

**RETURN AND RESTITUTION OF CULTURAL PROPERTY IN AFRICAN
STATES UNDER THE 1970 UNESCO AND 1995 UNIDROIT CONVENTIONS**

BY

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93402

**A Thesis in the Department of Jurisprudence and International Law
Submitted to the Faculty of Law
in partial fulfilment of the requirements for the degree of**

DOCTOR OF PHILOSOPHY

of the

UNIVERSITY OF IBADAN

AUGUST, 2015

CERTIFICATION

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DEDICATION

To

My Almighty Father,

who raised me up so I can stand on mountains,

He keeps raising me up to walk on stormy seas

and

He continually raises me up to be more than I think I can ever be.

To

HIM

alone be all the Glory over my life.

ACKNOWLEDGEMENTS

O God my help in ages past, my hope for years to come, my shelter from the stormy blast and my eternal hope. I give you honour and glory forever and ever for giving me the grace, showing me mercy and granting me favour, on all sides, to complete this thesis in record time.

Since man does not live in isolation, I hereby express gratitude to the following people who supported me one way or the other in making this research work a huge success.

My husband, Dr. B. A. Adewumi for his encouragement and support in every way. I cannot thank him enough. His extraordinary display of prowess on the computer facilitated the successful completion of the work in record time. I salute him!

Adeoluwa and Adeayo, my adorable boys, full of life and vitality. Their vitality surely affected mine. Many thanks to them for coping well when I was not available.

My Supervisor, Prof. Folarin Shyllon, he is a father indeed! His guidance and direction is so unparalleled. He created the avenue for me to become a UNIDROIT Scholar and benefit from the enormous resources of the UNIDROIT library. He was always available to attend to me despite his very tight schedule. Without his help, I couldn't have made it at all in record time. My sincere and profound gratitude goes to him.

My internal external supervisor, Dr. A. S. Ajala, despite his very busy schedule, he always made out time to attend to me. I am very grateful for his contribution to making this work a success.

My first unofficial supervisor, Dr. J. O. A. and Dr Akintayo, he encouraged me to follow this path the day we listened to Prof. Agbaje-Williams' valedictory speech which ended with a beautiful quote by Spirella, quoted in ODM, June23, 2011 thus:

“There is no thrill in easy sailing when skies are clear and blue; there is no joy in merely doing things any man can do. But there are some satisfactions that are mighty, sweet to take when you reach a destination that you thought you would never make.”

Thanks for being there through it all.

My second unofficial supervisor, Ms. Marina Schneider, Senior legal officer at UNIDROIT secretariat in Rome. Many thanks to her for painstakingly going through my work despite her very busy schedule; for constructively criticizing some portions of the work to make it better while also opening my eyes to areas not previously aware of.

Many thanks to the Dean, Prof. I. O. Olatunbosun, for his encouragement to move on and complete the work in record time.

Elder O. J. Bamgbose and Prof. O. A. Bamgbose, their kind words of encouragement and gestures went a long way in giving the strength to carry on.

The immediate past and current sub-deans, Mrs Folake Tafita and Dr. Alero Akeredolu respectively; my Ag. Head of Department, Dr. B. R. Akinbola; Dr. K. Samuel; Dr. K. Kester and the entire teaching and non-teaching staff of Faculty of Law, University of Ibadan, are all appreciated for their support and encouragement.

Geneva Summer Schools is appreciated for the partial scholarship awarded to attend the cultural heritage law course that made it possible to interact with heritage law practitioners and scholars from all over the world.

Alessandro Chechi and other members of the Art Law Centre, University of Geneva, Geneva, Switzerland are appreciated for giving the privilege to make use of the enormous resources of the prestigious centre's library.

Special thanks to the United Kingdom Foundation for International Uniform Law for the financial support in making the researcher a UNIDROIT Scholar.

The International Institute for the Unification of Private Law (UNIDROIT) in Rome is acknowledged for the opportunity of benefitting from the library resources under the Research Scholarship Programme, between October and November 2014. Many thanks to Ms Frederique Mestre for the warm welcome received at the Institute; Ms Bettina Maxion for her great assistance in making use of the library; Ms Laura Tikanvaara and all other library staff and fellow interns for making the researcher's stay in Rome worthwhile.

Mrs. P. O. Osunsanya and Mrs. Aina Ajayi, the indefatigable mothers are appreciated for their care, concern, prayers and encouragement. God will continue to strengthen them both.

The Onayemi's, the Akinwoles', the Ogundimus' and the Olawales', many thanks to them for always being dependable allies. They are all appreciated for caring for the boys as the occasion demanded.

My Pastor, Prof. G. E. Akinbola and Glory voices members; thanks for the spiritual and moral support.

Finally, many thanks to the postgraduate students who offered Cultural Property Law during the period of this research work. Their interest in the field of study served as a great source of encouragement.

ABSTRACT

Cultural property, which is the pillar of civilisation and peoples' identities, has been displaced through colonisation, plunder and massive theft; causing irreplaceable loss of valuable information on mankind. Return and restitution of cultural property is achievable under the 1970 United Nations Economic, Social and Cultural Organisation Convention (UNESCO Convention) and the 1995 International Institute for the Unification of Private Law Convention (UNIDROIT Convention). However, the action steps African states need to take to derive maximum benefits from these Conventions have not attracted much scholarly attention. This study, therefore, examined the return and restitution of cultural property in some African states, under the UNESCO and UNIDROIT Conventions, with a view to determining their ratification rates, domestication and implementation. The factors hindering the efficacy of both Conventions in selected African states were also investigated.

The study adopted jurisprudential theories of natural law, historicism and sociological school and applied legal research methodology. Primary data used were the UNESCO and UNIDROIT Conventions, Constitutions of randomly selected five African states with provisions protecting cultural heritage, cultural heritage legislations of 27 African states and 38 other international instruments. Key informant interviews were conducted with the legal officers involved in the drafting of the UNIDROIT Convention at UNIDROIT secretariat in Rome and heritage law practitioners and scholars at the Art Law Centre, University of Geneva. In-depth interviews were also conducted with politicians, lawyers, judges and members of the public in Ibadan metropolis. Secondary data consulted included legal texts on cultural property and policy documents. Data were subjected to interpretive and comparative analyses.

As at December 2014, only 70.4% and 3.7% of the selected African states had ratified the UNESCO and the UNIDROIT Conventions respectively. None of the States had any legislation specifically aimed at domesticating the provisions of both Conventions. Largely, the provisions of both Conventions have not been implemented. Although South Africa ratified the UNESCO Convention in 2003, the enactment of The National Heritage Resources Act, 1999 predated it. There is no difference in the legislation of states such as Egypt, Nigeria and Zimbabwe that had ratified the UNESCO Convention concerning return and restitution of cultural property and those that had not (Ethiopia, Benin and Kenya). For example, both Kenya's Antiquities Act 1983 and Egyptian Law

117 of 1983 declared state ownership of cultural property. Lack of awareness among politicians, lawyers and the populace about the benefits derivable from the Conventions, coupled with lack of priority given to the issue of return and restitution of cultural property were some of the factors hindering the efficacy of the Conventions in the African states.

