating the opportunity for settlement or resolution through negotiation, conciliation or mediation. This is one of the great strengths of arbitration.

Emily SIDORSKY, in a detailed article, identified three primary advantages to be derived from arbitration in the settlement of cultural property disputes. These are: (1) the non-national quality of the forum could provide neutrality; (2) the appointment of arbitrators could provide expertise; and (3) the rules and regulations of the arbitration process could increase the speed and efficiency of the proceedings and reduce overall costs. Two further important benefits are: (a) its strict confidentiality could be a favourable feature; and (b) problems of enforcement are likely to be reduced because the consent of both parties is required to initiate an arbitration proceeding.³⁴

PROTT and O'KEEFE had earlier also endorsed the use of arbitration in this context, stating that it is a useful dispute settlement mechanism in many matters involving States and, "although it has defects, in general it works very well. It is important that provision be made for some method of settling disputes and arbitration is particularly suitable for those with an international element."³⁵ At a recent conference on Resolution Methods for Art-Related Disputes at the Art-Law Centre in Geneva, it was observed that such disputes involve complex legal and ethical issues, and it was accepted that as an arbitral tribunal does not represent a national forum, it appears at first sight to be in a more neutral position than a national court to pronounce itself on a State claim that, among other issues, involves assessing issues of sovereignty and national cultural policy and law.³⁶ It should be emphasised that under Chapter 2 of the UNIDROIT Convention (restitution of stolen cultural objects), the parties could be private individuals and both can agree to submit their dispute to arbitration.

After enumerating all the advantages of arbitration which apply equally to claims involving stolen goods and illegally exported cultural objects, SIDORSKY examined three models of international arbitration currently in operation in order to develop insight into an appropriate model for an international arbitration mechanism suitable for the resolution of cultural property disputes. The first of these, the format and rules of the International Centre for the Settlement of Investment Disputes (ICSID) is explored as an example of an institutional arbitration solution. The second, the

³³ S.A. TIEWUL / F.A. TSEGAH, "Arbitration and Settlement of Commercial Disputes: A Selective Survey of African Practice", 24 *International and Comparative Law Quarterly* (1975), 393; J.D.M. LEW, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, Oceana Publications Inc., Dobbs Ferry, New York, 1978, 12.

³⁴ E. SIDORSKY, "The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration", 5 *International Journal of Cultural Property*, 19, 32-33 (1996).

³⁵ PROTT / O'KEEFE, *op. cit.*, *supra* note 9, 196.

³⁶ Q. BYRNE-SUTTON, "Resolution Methods for Art-Related Disputes, Art-Law Centre, Geneva (17 October 1997)", 7 *International Journal of Cultural Property*, 249 at 255 (1998).

Santiago de Compostela Resolution of the Institute of International Law, is an example of an international arbitration model that is non-institutional. The third, the Permanent Court of Arbitration in the Hague Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State, is an example of a set of rules that could be adopted by an international arbitration centre specialising in the settlement of cultural property disputes. In the assessor's opinion, the flexibility offered by the Optional Rules enhances the likelihood that parties of diverse nationalities, and State entities in particular, would be amenable to utilising these Rules. The Secretary General of the Permanent Court of Arbitration is available to facilitate the proceedings and the International Bureau of the Permanent Court of Arbitration offers administrative support and administers the archives of the arbitration. Second, by providing that agreement to arbitrate under the Rules constitutes a waiver of any sovereign immunity from jurisdiction claims, the Rules adequately address an issue which is raised in cultural property disputes. A third significant advantage of the model is the Rules' provisions for "Interim Measures of Protection". This is particularly relevant in the cultural property context, as the conservation of the objects pending the resolution of the controversy is often a salient feature of the dispute.³⁷ This is in consonance with Article 8(3) of the UNIDROIT Convention which states that "[r]esort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State." This clause was inserted to enable, in particular, the safeguarding of an object, for example, by prohibiting its further export during the proceedings or its disappearance or destruction by inappropriate handling.³⁸

The Court of Arbitration for Cultural Property

Since uniform application of the UNIDROIT Convention will be crucial to its eventual success, it would be a good thing to have a specialised body devoted to arbitration of cultural property disputes, such as are already in existence for matters involving investment disputes, maritime claims and more recently, intellectual property disputes.³⁹ In course of time, such an institutional arbitration tribunal will be able to provide specialist services and cater for the special interests involved in cultural property disputes. Quite often, such disputes involve conflicting yet legitimate interests. It is suggested that such an institutional tribunal should operate under the aegis of either UNIDROIT or UNESCO, more probably the former since it already has a pool of lawyers versed in the complex legal and ethical issues that arise in the context of cultural property disputes. In this connection, the provision of Article 20 of the UNIDROIT

³⁷ SIDORKSY, *op. cit.*, *supra* note 34, 37-45.

³⁸ PROTTE, *op. cit.*, *supra* note 27, 72; Acts and Proceedings, *op. cit.*, *supra* note 28, 232.

³⁹ G. FRANCIS, "The WIPO Arbitration Center", *Managing Intellectual Property* 4 (March 1994). WIPO is the World Intellectual Property Organization in Geneva. The centre became operational on 1 July 1994.

Convention which reads that the President of UNIDROIT "may at regular intervals, or at the request of five Contracting States, convene a special committee in order to review the practical operation of this Convention" could be used to facilitate the evolution of a Court of Arbitration for Cultural Property as already exists in the field of sports law through the establishment of the Court of Arbitration for Sport (CAS).⁴⁰

The key to the success of such a special arbitration centre would be the ability of such a body to design, in the words of Professor MNOOKIN, "an arbitration process in which the parties' underlying interests are identified and explored. Obviously, to the extent that common interests are revealed, the arbitrators may be able to create a resolution that serves these shared interests." In addition, differences in interests may allow resolutions that make both parties winners. Professor Mnookin points out that one of the advantages of arbitration is that with the consent of both parties, a wide variety of dispute resolution techniques, including mediation, may be employed.⁴¹

In recent years, litigation in the United States over stolen or illegally exported cultural objects confirms the suggestion that arbitration could play a role that makes both parties winners. Thus, in the *Union of India v. The Norton Simon Foundation*,⁴² the return of stolen "Siva Nataraja" to India was postponed to enable the good faith acquirer, a United States collector, to display it for ten years. In the case of a garland sarcophagus lent to the Brooklyn Museum, the lender of the sarcophagus, a private collector, appeased the Republic of Turkey that was claiming it by donating the eleven-million-dollar artefact to the American-Turkish Society. Subsequently, the American-Turkish Society sent the garland sarcophagus back to Turkey, the plaintiff country, where it remains on loan indefinitely. Similarly, the Metropolitan Museum of Art in New York returned the "Lydian Hoard" to Turkey after litigation had commenced in response to the "blackmail" of a potentially successful lawsuit.⁴³

All these cases suggest that there are already precedents which arbitrators can use through process design to help parties create value.⁴⁴ For example, why not share the Parthenon marbles, or lease them back to Greece in perpetuity or for a given period? Then, why not make perfect copies of the Parthenon marbles? If a perfect copy of the marbles could be made, would it matter if the originals were at the British Museum or in Athens? ⁴⁵ Skilful arbitrators as process designers can begin to teach us that perhaps cultural goods should be treated differently. Perhaps in cultural property

⁴⁰ At the Geneva Symposium on Resolution Methods for Art-Related Disputes, Gabrielle KAUFMANN explained how what is being sought for cultural property had been achieved in the field of sports law through the establishment of CAS. See BYRNE-SUTTON, *op. cit.*, *supra* note 36, 255.

⁴¹ R.H. MNOOKIN, "Creating Value Through Process Design", 11 *Journal of International Arbitration*, 125 (1994).

⁴² United States District Court, Southern District of New York, 74 Cir. 5331; United States District Court, Central District of California, Case No. CV74-3581-RJK.

⁴³ These and other cases are discussed in BORODKIN, *op. cit.*, *supra* note 22, 401-405.

⁴⁴ MNOOKIN, *op. cit.*, *supra* note 41, 131.

⁴⁵ A. MAS-COLELL, "Should Cultural Goods Be Treated Differently?", 23 *Journal of Cultural Economics*, 87 at 91-92 (1999).

arbitration just as in commercial arbitration it is possible to construct a process which can help the parties create value for themselves in a wide range of disputes, large and small. The Mnookin model postulates that neutral third parties can design a problem-solving approach which can create opportunities:

- to probe interests rather than simply to choose between positions;
- to design, with the participation of counsel, a dispute resolution process tailored to a particular problem and the parties' underlying interests;
- to help the parties focus on a forward-looking approach, through an expedited, flexible and creative arbitration process;
- to shape an efficient and successful resolution.⁴⁶

The final solutions in the "Siva Nataraja", "Lydian Hoard", garland sarcophagus and similar cases have all the elements Professor Mnookin postulated. It is a pity that the arbitration option was not available to achieve the same results without the pains of litigation. Indeed, the same ideas lay behind the work of the Intergovernmental Committee for Promoting the Return of Cultural Property. As the representative of the Director-General said at the Committee's third session, "UNESCO's mission was to seek all ways and means to enable Member States to engage in fruitful dialogue on the basis of mutual respect and dignity and in a spirit of international solidarity. From such dialogue developed fruitful ideas."⁴⁷

An International Fund to assist in prosecuting claims

Recourse to arbitration will still carry its own financial burden, and here we confront an issue that came up as long ago as during the first meeting of the IGC in 1980. At that first session, the representative of the Director-General introduced the section of the working document relating to the setting up of an international fund to assist in effecting the return of cultural property by underlining that during the examination of the Statutes of the committee by the General Conference at its twentieth session, several delegates expressed the opinion that the creation of a Special Fund would be desirable. Previously, in a study conducted in August 1977, ICOM had advocated the creation of such a Fund as an instrument of action of the Committee. The Fund, whose creation would have to be approved by the relevant organs of UNESCO, could facilitate the Committee's task by enabling it to finance (a) studies aimed at assembling complete collections; (b) technical co-operation activities (experts, grants or equipment); (c) information activities for the general public; and (d) in certain circumstances, return or restitution operations (by covering the cost of transport and insurance, for example).