Many African states are yet to maximise the benefits derivable from the UNESCO and UNIDROIT Conventions by not ratifying, domesticating and implementing their provisions. The States need to take steps to enact cultural property specific legislations, strengthen their enforcement mechanisms and maintain control over the cultural property within their territories.

Keywords: Return and restitution of cultural property, Cultural property in African states, 1970 UNESCO Convention, 1995 UNIDROIT Convention.

Word count: 476

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ABBREVIATIONS

AC – Appeal Cases (England and Wales)

AFRICOM- African Council of Museums

ALL E.R- All England Reports (England and Wales)

ECOSOC- United Nations Economic and Social Council

EWCA Civ. (found in Barakat’s case)

ICOM- International Council of Museums

IGC – Intergovernmental Committee

ILRM – Irish Law Report Monthly

INTERPOL- International Police

N.Y.S.- New York Supreme

QB- Queens Bench

SA – South Africa

SCA – Supreme Council of Antiquities

UNESCO- United Nations Educational, Scientific and Cultural Organisation

UNIDROIT- International Institute for the Unification of Private Law

UNODC- United Nations Organisation on Drugs and Crime

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

“A work of art gains in beauty and truth, both for the uninitiated and for the scholar, when viewed in the natural and social setting in which it took shape; a nation suffers affliction at the spoliation of the works it has created; a nation needs to be alive on an imaginative level and return and restitution enables a nation to recover part of its memory and identity.”¹

Riches of countries consist not only of its mineral resources but also its creativity such as intellectual property and cultural property. Some countries have however been deprived of their cultural property, hence the clamour for return. This deprivation is as a result of colonization, war, pillage, commercial trade and plunder.

Generally from ancient times, all over the world plundering is seen as natural during war. The setting aside of a nation’s art treasures has always been regarded as a trophy of war which adds to the glory of the victor and the humiliation of the vanquished.²

The carting away of a country’s art valuables has been considered to bring public praise and fame to the winner and shame to the loser. This continuous loss of cultural property by countries is not in any way associated with unfairness.³ This situation can be buttressed by the looting in Nigeria of the Benin artefacts in a punitive expedition carried

¹ M’Bow, A. 1979. A plea for the return of an irreplaceable cultural heritage to those who created it, Return and Restitution of Cultural Property, *Museum* Vol. XXXI, No. 1: 58.

² Shyllon, F. Negotiations for the Return of Nok Sculptures from France to Nigeria – An Unrighteous Conclusion, A Paper presented at the Conference on the Return of Cultural Property and the Fight Against its Illicit Trafficking, 30 September – 3 October, 2002, Seoul, Korea.

³ An essential resource on the on-going debate over the vast amounts of art and cultural property displaced as a result of World War II is *The Spoils of War*, Simpson .E. (Ed.) 1997. New York: Harry N. Abrams, Incorporated. This book is a collection of essays which remarkably illustrate the situation. For more information on the discussion see the following articles: Greenfield J., The Spoils of War: 34; Nicholas L. World War II and the Displacement of Art and Cultural Property: 39; Pruszyński J. Poland: The War Losses, Cultural Heritage and Cultural Legitimacy: 49; Leistra J. A Short History of Art Loss and Art Recovery in the Netherlands: 53; Lust J. The Spoils of War Removed from Belgium during World War II: 58; Hamon M. Spoliation and Recovery of Cultural Property in France, 1940-94: 63; Shvidkoi M. Russian Cultural Losses during World War II: 67; Fedoruk A. Ukraine: The Lost Cultural Treasures and the Problem of their Return: 72; Maldis A. The Tragic Fate of Belarusan Museum and Library Collections during the Second World War: 77; Hiller M. The Documentation of War Losses in the Former Soviet Republics: 81; Mann V. Jewish Ceremonial Art and Private Property: 84; Sailer G. Austria: 88; Fodor I. The Restitution of Works of Art in Hungary: 92; Schmidt W. The Loss of German Artistic Property as a Result of World War II: 95.

out in 1897 and also in the plunder that was experienced during the French Revolution and by Napoleon. The revolution was a revolution against despotism aimed at relieving the suffering of the people. When Napoleon came on board during the revolution, he looted the territories he conquered especially in Belgium and Italy and imposed the Napoleon Code on the people.

The amount of looting of works of art (especially in Belgium and Italy) had consequences that are directly relevant to the purpose of this study because at the Congress of Vienna, the victors of 1815 compelled France to carry out one of the first large scale restitutions recorded in history.⁴ The reasons put forward to justify this operation appear to be applicable even today, especially in the concept expressed by the English plenipotentiary, Viscount Castlereagh in the last sentence of the arguments set forth in the circular note addressed to the ministers of the Allied Powers, in which he wondered why France might wish to keep the spoils of the art of all other countries which according to him, are '*objects that all modern conquerors had invariably respected as being inseparable from the country to which they belonged*'.⁵

Furthermore, contrary to the general and widely accepted notion that looting is part of war, is what the historian Polybius in his extraordinary exhortation which dates back to ancient times said. According to him:

the city should not owe its beauty to adornments brought in from elsewhere, but to the valour of its inhabitants.... I trust that future conquerors will learn from this reflexions not to plunder the cities they bring into subjection and not

⁴Wheaton H. 1852. *Elements of International Law*. Brockhaus Leipzig (in the chapters on Rights of War between enemies) Vol. 1:15 cited by Rollet-Andriane L. 1979. Precedents, Return and Restitution of Cultural Property, *Museum* Vol. XXXI, No. 1: 6.

⁵ Obligations of a similar kind, but numerically fewer and qualitatively less important, had, however, already appeared in a number of 17th Century Treaties such as the Treaty of Munstar in 1648 between Spain and the Netherlands (art. LXIX); of the Isle des Faisans in 1659 between Spain and France (art. LIX); of Nimwegen in 1678 between Spain and France (art. XX); of Nimwegen between Austria and France in 1679 (art. XIX); of Lunden, between Denmark and Sweden, in 1679 (art. XII); of Ryswick, between the Netherlands and France, in 1697 (art. II and VI); of Utrecht, between the Netherlands and France, in 1713 (art. VI); and between France and Savoy (art. XII), etc. Several of these treaties also provide for the return of archives removed from their place of origin or those relating to a ceded territory (cf. Treaty of Paris in 1783 between the United State and Great Britain, art. VII). Similarly, the Treaty of Oliva between Poland and Sweden (1660) provide for the restitution by Sweden of the Polish royal library; and the Treaty of Whitehall between Great Britain and the Netherlands in 1662 provides for the restitution of the works of art belonging to the Stuart collection.