A number of delegates and observers expressed reservations as to the appropriateness of creating a fund of this kind. Reasons of a psychological nature, among others, were put forward, such as the reactions of certain States, which would

⁴⁶ MNOOKIN, *op. cit.*, *supra* note 41, 131.

⁴⁷ IGC, Third Session, UNESCO Doc. CLT-83/CONF.216/8.

be called upon, at one and the same time, to return cultural property and to finance the costs incurred, directly or indirectly, by such restitution. According to this point of view, it would be more effective to leave the State free to contribute aid within the context of bilateral or multilateral co-operation.⁴⁸ At the second session, the Director-General was asked to carry out a feasibility study on the creation of a special fund for museum development and for promoting the return or restitution of cultural property to its countries of origin.⁴⁹ Things came to the boil at the eighth session held in 1994. Turkey reported the return of the "Lydian Hoard" and the impending return of the Roman sarcophagus. The Turkish delegate then "deplored the very high cost of the legal action necessary to secure restitution of stolen cultural property that had entered foreign territory illicitly."⁵⁰ Many other speakers said that they had encountered the same problem. Recommendation 3 of the session therefore invited the Director-General to examine again the possibility of establishing an international fund at UNESCO which would be financed by voluntary contributions, public and private, intended to facilitate the restitution of stolen or illicitly exported cultural objects, in cases where the countries concerned are unable to meet the related financial costs; and it further invited him to report on this matter to the General Conference at its next session for the possible launching of an appeal to the international community to this effect. The preamble to the Recommendation made it clear that making the recommendation was tantamount to endorsing one of the main lines of action urged in the Arusha Appeal of the ICOM/UNESCO Regional Workshop of 29 September 1993, that "an international fund be urgently created to finance the acquisition of stolen property and its restitution to museums and communities when the national and international legislations do not provide for this."⁵¹

The Secretariat's report was ready for consideration by the ninth session when it met in Paris in September 1996. It was reported that three issues should be addressed concerning the creation of an International Fund: (a) the advisability of the creation of such a Fund; (b) the use of the Fund once it was created; and (c) the source of financial resources of the Fund. The Secretariat had discussed with experts in several countries three possible uses of the Fund, for example for transportation, insurance and re-installation costs (which were minor and generally not controversial); for compensation (about which there were serious doubts); and for legal fees (which also gave rise to

⁴⁸ IGC, First Session, UNESCO Doc. 21 C/83.

⁴⁹ IGC, Second Session, UNESCO Doc. CC-81/CONF.203/10.

⁵⁰ IGC, Eighth Session, UNESCO Doc. 28C/101. One estimate puts the legal fees incurred by Turkey in its eight-year claim against the Metropolitan Museum of New York over the "Lydian Hoard" at 1.3 million pounds sterling. See N. PALMER, "Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities", in N. Palmer (ed.), *The Recovery of Stolen Art* (Kluwer Law International, London, 1998), 19n. In other cases Palmer notes that success was achieved "only at the cost of massively expensive litigation, involving intricate questions of law and fact", *ibid.*, 18.

⁵¹ Arusha Appeal adopted at the ICOM/UNESCO Regional Workshop on Illicit Traffic in Cultural Property, Arusha, Tanzania, 24-29 September 1993.

some hesitation). The Committee once again invited the Director General to distribute to all Member States of UNESCO the Secretariat's report and to request their views.⁵²

At the tenth session, in January 1999, a working group was set up, headed by Italy and with the collaboration of UNIDROIT, to study the issue. The Committee finally adopted Recommendation 6, which supports the establishment of an International Fund to be financed by voluntary contributions from States and private institutions. The Fund should be used to finance training and education projects. It should however not be used to compensate persons engaged in smuggling or to finance legal costs.⁵³ The General Conference of UNESCO at its 30th session on 16 November 1999, adopted the Recommendation. UNESCO will now seek extra-budgetary donations to the Fund. The General Conference also agreed that the Fund can be used to cover a proportion of the legal costs.