*to take advantage of the distress of other peoples to adorn their homelands.*⁶

Elsewhere he says as follows:

*The laws and the right of war oblige the victor to ruin and destroy fortresses, forts, towns, people, ships, resources and all other such like things belonging to the enemy in order to undermine his strength while increasing the victor's own. But although some advantage may be derived from that, no one can deny that to abandon oneself to the pointless destruction of temples, statues, and other sacred objects is the action of a madman.*⁷

Cicero also demonstrated a cultural indignation against Verres for the loss to the community of 'Statues that people would go to Messina to see as one of the most beautiful things there'.⁸ This led to a judgment against the former Roman Praetor forcing him to pay 45million sesterces to the Sicilians in retribution for the artistic riches plundered from their public monuments and temples.

On the part of Charlemagne he resisted the temptation to 'enrich his Franco-Germanic possessions with works of art that had been preserved in Italy' and consulted Pope Adrian as to his duties in the matter.⁹ Richelieu, Mazarin, Colbert and Louvois have also been given credit for 'never having contemplated taking advantage of the victories of the French Armies to enrich the royal collections. During their wars, Louis XIII and Louis XIV, while they annexed provinces, scrupulously refrained from despoiling the vanquished of the monuments which were the mementoes to their nation's past, which embodied their scientific, literary and artistic achievements.'¹⁰

The notion of simple honesty had occasionally prompted restitutions of works of art removed from conquered countries. Instances of voluntary returns are as follows:

⁶ Quoted by Seferiades, S. 1932. *La Question du Repatriement des Marbres d'Elgin Considerée plus spécialement au Point de Vue du Droit des Gens. Revue de Droit International.* Vol. 2. Adapted by Rollet-Andriane L.*op.cit.*: 4.

⁷ Toman, J. 1996. *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing and UNESCO Publishing: 4

⁸ De Signis, C. 1979. *Verrem Oratio, Lib. IV.* quoted from *Museum* Vol. XXXI, No. 1: 4

⁹ Muntz. 1895. *Les Annexions de Collections d'Art ou de Bibliothèques. Revue d'Histoire Diplomatique.* cited by Rollet-Andriane L. *op.cit.*: 6.

¹⁰ *ibid*

1. The return of one of the two copies of the *Kebra Nagast* or ‘Glory of Kings’, embodying the legend of the origin of the Ethiopian ruling dynasty by the British Government to Ethiopia.¹¹
2. The presentation of Tewodros’ crown by King George V to Tafari Makonnen, the then Ethiopian Regent, on his state visit to England. Also the presentation by Queen Elizabeth II of Tewodros’ cap and imperial seal in 1965 during her state visit to Ethiopia.¹²
3. The return of a collection of paintings and prints to the Philadelphia Academy of Arts by Sir Alexander Croke in 1812 was seen to be in line with the practice of civilised countries under the law of nations.¹³

Notwithstanding the forgoing, a doctrine foreshadowed by enlightened thinkers as John Locke, George-Fredrick Martens and Quatremere de Quincy, and formulated by jurists emerged to the effect that scientific and artistic works cannot be displaced because they are predestined to meet the unending intellectual needs of the country.¹⁴ The above doctrine/precept has been reflected in several treaties¹⁵ and constitutes instances of compelled return such as are reflected by the Treaties below:

1. The Treaty of 3rd September 1866 mandating the Grand Duchy of Hessen to return a library taken from Cologne in 1794. Article 18 of the Treaty of Vienna of 3 October, 1866 obliged a return to Venice of the ‘objects of art and science’ which had been displaced from it a long time before then. The second paragraph of Article 56 of the Annex to the Fourth Convention of the Hague in 1907, stipulated the prohibition of any seizure or destruction of, or intentional damage

¹¹ Pankhust, R. 1986. Restitution of Cultural Property: The Case of Ethiopia. *Museum*. 149: 58-59

¹² *ibid*

¹³ Toman, J, *op.cit*, 336 – 337.

¹⁴ Bluntschli, *Droit International Codifie*, art. 650, No. 4. It is also interesting to note that, in some cases, those responsible for implementing the allied decisions of 1815, which compelled France to effect one of the first large scale restitution recorded in history, did not stop at merely returning the transferred item to their last owners: some manuscripts which Napoleon’s armies had seized in Rome were restored, not to the Pope, but to the Heidelberg Library whence they had been looted in 1622.

¹⁵Writers have aired their views about the laws, directives and Conventions on this issue in *The Spoils of War*. *op.cit*. some of their opinions can be found in the following articles: Kaye L. Law in Force at the Dawn of World War II: International Conventions and National Laws: 100; Petropoulos J. German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich: 106; Kurtz M. The End of War and the Occupation of Germany, 1944-52. Laws and Conventions Enacted to Counter Germany Appropriations: The Allied Control Council: 112; Plaut J. Investigation of the Major Nazi Art- Confiscation Agencies: 124; Smyth C. The Establishment of the Munich Collecting Point: 126; Farmer W. Custody and Controversy at the Wiesbaden Collecting Point: 131; Taper B. Investigating Art Looting for the MFA&A: 135; Fairson, Jr. S. Transfer of Custody to the Germans: 139 *etc.*

to, historical monuments, works of art and science which should be prosecuted if carried out.

2. The Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on 28 June, 1919, contains three provisions – Articles 245 to 247 – concerning restitutions:
 - a. According to Article 245, the German government had “to restore to the French government the trophies, archives, historical souvenirs or works of arts carried away from France by the German authorities in the course of the war of 1870 to 1871 ...”
 - b. Article 246 obliged Germany to restore to the British government the original Koran of the Caliph Othman and the skull of the Sultan Makaoua.
 - c. Article 247 mandated Germany to return to the University of Louvain the manuscript, incunabula, printed books, maps and collection items corresponding in number and value to those destroyed when Germany burnt the Library of Louvain, and to deliver the leaves of the Triptych of the Mystic Lamb, painted by the Van Eyck brothers, and the leaves of the Triptych of the Last Supper, painted by Dierick Bouts to Belgium for the reconstitution of two great artistic collections.¹⁶
3. The Treaty of St. Germain¹⁷ forced the return of all deeds, documents, antiquarian and art objects and all scientific and bibliographical material removed from the invaded territories, and those removed from Italy as far back as 1718 by Austria. Belgium, Poland and former Czechoslovakia¹⁸ also benefited in the treaty in the area of precluding presumption of prescription.¹⁹
4. The peace treaty of Riga (18 March 1921) was concerned with the absolute restitution of cultural property carted from Poland since 1st January, 1772. The text however contains a couple of problems facing the principle of restitution till date such as: dismembering complete collections or break up groups of items

¹⁶Treaty of Peace with Germany, also known as Treaty of Versailles, signed June 28, 1919, Section 2, Articles 245-247

¹⁷Treaty of Peace between the Allied and Associated Powers and Austria, also known as the ‘Treaty of St. Germain’, signed at St. Germain-en-Laye, September 10, 1919; entry into force, November 8, 1921. (Preamble; Part 8, Section 1: Article 184 and Section 2: Articles 191-93, 195-96)

¹⁸ Czechoslovakia is now Czech Republic and Slovakia

¹⁹ Prescription has to do with the right of possession of property based on long term exercise of property rights.

which constitute a whole (art. 11, para. 7); lawful cases of voluntary transactions (art. 11, para. 8); opposability of the provisions of the agreement by third parties in possession of the items (paras. 11 to 14 of art. 11 oblige the restituting State to recover this property and bear the costs of any indemnification); and finally the setting up of a Mixed Commission to attend to the implementation of these measures which, it should be pointed out and not presented as act of reprisal or revenge but, according to the preamble to the treaty, as constituting a response to the ‘desire... of concluding a final, lasting and honourable peace based on a mutual understanding’ – and therefore on the same motivations as those underlying present day negotiations for the restitution of cultural property to countries that have lost it as a result of colonial or foreign occupation.²⁰

Interestingly, the post-First World War peace treaties led to formulation and intimidation of principles in current contemporary international law for the protection of Cultural Property.