In this author's view, the reluctance to set up a Fund to assist poor States to fight in foreign courts for the restitution of their cultural property is incomprehensible. If UNESCO, ICOM, ICCROM (the International Centre for the Study of the Preservation and Restoration of Cultural Property), the European Union and various private foundations can fund the training of African museum staff and provide other crucial technical assistance, there should be no insurmountable difficulties to funding legal fees to recover stolen or illegally exported cultural objects in foreign courts. There is no need for selectivity in the type of assistance to African and other developing or under-developed countries in this matter. These countries have major problems protecting their cultural heritage, not the least of which is inadequate financial resources. And the Turkish delegate told the IGC from the country's vast experience in pursuing claims that his country deplores "the very high costs" of legal action needed to secure the restitution of stolen cultural property that had entered foreign territory.

Mali, for example, is one of the world's five poorest countries and Africa's second in archaeological riches (after Egypt).⁵⁴ In desperation, Mali has become the first African nation to enter into a bilateral agreement with the United States prohibiting the import into the United States of archaeological objects from the Niger River Valley region that has suffered rampant pillaging of sites for over a decade. What is being sought is legal aid to a country on the international plane in defence of human rights, that is, the human right to culture and the right of access to culture enshrined in the Universal Declaration of Human Rights of 10 December 1948; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 and the International Covenant on Civil and Political Rights of 16 December 1966. The assertion in the Abranches report of 1983 that there is often a more substantial African cultural heritage in Europe than in the African countries concerned, remains very much true

⁵² IGC, Ninth Session, UNESCO Doc. 29/C/REP.12.

⁵³ IGC, Tenth Session, UNESCO Doc. 30/C/REP.4.

⁵⁴ S. MCFADDEN, "Africa Plundered – How Collectors are Stealing the Art of a Continent", *The Bulletin – The News Weekly of the Capital of Europe*, 14 March 1996, 24 at 30.

today.⁵⁵ The great public collections of African art are in New York (the Metropolitan Museum), Paris (the Musée de l'Homme and the Musée des Arts d'Afrique et d'Océanie), London (the British Museum), Berlin (the National Gallery), Zurich (the Rietberg Museum), Basel and Washington. The Tervuren Museum in Brussels, which has been collecting for longer than any other, owns more than 400,000 African objects. The largest African museums have an average of 5,000 works.⁵⁶

Could it be that all the arguments which the Western nations bring to bear against the International Fund simply reflect the fact that they are not over-anxious to fund the denuding of their museums of their African objects? If so, their fear is misplaced, since both the UNESCO and UNIDROIT Conventions apply prospectively, not retroactively. Even though Africa has been emptied of much of her cultural property, there still remains much of value on the Continent and the plea is that the impoverished African nations be given the wherewithal to recover what is being seized or dug up and sold now, rather than the expropriated masterpieces that have become famous in European and American museums. The world community should not be too timid to create a good precedent.

Finally, it may be noted that the setting up of an International Fund to meet legal costs will give more efficacy to the UNIDROIT Convention. Indeed, at the ninth session of the Intergovernmental Committee, a committee member noted that the relationship of a UNESCO Fund to international instruments such as the UNIDROIT Convention should be considered. There was considerable discussion at the diplomatic Conference concerning the fear expressed by countries losing large amounts of cultural property that they will not have the financial resources to bring the claims themselves. UNESCO's Chief of International Standards Section and an architect of the 1995 framework along with UNIDROIT experts has promised that the question of making adequate provision for such States in order to pursue their legal remedies is one on which UNESCO and UNIDROIT will be consulting to find solutions.⁵⁷

It should be remembered that the UN Trust Fund created in 1989 has assisted States in the settlement of disputes through the ICJ by reducing the financial burden of court proceedings (such as the costs of legal counsel, secretarial assistance, accommodation and translation) and of executing Court judgments (for example, financial assistance was granted for the marking out of the adjudged boundary in the frontier dispute between Burkina Faso and Mali).⁵⁸ Perhaps the matter should be referred to the United Nations.

⁵⁵ UNESCO Doc. CLT-83/CONF. 216/3.

⁵⁶ MCFADDEN, *op. cit.*, *supra* note 54, 26.

⁵⁷ L.V. PROTT, "UNESCO and UNIDROIT: A partnership Against Trafficking in Cultural Objects", *Uniform Law Review* 1996, 59 at 67. It is hoped that something will come out of the joint initiative.

⁵⁸ E.-U. PETERSMANN, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International, London, 1997), 61.

V. – ADVANTAGES OF MEMBERSHIP OF THE CONVENTIONS

Whereas the UNESCO Convention⁵⁹ is basically founded on a philosophy of Government action and therefore requires cultural objects to have been “designated” by the State requesting return, the UNIDROIT Convention,⁶⁰ being a scheme under private law, does not require that a cultural object be “designated” by the State for it to be covered by the Convention.