International Humanitarian Law and the Law of armed conflict, human rights and minorities, and state succession and recognition of new states are covered by the obligations and remedies for breach of these principles.²¹

After the Second World War,²² a Declaration was published in London, Moscow and Washington on 5 January, 1943 by seventeen governments and the French National Committee in which the United Nations’ reserved the right to declare null and void any transfer of or traffic in property, rights and interest, of whatever nature, which are or were situated in the territories occupied by or under the direct or indirect control of the governments with which they are at war or which are or were in the possession of persons (including legal entities) residing in the territories in question... whether such transfer or traffic has taken the form either of evident plunder or of apparently legal

²⁰ The text of the Treaty of Riga was published in the League of Nations Treaty Series, Vol. 6, No. 1, 1921, pp. 123 – 161.

²¹ Vrdoljak A. 2013. Enforcement of Restitution of Cultural Heritage through Peace Agreements in Francioni & Gordley. Eds. *Enforcing International Cultural Heritage Law*. Oxford: Oxford University Press: 22-39 at 38

²² cf. in particular, Art. 75 of the treaty with Italy (United Nations Treaties, Vol. 49, p. 3 et seq.), providing for the return of cultural property removed from occupied territories by force or constraint, whatever the subsequent transactions concerning them. See also ‘Statement of Policy with Respect to the Control of Looted Articles’ signed in Paris on 8 July, 1946 by France, the United States and the United Kingdom (The Department of State Bulletin, Vol. XXV, No. 636, 17 August 1951) and the settlement concerning restitution adopted by the Inter-allied Control Council, with headquarters in Berlin in 1946.

transactions, even if the said transfer and traffic are represented as having been effected without constraint.’²³

It is glaring that almost all the legal difficulties frequently raised concerning return and restitution has been to topic of discussion for a long time now.

The treaties mentioned above handled the issue from post war settlement between former enemies and favoured countries demanding the return of the cultural property they have lost.

Having made the above restitutions over the years, carting away of cultural property from one country to another has taken place in an epidemic proportion and its trade is comparable with the international trade in drugs. By the 1980’s, the black market for stolen or smuggled cultural property had become the ‘second biggest only to narcotics.’²⁴ The displacement is a concern to the whole world, as it constitutes dispersion and spoliation of the world’s cultural treasures, which also constitute precious symbols of national identity, but it is those who can least protect themselves (i.e. the source countries) that are the great losers.

The unacceptability by the international community of the practice of removing artefacts of significant importance from their place of origin has led to the adoption of professional codes of ethics by many museums and art dealers around the world.²⁵

The protection of cultural heritage has been a pressing issue for former world human colonies. Africa is a continent well-endowed with items that qualify as Cultural Property. for example, there exist the ancient artifacts from Senegal and stone axes from Ghana. Ceramic works in Senegal, Mali, Niger, Ghana and Cameroon. In Nigeria

²³ The Department of State Bulletin, Vol. VIII, p.21-22. cf. also the preamble to the Resolution 3.428 adopted by the General Conference of UNESCO at its eighteenth Session(1974)

²⁴Kono T. & Wrbka S. 2010. General Report in Kono T. Ed. *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*. Leiden-Boston: Martinus Nijhoff Publishers: 33 citing Harris L.J. 1999. From the Collector’s Perspective: The Legality of Importing Pre-Columbian Art and Artifacts. P.M Messenger. Ed. *The Ethics of Collecting Cultural Property: Whose Culture?* Albuquerque: University of New Mexico Press: 155 citing J. A. R. Nafziger. 1985. International Penal Aspects of Protecting Cultural Property. *The International Lawyer*. 19: 835; Warring J. 2005. Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property. 19 *Emory International Law Review*: 234

²⁵ See generally: Pernille Askerud and Clement E., Preventing the Illicit Traffic in Cultural Property. *A Resource Handbook for the Implementation of the 1970 UNESCO Convention*, 1997.

there were the Benin bronzes, ancient arts of Ife, Iwo Eleru and Igbo - Ukwu art in the Eastern part of the country.

Africa is a continent with several of its nations under a form of colonisation at one time or the other. It is also a continent with Cultural Property exposed to plunder, pillage and massive theft. It is a continent whose wealth of cultural property requires return or restitution in view of their displacement experiences.

Many African countries do not have laws and regulations to effectively protect their cultural heritage from being displaced. In former colonies, a great deal of the displacement in cultural property is not yet covered by any legislation and is not, in the strict sense of the word, illegal.

The present approach of addressing the issue of displacement in terms of cooperation and justice and also for the benefit of the weaker party, came on board during the multilateral negotiations under the auspices of UNESCO,²⁶ in response to the effects of the world war. This led to the adoption of the 1954 Hague Convention on the Protection of Cultural Property during Armed Conflict. The 1954 Hague Convention however, protects cultural property in peace time because measures to safeguard and protect cultural property can only be implemented in peace time.

UNESCO, while working in partnership with other bodies, has formulated international agreements and Conventions in this field. After ten years of working in this field, UNESCO came up with the 1970 UNESCO Convention which was aimed at Prevention, Restitution and Cooperation.

The 1970 UNESCO Convention had apparent defects in its provisions on Restitution in the sense that certain aspects of national law such as time limitations on claims and the status of a 'good faith' purchaser provided loopholes which enabled the transfer of illegally acquired cultural property into the legal market.²⁷ The need to cure these defects led to UNESCO working with the International Institute for the Unification of Private

²⁶ United Nations Economic, Scientific and Cultural Organisation.

²⁷ For more detailed explanation see O'Keefe, P. J. and Prout, L.V. Eds. 2011. *Cultural Heritage Conventions and Other Instruments. A Compendium with Commentaries*. Great Britain: Institute of Art and Law Ltd.

Law in Rome (UNIDROIT²⁸) to birth the 1995 UNIDROIT Convention on the issue of return and restitution alone.

The thesis will carry out a discussion of the concept of Cultural Property from a historical perspective by taking into consideration the terminologies used before the 1954 Hague Convention where the term Cultural Property was first used and defined and the subsequent definition in the 1970 UNESCO Convention. The definition in the 1995 UNIDROIT Convention will also be considered. It will examine the idea of ‘return’ and ‘restitution’ and distinguish it from reparation.²⁹

The Return and Restitution Provisions of the 1970 UNESCO and 1995 UNIDROIT Conventions will be compared and the benefits they hold highlighted. Administrative and practical measures in place to ensure the benefits derivable from the Conventions are enjoyed by countries will be discussed. The level of participation by African states in the Conventions as well as the means of ensuring more participation by African countries in the Convention will also be discussed before making recommendations and concluding.