Accordingly, cultural objects stolen from private homes, from all kinds of religious buildings, from private collections which are not yet registered with the State and from traditional communities, can all be claimed back, even though the State has neither registered nor designated them.⁶¹ It would be difficult, however, for a country to prove ownership unless the stolen object had been adequately registered or inventoried. This is a major problem area for Africa. Few African museums have comprehensive inventories of their collections. In this age of digital information, computerised registration of objects means that in case of theft of museum objects, the relevant information can be passed on to INTERPOL and international channels immediately. The report on the Amsterdam Conference of African museum directors gave the following bleak summary of the situation in Africa:⁶²

“At present, even the most basic facilities for adequate registration are lacking in the majority of African museums. Interpol, for instance, requested member States in 1995 to supply the office with data concerning objects stolen in 1994 ... Of the African countries, only Zimbabwe was able to supply adequate data on stolen objects.”

The impression should not, however, be conveyed that there is a total lack of initiative in this matter. The major African contribution in the area of documentation is the *Handbook of Standards* published by ICOM in 1996.⁶³ The result of a four-year effort of professionals of six African museums and the ICOM International Committee for Documentation (CIDOC), it has been described as “one of the most important museum documentation standards of recent years.”⁶⁴ What is lacking, obviously, is assiduous application of the available technique.

In any event, the UNIDROIT Convention has a broader provision on inventories when compared with the UNESCO Convention which should prove more advantageous to African States. Article 3(7) of the UNIDROIT Convention states that a “public collection” consists of “a group of inventoried or otherwise identified cultural objects” owned by a Contracting State; a regional or local authority of a Contracting State; a religious institution in a Contracting State; or an institution that is established for an

⁵⁹ The Convention appears at 10 *International Legal Materials*, 289 (1971).

⁶⁰ The Convention appears at 34 *International Legal Materials*, 1322 (1995).

⁶¹ PROTTE, *op. cit.*, *supra* note 57, 62.

⁶² LEYTEN, *op. cit.*, *supra* note 23, 265.

⁶³ ICOM, *Handbook of Standards: Documenting African Collections* (ICOM, Paris, 1996).

⁶⁴ R. THORNES, *Protecting Cultural Objects in the Global Information Society: The Making of Object ID* (Getty Information Institute, Los Angeles, 1997), 17.

essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest. The phrase "otherwise identified cultural objects" means any other satisfactory means or evidence of identification would be admissible in court proceedings to establish ownership other than conventional inventories.

The UNESCO Convention provides for action by a Contracting State "at the request of the State Party of origin" and that requests for recovery and return should be made "through diplomatic offices."⁶⁵ Thus, claims can be formulated only on a Government-to-Government basis. The UNIDROIT Convention operates quite differently. It provides for a claim to be brought before a court or other competent tribunal. This means that a private owner may make use of the normal legal channels available in the country where the object is located in order to seek a court order for the return of a stolen object, and a State may take similar action for the return of an illegally exported cultural object.⁶⁶ But as stated at the beginning of this study, only twenty of the fifty-three African nations that comprise the African membership of the United Nations are Parties to the 1970 Convention. And with regard to the 1995 Convention, not a single African country is a Party, although at the ninth session of the Intergovernmental Committee in 1996 the observer from Tunisia expressed his country's intention of joining the UNIDROIT Convention.⁶⁷ What, then, is the point of paragraph 6 of the African Declaration read out at the second session of the IGC in 1981 that "the Conventions relating to the protection of cultural property should be ratified as a matter of urgency" ?⁶⁸

Becoming a Party of both 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 thirty-three African States⁶⁹ that have not joined the UNESCO Convention, and the fifty-three African nations that are yet to become States Parties to the UNIDROIT Convention are hereby enjoined to ratify⁷⁰ or accede to the Conventions as a mark of their determination to fight a major scourge of our time – trafficking in cultural property.⁷¹ "Together the two Conventions", commented the

⁶⁵ Article 7(b)(ii).

⁶⁶ PROT, *op. cit.*, *supra* note 57, 65-66.

⁶⁷ IGC, Ninth Session, UNESCO Doc. 29C/REP. 12.

⁶⁸ IGC, Second Session, UNESCO Doc. CC-811/CONF. 203/10.

⁶⁹ Benin, Botswana, Burundi, Cape Verde, Chad, Comoros, Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Malawi, Morocco, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Uganda and Zimbabwe.

⁷⁰ Burkina Faso, Côte d'Ivoire, Guinea, Senegal and Zambia are signatory States to the UNIDROIT Convention.