1.2 Statement of the Problem

A survey of some laws of African countries, especially from the UNESCO database, show that they do not have dynamic provisions on safeguarding Cultural Property. The laws are still based on or have their origin in the laws made by the colonial powers which do not reflect the true situation in Africa.

The laws in French speaking countries in Africa have their root in the 1956 French Law³⁰ that was in operation in the French overseas territories at that time. This Law, like the typical French legislation, had a classification system for monuments and sites and movables of particular importance and excavations on all land, either public or private,

²⁸ ‘UNIDROIT’ is an acronym from the Institute’s French title ‘*Institut international pour l’Unification du Droit prive*’. This is interpreted in English to mean International Institute for the Unification of Private Law.

²⁹ Reparation is compensation for wrong or compensation demanded by a defeated nation from a victor in a war.

³⁰1956 French Statute No. 56-1106 which dealt with the protection of monuments and sites of historic, scientific, artistic or scenic character, with the classification of historic, scientific and ethnographic objects, and with the control of excavations. This Law was in force in the areas covered by the present day Benin, Cameroon, Chad, Central African Republic, Congo (Brazzaville), Comoros, Djibouti, Gabon, Guinea, Ivory Coast, Malagasy Republic, Mali, Mauritania, Morocco, Niger, Reunion, Senegal, Togo, Tunisia and Upper Volta.

was carried out under the issuance of a license by the government which is subject to revocation on non-compliance or the government taking over.³¹

The British colonies in Africa on the other hand had no statute applicable like that of the French colonies, most of them had cultural heritage enactments in force before their independence formulated to follow a standard pattern of protecting all objects made before a particular date.³² The date was discovered to vary from country to country and was often related to some recent event of local importance.³³ For example, in Nigeria, the first legislation on cultural property in Nigeria was in 1924 which was repealed by the Antiquities Ordinance of 1953.³⁴ The 1974 Act³⁵ was promulgated to prevent the illegal export of antiquities which the 1953 Act did not prohibit. The National Commission for Museums and Monuments (NCMM) Act³⁶ which became the law in 1979 consolidated the provisions of the earlier Act and reinforced their deficiency.

At the international scene however, the 1970 UNESCO Convention came into being, and considering the dynamic need of nations, was followed later by the UNIDROIT Convention of 1995.

Since the inception of the 1970 Convention, African countries who stand to benefit a lot by becoming state parties have failed to do so. They have also not become parties to the 1995 UNIDROIT Convention. The promotion of the return and restitution of cultural objects to African states cannot be achieved except African countries become parties to these Conventions.

³¹O'Keefe P.J & Pratt L.V. 1984. *Law and the Cultural Heritage, Discovery and Excavation*. Oxon: Professional Books Limited. Vol. 1: 67

³²*ibid*

³³*Ibid*; unlike most French based legislation, there is generally no provision for the authorities to undertake or take over excavations discovered as a result of finds reported or excavations carried out after obtaining permission. The English language legislation however have an interesting feature of paying attention to recent ethnographic objects because of their use in traditional ceremonies. Countries whose legislation follow this pattern are Botswana, Gambia, Ghana, Lesotho, Sierra Leone and Zambia. Zimbabwe's legislation is not so well couched. Sudan's law is more detailed in its provisions on excavation. South Africa is in a class of its own. Liberia and Swaziland have their own different laws and the East African speaking nations of Kenya, Tanzania and Uganda have a slightly different pattern of having provisions for declaration of sites or objects with an increased level of protection accorded to them. (see O'Keefe P.J & Pratt L.V., *Law and the Cultural Heritage*. Vol. 1. *op.cit.* p.58).

³⁴ Now Antiquities Act 1953; Laws of the Federation of Nigeria (LFN) 1958. Ch 12

³⁵ Antiquities (Prohibited Transfer) Act 1974: Laws of the Federal Republic of Nigeria 1979 No. 9.

³⁶ National Commission for Museums and Monuments (NCMM) Act 1979: Laws of the Federal Republic of Nigeria 2004 Cap. N 19

Intellectual and practical efforts put in place for the actualisation of return and restitution of their Cultural Property is being frustrated because some state parties to the 1970 and 1995 Conventions have not put mechanisms in place within their country to enforce the provisions of the Conventions. In Nigeria for example, section 12 of the 1999 Constitution³⁷ provides that: ‘No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’ This simply means any Convention to which Nigeria is a High Contracting Party must be translated into her domestic laws for it to have efficacy in the land.

A country can only enjoy the full benefit provided by the Conventions when the country ensures all that is needed for the full operation of the Convention internally is in place. Countries like Japan and Korea have advanced protection policy for their cultural property. South Africa also has an integrated and interactive system for the protection of its cultural property.³⁸ For some African countries like Nigeria, this field suffers from underfunding, plunder and pillage because the politicians and high civil servants who are meant to secure the country’s Cultural Patrimony have not made it a priority issue. They have no idea that a Nation’s legacy should be protected and handed over to future generations because of their uniqueness and irreplaceable status.

It is in the light of the forgoing issues that this thesis seeks to analyse the provisions of both Conventions and determine how best to ensure that each country in Africa, has an adequate representative national collection of its own cultural property.

1.3 Definition of Terms

In simple language, ‘Return’ has been defined³⁹ to mean “to revert to a former owner” while ‘Restitution’ has been defined⁴⁰ to mean “the act of restoring something that has been taken away or lost.” Different authors have also defined these words differently. However, this thesis is based on some assumptions or fundamentals as regards these concepts. The following are assumed:

1. **‘Return’** is used for Cultural Property that has been illegally exported.⁴¹

³⁷ Constitution of the Federal Republic of Nigeria Cap.C20 LFN 2004.

³⁸ National Heritage Resources Act, No.25 of 1999, South Africa.

³⁹ Funk & Wagnalls Standard Dictionary. 1963. Vol 2. New York: International Edition.

⁴⁰ *ibid*

⁴¹ This is the definition based on the 1995 UNIDROIT Convention

2. **‘Restitution’** is used for Cultural Property that has been stolen.⁴²

3. **‘Cultural Property’**

- a. Refers to *‘property “movable or immovable” which on religious or secular grounds is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science and the structures housing such property’*.⁴³
- b. Are *‘all those diverse and manifold artefacts that are an expression of a specific culture and which stand out either because there are not many others like them because of the superior artistry with which they are fashioned or because they are uniquely characteristic of that culture’*.⁴⁴
As such, they should be viewed in the natural and social settings in which they took shape.
- c. offers *‘the potential for a deeper understanding and appreciation of a people’s past from which could be constructed the history of a family, of a village or a nation.’*⁴⁵

Afigbo has stated that

*‘the presentation of a memorable event in situ has an advantage over written or verbal information and educators insist that the imparting of knowledge is based on the principle that visual experience is the best mode of instruction. The natural environment also offers a practical re-enactment of man’s past activities.’*⁴⁶

He further asserts that:

*‘learning about the past/history in the natural environment could fire one’s imagination and arouse narcissistic nostalgia, patriotic feeling, emotion, pride, even repugnance and revulsion. This reaction to the concrete evidence of one’s forebears sends messages of cultural and symbolic import to one which could even be used for historical and political debate.’*⁴⁷

⁴² *ibid.*

⁴³ See generally Article 1 of 1970 UNESCO Convention and the annexe to 1995 UNIDROIT Convention

⁴⁴ UNESCO, Preventing the Illicit Traffic in Cultural Property, *A resource handbook for the Implementation of the 1970 UNESCO Convention*, 1997: 5

⁴⁵ Afigbo, A. E. and Okeke, C. S. Weaving Tradition in Igbo Land: 17-110 adapted from Izuakor, L. I. 1998. Nigerian Historiography: The Museum as a Resource, *Nigerian Heritage*. Vol. 7: 23.

⁴⁶ *ibid*

⁴⁷ Izuakor, L.I. *ibid*

M'Bow's statement to the effect that a nation needs to be alive on an imaginative level and return and restitution enables a nation to recover part of its memory and identity⁴⁸ is equally appropriate.

1.4 Justification for the Study

This research work analyses the provisions on return and restitution found in the 1970 UNESCO Convention and the 1995 UNIDROIT Convention bringing to limelight the benefits derivable from the combination of the two Conventions on the return and restitution of Cultural Property to source countries with particular reference to Africa. To a large extent, it makes a comparative analysis of the provisions of the UNESCO and UNIDROIT Conventions.

According to Hayden, to “compare” is to examine two or more entities by putting them side by side and looking for similarities and differences between or among them.⁴⁹ It is acknowledged that the primary purpose of any exercise in legal comparison is the creation of new knowledge.⁵⁰ In this regard, Kung defines the comparative legal method of research as “a unique, systematic and jurisprudential strategy applied, by virtue of similarities and differences between the diverse legal systems, to acquire new understanding regarding the specific topic...”⁵¹ Sacco⁵² argues that a comparative evaluation of different countries on a similar issue is of great help in drafting legislation and bringing about law reform. This happens to be UNIDROIT's mandate which compares legal systems and tries to find a common denominator that unifies them on specific subject matters. In the context of this thesis, the differences in countries' legislation which made the 1970 UNESCO Convention weak was what UNIDROIT focused on to have a unique rule for all countries.

⁴⁸ M'Bow, A. 1979. A plea for the return of an irreplaceable cultural heritage to those who created it, Return and Restitution of Cultural Property, Museum Vol. XXXI, No. 1: 58

⁴⁹ Hayden, M. 2006. *Introduction to International Education*. London & Thousand Oaks and New Delhi: Sage Publications Ltd. :4; According to Watson, “comparative law then, as an academic discipline in its own right, is a study of the relationship, above all the historical relationship, between legal systems or between rules of more than one system.” See Watson. 1973. *Legal Transplants*: 9.

⁵⁰ According to Venter, comparative law is also an aid to legislative process; an instrument of interpretation of the law; a vehicle for teaching law, and a means of promoting legal unification. See Venter, F. 2000. *Constitutional Comparison*. Kluwer Law International & Juta & Co.: 19.

⁵¹ Kung, 2006. *An International Perspective on the Fundamental Human Rights of Educators* : 7.

⁵² Sacco, R. 1991. Legal Format: A Dynamic Approach to Comparative Law. *African Journal of Comparative Law* 1: 4.

Hervey⁵³ seeks to justify a comparative study by arguing that it fosters a better understanding of one's domestic legal system. In the same vein, Bogdan⁵⁴ asserts that a lawyer like any other professional cannot limit himself only to what occurs within the borders of his own country. He submits that "The importance of learning from the experience of other countries is obvious within the fields of natural science, medicine and technology. The same compelling need to make use of the experience of others should also be recognized within the legal field."

The reason for undergoing this study of comparing legal systems and legislation is predicated on the sustained interest in the issues involving return and restitution of Cultural Property to its country of origin and also on the rationale for having separate private law and public law Conventions on the return and restitution of cultural property while trying to find out if this has actually led to the actualization of the concern by UNESCO of ensuring that each country has an adequate representative national collection of its own cultural heritage and the adoption of that concern by African countries for Africa's benefit.

In comparing two different Conventions, there must be some similarities or some points of connection. Also, there must be some divergence otherwise nothing of value will be gained as two things that are completely identical cannot be compared.

In comparing provisions of the 1970 UNESCO and 1995 UNIDROIT Conventions, an important similarity shared by the two Conventions is that both of them are International instruments with provisions on return and restitution of Cultural Property and both are not retroactive in nature. They are also aimed at common problems which they are attempting to solve using different procedures. Being complimentary in nature, the areas of divergence are evident. A major difference is that 1970 UNESCO Convention is a scheme under Public International Law while 1995 UNIDROIT Convention is a scheme under Private International Law. The above similarities and difference justify making further in depth comparison between the provisions of the two Conventions to bring to limelight the benefits derivable from their combined operation.

⁵³ Hervey. 1993. *Justifications for Sex Discrimination in Employment*: 17.

⁵⁴ Bogdan, M. 1994. *Comparative Law*. Kluwer Law & Taxation Publishers, Sweden Norstedts Juridik/Norway Tano: 20 & 29.

1.5 Objectives of the Study

The objectives of the research are to:

1. examine whether the two Conventions have adequately made provisions for the main issues involved in the return and restitution of Cultural Property.
2. identify the benefits derivable from the combination of the two Conventions on the return and restitution of Cultural Property to source countries with particular reference to Africa.
3. assess the extent to which African countries have participated in the 1970 UNESCO and 1995 UNIDROIT Conventions.
4. determine how African states ratification can be made more effective and
5. Discuss means of having more participation⁵⁵ of African countries in the Conventions.

1.6 Research Questions

The thesis raised and answered the following questions:

1. Why the clamour for return and restitution?
2. Why should we have both public and private law instruments on return and restitution of cultural property?
3. Are there mechanisms in place to actualize the provisions of these Conventions?
4. How much impact have the Conventions, the administrative and practical measures put in place by UNESCO and UNIDROIT had in Africa?
5. Why should return and restitution be a major concern for Africa?

1.7 Research Methodology

Methodologies to research can be quantitative, qualitative or mixed method. Africa is the area of study being a continent of source countries for cultural property. This research work is qualitative and quantitative in nature. Background work which is library based, involving a systematic survey and exposition of available literatures and documents, drawing logical conclusions and offering relevant prescriptions was carried out. Thus, the research involved review, synthesis and analysis of relevant literatures, legislations, case law and policy documents, reports of international organisations and inter-governmental committees relating to the return and restitution of cultural property.

⁵⁵ The word 'participation' as used in this thesis refers to ratification, domestication and implementation rates of African countries.