⁷¹ One of the recommendations of the Workshop on the Protection of African Heritage in Amsterdam urged Governments to accede to the UNESCO and UNIDROIT Conventions. LEYTEN, *op. cit.*, *supra* note 23, 264; ICOM News, Issue 2, 1998. At the ICOM/UNESCO regional workshop on Illicit Traffic in Cultural Property in Arusha (Tanzania) in September 1993 and in Bamako (Mali) in October 1994, respectively, States not yet Parties to the 1970 UNESCO Convention were urged to join without delay. And at the UNESCO/ICOM Sub-Regional Workshop on Illicit Traffic in Cultural Property in Kinshasa (Zaire, now

leading jurist in this field, “close many of the loopholes that had prevented courts from combating more forcefully the illegal trafficking of cultural objects.”⁷²

The Director General of UNESCO described the UNIDROIT Convention as “a breakthrough international framework to combat private-sector transactions in stolen art and cultural property” and as “a watershed in our common struggle to defend cultural property.”⁷³ First, the Convention confronts the legal constraints that impede identification of the current location and of the possessor of stolen cultural property by providing that a claimant to a cultural object may choose a court either in the possessor’s country or in the country where the object is currently located.⁷⁴ More often than not, it is the location of a cultural property or art work that is known, not its possessor. In the case of cultural property, missing objects are found when offered for sale in an auction catalogue or by a dealer in a country with a major art trade, although the vendor is not known or is not in that jurisdiction. The provision was felt desirable because the claimant may know where the object is (in a museum on loan, in a restorer’s workshop, in a bank vault) but may not know the identity of the possessor.

Second, the Convention challenges legal obstacles preventing the recovery of stolen cultural property once it has entered the art market. Under most existing national laws, it is virtually impossible for rightful owners to retrieve a stolen object once it has been sold to a good faith purchaser. This holds true even if the object in question is widely acknowledged to be stolen, provided the purchaser was never informed of or involved in the object’s theft. Australia, Canada, New Zealand and the United States, whose laws favour the original owner of stolen cultural property, are exceptions. The Convention puts the burden of proof on the holder of allegedly stolen cultural property. It states that the “possessor of a stolen cultural object must return it,” regardless of personal involvement or knowledge of the original theft.⁷⁵ It further denies any compensation for the return of a cultural object unless “the possessor

Democratic Republic of Congo) in June 1996, States which had not yet done so were urgently entreated to become Parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, to the 1970 UNESCO Convention and to the 1995 UNIDROIT Convention. For the texts of the Arusha Appeal, Bamako Appeal and the Kinshasa Declaration, see P. ASKERUD / E. CLÉMENT, *Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention*, UNESCO, Paris, 1997, Section 3:97-106. Especially worthy of mention however is Resolution A/RES/54/190 on the “Return or Restitution of Cultural Properties to the Countries of Origin” adopted on 17.XII.1999 by the General Assembly of the United Nations upon proposals by Cameroon, Chad, Djibouti, Egypt, Gabon, Guinea, Malawi, Mali, Morocco, Nigeria, Democratic Republic of Congo and Togo. Press Release GA/9699 – 7 March 2000, 122; the text of the Resolution is reproduced in this issue of *Uniform Law Review*, 308.

⁷² UNESCO Sources, No. 72, September 1995; quoting Lyndel V. PROTT.

⁷³ UNESCO News, Volume 2, No. 5, 20 September 1995.

⁷⁴ Article 8(1). The Secretary-General of the Hague Conference on Private International Law, a member of the Study Group, pointed out that the use of a court in the jurisdiction where the object was located was in fact a new ground of jurisdiction which in the circumstances was reasonable. Acts and Proceedings, *op. cit.*, *supra* note 28, 111-112; PROTT, *op. cit.*, *supra* note 27, 71.

⁷⁵ Article 3(1). For a similar provision concerning illegally exported objects, see Article 5(1).

neither knew nor ought reasonably to have known the object was stolen.”⁷⁶ The Convention may indeed be regarded as “the best international legal means” available to deter the illicit trade in cultural property.⁷⁷

VI. – TOWARDS HARMONISATION OF AFRICAN CULTURAL PROPERTY LAWS

At the Amsterdam Conference on the Protection of African Cultural Heritage, some Western experts demanded that Africa should first put her house in order. African States must indeed do so. Let us first, however, note that even the richest countries, with state-of-the-art security, are seeing major thefts from the public museums and private collections as well as unauthorised digging at protected archaeological sites, doing irreparable damage to their archaeological heritage.⁷⁸ Nonetheless, there is scope for concerted efforts by the African States. They should examine their legislations on the protection and preservation of cultural property and make sure they are adequate to deal with the current emergency. After such reviews, the laws should be upgraded in accordance with all the international instruments. In this connection, it is important to bear in mind that certain basic provisions are indispensable for the successful protection of Africa’s cultural property, having regard to the various problems confronting cultural heritage management in Africa at present. It would be necessary to state that all archaeological objects belong to the State. It would also be expedient to prohibit the export of cultural objects unless the State’s licence is given. The crucial point is that unless a country has adequate national legislation, joining the international Conventions will have only limited effect in overcoming the scourge of illicit trafficking.⁷⁹ The next stage should be the harmonisation of laws (through the Organisation of African Unity),⁸⁰ as is being done in the European Union, for example. There would be a need to establish joint border patrols. The “Red List”

⁷⁶ Article 4(1). For a similar provision concerning illegally exported objects, see Article 6(1).