Analysis of African countries' domestic legislation to determine the percentage of those who have participated in the Conventions, the percentage of those with local legislation on the return and restitution of cultural property was carried out. This thesis employed the jurisprudence of global, regional and national institutions as aids to interpretation.

During the research period, the researcher attended the Geneva Summer School, University of Geneva, Geneva, Switzerland in June 2014 where a certificate of completing the cultural heritage course was issued. During the three weeks spent there, the researcher had the opportunity of interacting with and conducting unstructured interview on scholars and practitioners in heritage law such as J. Lai, A. Chechi,⁵⁶ C. Graber,⁵⁷ Y. Benhamou,⁵⁸ B. Vezina,⁵⁹ T. Schultz,⁶⁰ M.A Renold,⁶¹ P.Gerstenblith,⁶² B.Widmer, S. Manacorda,⁶³ R.Pavoni⁶⁴ and C. Johannot-Gradis⁶⁵ amongst others. The library resources of the Art Law Centre, University of Geneva, Geneva, Switzerland were utilized.

⁵⁶ PhD (2011), European University Institute (EUI); LLM (2003), University College London (UCL); J.D. (2001), University of Siena. Alessandro Chechi is a Post-doctoral researcher at the Art-Law Centre, University of Geneva, under the UNESCO Chair. He joined the ArThemis research team in July 2011 from the EUI, where he had defended his PhD thesis on the settlement of cultural heritage disputes in March 2011. Alessandro is lecturer in public international law at the Université Catholique of Lille and at the University for Foreigners of Siena. He is also reporter for Italy of the International Law in Domestic Courts – Oxford University Press project since 2007.

⁵⁷ Researcher at the Institute of European and International Economic Law, University of Berne, Switzerland.

⁵⁸ Yaniv Benhamou holds a Ph.D. in Intellectual Property Law. He is a Lecturer in Intellectual Property, Information Technologies and Media Law at the Swiss University of Applied Science and works in the Switzerland's largest law firm. He is also Swiss correspondent for Kluwer Copyright Law and author of different publications in the field of Intellectual Property and Art Law (such as the exhibition and its book: "Controversies: A Legal and Ethical History of Photography"). In addition to these legal activities, he participates regularly in associative and cultural activities in the field of Art and Music.

⁵⁹ She is a legal officer at the Traditional Knowledge Department of WIPO in Switzerland.

⁶⁰ Swiss National Science Foundation Research Professor, Department of International Law, Graduate Institute of International and Development Studies, Geneva; Reader in Commercial Law, King's College London.

⁶¹ Prof. University of Geneva, Dr. iur., LL.M., Director Art-Law Centre. Marc-André Renold studied at the Universities of Geneva and Basel in Switzerland and at Yale University in the USA. He is Professor of art and cultural heritage law at the University of Geneva. He is also Attorney-at-law, Member of the Geneva Bar. He is the author or co-author of several publications in the field of international and comparative art and cultural heritage law and has been, since its inception, an editor of the "Studies in Art Law" series. He is also the holder of the UNESCO Chair in the International Law of the Protection of the Cultural Heritage at the University of Geneva.

⁶² Distinguished Research Professor and Director, Center for Art, Museum and Cultural Heritage Law, DePaul University College of Law USA

⁶³ He is from University of Paris and is a criminal law expert on heritage issues.

⁶⁴ He lectures at the Department of Law, University of Siena.

⁶⁵ Johannot-Gradis C. is the author of the book 'Tangible and Intangible Cultural Heritage: what protection in armed conflict?' She is an authority in this field.

Part of the research was carried out at the UNIDROIT Secretariat and the UNIDROIT library in Rome, Italy under a Research Scholarship Programme, between October and November 2014, through the financial support from the United Kingdom Foundation for International Uniform Law. Key informant interviews were conducted with the legal officers in relation to the 1995 UNIDROIT Convention especially Ms Marina Schneider, the UNIDROIT Senior Legal Officer in charge of the instruments of ratification. At the UNIDROIT secretariat library, in-depth interview to determine personal opinion on cultural property was carried out with fellow researchers from different countries of the world.

In-depth interviews of randomly selected politicians, lawyers, judges and members of the public within Ibadan metropolis was carried out to determine the opinions of Yorubas' on cultural property.

The data were subjected to interpretive and comparative analyses.

1.8 Scope of the Study

There are a number of Conventions and international instruments that deal with Cultural Property and Cultural Heritage of humanity such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954. Some of the other instruments may be referred to only where relevant to the theme of this work.⁶⁶

This thesis however is a critique of African States Participation under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 and the UNIDROIT Convention on Stolen or

⁶⁶ Other Conventions and international instruments includes; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999; States Participating in International Treaties Concerning the Protection of Cultural Heritage in Time of Conflict and Punishment of Offences Against It; Convention concerning the Protection of the World Cultural and Natural Heritage 1972; Convention for the Protection of the Architectural Heritage of Europe 1985; European Convention on the Protection of the Archaeological Heritage (Revised) 1992; European Landscape Convention 2000; Convention on the Protection of Underwater Cultural Heritage 2001; Convention for the Safeguarding of the Intangible Cultural Heritage 2003; Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005; Council of Europe Framework Convention on the Value of Cultural Heritage for Society 2005; Declaration on Principles of International Cultural Diversity 2001; UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage 2003; United Nations Declaration on the Rights of Indigenous People 2007.

Illegally Exported Cultural Objects 1995. The thesis will make prescriptions for Africa on how to make each country have an adequate representative national collection of its own cultural property.

1.9 Limitations/Research Focus

The 1970 UNESCO Convention and the 1995 UNIDROIT Convention do not deal with cultural property that had been dispersed before they came into force. This can be said to account for the non-participation of some African countries in the two Conventions. Measures to return and restitute those categories of objects such as the objects carted away during the Benin expedition of 1819 in Nigeria, looting of cultural treasures carted away to the home countries of western colonial powers and all the instances of illegal exportation of cultural objects which took place in a country before the entry into force of the Conventions in that country are only within the jurisdiction of the UNESCO Intergovernmental Committee created for such purpose.

The national laws that will be highlighted in this thesis are those available in the UNESCO Database. The laws of countries which have not been uploaded in the database will not be taken into consideration in this research.