⁷⁷ PROT, *op. cit.*, *supra* note 27, 89. Five States, including Algeria, Egypt, Libya and Morocco, voted against the adoption of the Convention at the diplomatic Conference. They wanted to express the view that the instrument does not go far enough and especially does not oblige States to return stolen cultural objects unconditionally, *i.e.* without compensation of a *bona fide* purchaser. K. SIEHR, “Editorial”, 5 *International Journal of Cultural Property*, 7 (1996).

⁷⁸ UNESCO Press, “A Major Step in the Fight Against Illicit Traffic in Cultural Property”, No. 98-11 (1998).

⁷⁹ UNESCO and UNIDROIT are available to give technical assistance to a country wishing to revise or indeed introduce legislation for the protection of its cultural heritage.

⁸⁰ There already exists a Commonwealth Scheme for the Protection of the Cultural Heritage, but the majority of African States are not members of the Commonwealth. The Commonwealth Scheme is reproduced as Appendix VIII, “Scheme for the Protection of Cultural Heritage Within the Commonwealth”, in PROT, *op. cit.*, *supra* note 27, 117-127. See also P.J. O’KEEFE, “Protection of the Material Cultural Heritage: The Commonwealth Scheme”, 44 *International and Comparative Law Quarterly*, 147 (1995). The Scheme, which was adopted at the Commonwealth Law Ministers’ Conference at Mauritius in November 1993, only covers illegally exported cultural objects and excludes stolen cultural objects (Article 1(1)). Its potential was immediately undermined by the declaration of the British Attorney-General that, while Britain welcomed the Scheme, it could not at present join it, citing, *inter alia*, difficulties arising from placing bureaucratic burdens on its large art trade.

approved at the Amsterdam Conference, for example, names Chad, Cameroon, Côte d'Ivoire, Ghana, Niger and Nigeria. These countries, when linked in a chain, are neighbours. The feasibility and productivity of joint patrols is surely obvious. There is no reason why the respective police, customs and immigration departments cannot have special units linked together under bilateral and multilateral, mutually beneficial agreements. National budgets should provide for the expansion of preventive activities, so that the cultural heritage can be passed on to future generations.

VII. – A PLEA TO AFRICAN GOVERNMENTS

Early political leaders such as Julius Nyerere, Kwame Nkrumah, Jomo Kenyatta and Leopold Sedar Senghor were connected to their roots and their past. Kenyatta wrote the classic anthropological and sociological study of his people, *Facing Mount Kenya*, and the championing of the concept of *negritude* by Senghor in his poetry and other writings is well documented. The present generations of Africans are alienated from their past, and future generations may have no link with it at all, if the current trend continues.

The reasons why African States have not embraced the Conventions include:

- the failure of African lawyers to show an 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 Conventions;
- the cost and duration of pursuing cases in foreign courts;
- the failure of previous attempts to recover cultural objects in foreign courts.

But with the innovative provisions (already highlighted) of the UNIDROIT Convention, litigation in the courts of States Parties should be less daunting than hitherto. Besides, the Convention's arbitration option offers a more practical avenue for the settlement of cultural property disputes. It has the potential of being a better and cheaper means of resolution of return or restitution claims whether between States or between a State and a private party, or between two private parties.

The value of bronze and terracotta figures stolen from a single museum at Ife, in Nigeria, has been estimated at US\$ 250 million.⁸¹ Burkina Faso was the setting of the nightmarish scene of Bobo priests driven to suicide by their extreme anguish upon discovering the theft of their village's entire store of ritual objects.⁸² These are just two incidents among many which bear eloquent evidence to the magnitude of the cultural tragedy now being played out in Africa. African Governments can show their deepest concern about what has been described by some as cultural genocide by becoming parties to these Conventions, a duty that must be performed without delay.

⁸¹ Antiques dealer Ralph Kiehlo, who works from Cotonou, Benin's chief port, gave the figure. Quoted in I. CONWAY, "Art dealers plunder Africa of its past", *The European*, 14-20 September 1995, 5; PROTT, *op. cit.*, *supra* note 27, 89.

⁸² MCFADDEN, *op. cit.*, *supra* note 54, 29.

The moral impact of fifty-three African countries acceding to the UNIDROIT Convention should not be under-estimated.⁸³ 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*⁸⁴ used, *inter alia*, to justify his decision that the idol "Siva Nataraja" should be returned to India.

Cultural property provides access to the history of nations. It is the foundation for cultural and social identity. Finally, it enriches lives, providing joy and sometimes even edification as a part of daily life.⁸⁵ The identity of peoples is inseparably bound up with their material culture.



LA REVENDICATION PAR LES ETATS AFRICAINS DE LEURS BIENS CULTURELS EN VERTU DES CONVENTIONS DE L'UNESCO ET D'UNIDROIT: LES NOUVELLES PERSPECTIVES OUVERTES PAR L'ARBITRAGE (Résumé)

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Le continent africain est encore aujourd'hui le plus touché au monde par le phénomène du trafic illicite des biens culturels, mais la grande majorité des Etats qui le compose n'est pas partie aux principaux instruments juridiques qui permettraient de protéger leur patrimoine. Partant de ce constat, l'auteur souhaite faire comprendre à ces pays combien ces conventions, notamment la Convention d'UNIDROIT de 1995 sur les biens culturels volés ou illicitement exportés, leur seraient utiles et pourquoi le régime de l'arbitrage est particulièrement adapté dans ce domaine.

Depuis l'accession à l'indépendance, de nombreux Etats africains ont adopté une approche trop tournée vers le passé qui vise davantage à récupérer les biens expropriés en période de colonisation qu'à protéger les biens encore sur leur territoire. Il est un fait que les objets continuent de sortir illicitement des pays d'origine et que les Etats ne s'intéressent pas assez aux moyens que le droit leur donne aujourd'hui pour éviter ces pertes ou y remédier en récupérant ces objets.

Les Etats avaient, avant l'adoption de la Convention d'UNIDROIT, et ont toujours, plusieurs moyens à disposition pour revendiquer leurs biens culturels illicitement transportés à l'étranger, à savoir: une action judiciaire introduite devant les tribunaux étrangers, une action sur la base des articles 3 et 7 de la Convention de l'UNESCO de 1970, une demande auprès du

⁸³ For example, the Report of the Swiss Working Group that considered whether Switzerland should ratify the UNESCO and UNIDROIT Conventions concluded that should Switzerland choose not to ratify, the country would become more attractive as a hub for illicit trade of stolen and illegally exported cultural objects, and "we can reasonably expect that a growing number of shady transactions will not promote a positive image of Switzerland abroad." Federal Office of Culture, Switzerland, *International Transfer of Cultural Objects – UNESCO Convention 1970 and UNIDROIT Convention 1995 – Report of the Working Group* (Berne, 1999), 30.

⁸⁴ [1991] 4 *All England Law Reports* 638, at 647.

⁸⁵ M.M. MÜLLER, "Cultural Heritage Protection: Legitimacy, Property, and Functionalism", 7 *International Journal of Cultural Property*, 395 at 405 (1998).

Comité intergouvernemental de l'UNESCO pour la promotion du retour de biens culturels à leur pays d'origine ou de leur restitution en cas d'appropriation illégale ou encore à travers la signature d'accords bilatéraux visant à la restitution des biens culturels. L'auteur indique les avantages que les Etats africains retireraient de l'utilisation de ces différents moyens et critique les Etats de ne pas agir lorsqu'ils le pourraient; il met également l'accent sur les difficultés que posent parfois les moyens en question.

L'auteur s'attarde ensuite sur une nouvelle voie ouverte par la Convention d'UNIDROIT, celle du recours à l'arbitrage, en relatant notamment l'origine de la disposition. Il insiste sur les avantages de cette méthode de résolution des différends (mais aussi de la négociation, de la conciliation et de la médiation), en termes de neutralité, expertise, confidentialité, efficacité, exécution des sentences et réduction des coûts. Comme cela existe déjà dans d'autres domaines, l'auteur appelle à la création d'un organe spécialisé en matière d'arbitrage dans le domaine de la revendication des biens culturels, sous l'égide éventuelle d'UNIDROIT, au nom d'une application uniforme de la Convention.

L'un des problèmes majeurs de toute méthode de revendication dans ce domaine étant celui de la charge financière pour le demandeur, l'idée d'un fonds international qui pourrait venir en aide aux Etats revient avec force. L'auteur retrace l'historique de cette proposition avancée il y a une vingtaine d'années devant les autorités compétentes de l'UNESCO, indique les utilisations possibles de ce fonds et reproche aux Etats industrialisés leur participation peu enthousiaste à ce projet.

Le trafic illicite des biens culturels ne pourra être enrayé que grâce à des législations nationales qui répondent réellement aux exigences actuelles et par une coopération internationale accrue. L'auteur termine son article par un plaidoyer en faveur de l'adhésion des Etats africains aux Conventions de l'UNESCO et en particulier à celle d'UNIDROIT de 1995 qui, aussi de l'avis autorisé de Mme L. Prott (UNESCO), peut être considérée comme "le meilleur moyen international" disponible pour lutter contre le commerce illicite des biens culturels.