CHAPTER TWO

LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK OF CULTURAL PROPERTY

2.1 Literature Review

There exist researches on the protection of cultural property and also on the return and restitution of cultural property which provide important insights into the development of this thesis.⁶⁷

M'Bow⁶⁸ in 1979 made a plea to the countries in possession of cultural objects to return those objects to those who created it. He laid emphasis on the significance of the objects to the owners and the damage the displacement of the objects have on the identity of those who have been robbed of them. Prunty⁶⁹ and Philippaki⁷⁰ have considered the effects that the displacement of cultural property has on a people by focusing on Greece as their case study. Bakula⁷¹ addressed the issue of displacement of cultural property from the angle of illicit trafficking and carried out an evaluation of how the 1970 Convention has fared on the issue of illicit trafficking while anticipating the likely positive effects of the Convention for the future. Cordero⁷² discussed the protection of

⁶⁷ Art and Cultural Heritage Mediation. Retrieved 6th July, 2014 from <http://icom.museum/programmes/art-and-cultural-heritage-mediation/>; Coggins, C.C. 1998. A Proposal for Museum Acquisition Policies in the Future, *International Journal of Cultural Property*. Vol. 7, No. 2: 434 -437; Mayour, F. Problems and Scope, Illicit Traffic in Cultural Property, Appeal launched in 1994 by Director General of UNESCO; Fighting Illicit Traffic, Retrieved 6th July, 2014 from <http://icom.museum/programmes/fighting-illicit-traffic/>; Opoku K, Blood Antiquities in Respectable Havens: Looted Benin Artefacts Donated to American Museum. Retrieved 6th July, 2014 from <http://www.modernghana.com>; Opoku, K. Nigeria Reacts to Donation of Looted Benin Artefacts to Museum of Fine Arts, Boston. 17 July, 2012; Rollet-Andriane, L. Precedents in Return and restitution of cultural property. *Museum*. Vol XXXI, No.14 – 7; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report. Prepared by the UNIDROIT Secretariat, *Uniform Law Review*, 2001-3: 476 – 564.

⁶⁸ M'Bow, A. *loc.cit*

⁶⁹ Prunty, A.P. 1984. Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles. *The Georgetown Law Journal*. Vol. 72: 1155 - 1182;

⁷⁰ Philippaki, B. 1979. Greece, Return and Restitution of Cultural Property, *Museum* Vol. XXXI, No.1:15 – 17

⁷¹ Bakula, C. Combating Trafficking in Cultural Property, The 1970 Convention: Evaluation and Prospects. Background Paper, second edition for participants in the Second Meeting of States Parties to the 1970 Convention Paris, UNESCO Headquarters, 20-21 June, 2012;

⁷² Cordero, J.S. 2003. The Protection of Cultural Heritage: A Mexican Perspective. *Uniform Law Review*. NS-Vol. VIII: 565 – 573

cultural heritage and handled the issue from a Mexican perspective while Keun-Gwan⁷³ attacked the issue from an Asian perspective. Toman⁷⁴ discussed the protection of cultural property during armed conflict from an internationalist view which sees cultural property as being the heritage of humanity as opposed to the nationalistic view of cultural property which necessitates the issues of return and restitution which is the bane of this research work.

Farmer⁷⁵ looked at how the 1970 Convention can be given effect to in the Caribbean countries while Siehr⁷⁶ looked into the implementation of the 1970 Convention in Europe.

Vrdoljak⁷⁷ addressed the issue of restitution of objects taken during armed conflict from the human rights perspective. O'Keefe⁷⁸ and Schneider⁷⁹ independently carried out an explanation of how ethics was utilised as the basis of the 1995 UNIDROIT Convention.

Gerstenblith⁸⁰ focussed on an assessment of the efficacy of criminal as opposed to civil penalties for violation of domestic controls adopted in implementing the 1970 Convention. She also focussed on an assessment of the applicability of the 1970 Convention to the particular problem of trade in undocumented archaeological artefacts that are likely to be the product of recent site looting. The discussion was based on a cross-section of the market nations that have implemented the 1970 Convention. This research work however, considers the issue of efficacy of the Convention from the angle of source nations like Africa.

⁷³ Keun-Gwan, L. An Overview of the Implementation of the 1970 Convention in Asia, Report presented at the *Second Meeting of States Parties to the 1970 Convention*. Paris, UNESCO Headquarters, 20-21 June, 2012;

⁷⁴ Toman, J. 1996. *The Protection of Cultural Property in the Event of Armed Conflict*. England: Dartmouth Publishing Company Limited

⁷⁵ Farmer, K. Implementation of the 1970 Convention: The Caribbean in Review, Background Paper, second edition for participants in the *Second Meeting of States Parties to the 1970 Convention*. Paris, UNESCO Headquarters, 20-21 June, 2012

⁷⁶ Siehr, K. 2003. A Special Regime for Cultural Objects in Europe. *Uniform Law Review*. NS-Vol. VIII: 551 – 563

⁷⁷ Vrdoljak A.F, 2013. Gross Violations of Human Rights and Restitution: Learning from Holocaust Claims in Prott L.V, Redmond- Cooper R. and Urice S. (eds.) *Realising Cultural Heritage Law. Festschrift for Patrick O'Keefe*. Great Britain: Institute of Art and Law: 163-187

⁷⁸ O'Keefe R., Tangible Cultural Heritage and International Human Rights Law in in Prott L.V, Redmond- Cooper R. and Urice S. (eds.) *Realising Cultural Heritage Law: 87-96*

⁷⁹ Schneider M., 2013. Protection and Return of Cultural Objects- the Interplay of Law and Ethics in Prott L.V, Redmond- Cooper R. and Urice S. (eds.) *Realising Cultural Heritage Law, ibid: 121- 132*

⁸⁰ Gerstenblith P., 2013. Models of Implementation of the 1970 UNESCO Convention: can their Effectiveness be Determined? in Prott L.V, Redmond- Cooper R. and Urice S. (eds.) *Realising Cultural Heritage Law, ibid:9-25*

Chechi⁸¹ has addressed the issues of proliferation of disputes under international law concerning restitution of stolen art objects and the protection of monuments. He has expressed the concern that the lack of an ad hoc mechanism for settling heritage disputes thereby utilising negotiation or the use of existing dispute resolution means can bring about an incoherent and fragmentary enforcement of the law. He explores the feasibility of two solutions for overcoming the lack of a specialized forum which are the establishment of a new international court and the interaction of the existing judicial and extra-judicial fora through the practice of ‘cross- fertilization’. It is obvious that African countries are a long way away from this because the existing forum for settling heritage disputes have not been adequately utilized by African countries.

The lead scholars in this field of study are Lyndel V. Prott⁸² and Patrick J. O’Keefe.⁸³ Both of them have in an article,⁸⁴ made a distinction between the terms ‘cultural property’ and ‘cultural heritage.’ They have jointly published works⁸⁵ in the field of cultural heritage that are relevant to this research work apart from their individual publications.

⁸¹ Chechi A., 2014. *The Settlement of International Cultural Heritage Disputes*. Oxford: Oxford University Press

⁸²Some of her works are Prott L.V. 1996. A Partnership against Trafficking in Cultural Objects. *Uniform Law Review*: 59 – 71; Prott L.V. 2009. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On. *Uniform Law Review*: 215 – 237; Prott, L.V. 1997. *Commentary on the 1995 Convention*. Leicester. Institute of Art and Law. (hereinafter ‘Commentary on the UNIDROIT Convention’); Prott L.V. 1979. 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, Return and Restitution of Cultural Property, *Museum* Vol. XXXI, No. 1: 59 – 61; Prott, L.V. Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 years after its adoption. Background Paper, second edition for participants in the Second Meeting of States Parties to the 1970 Convention Paris, UNESCO Headquarters, 20-21 June, 2012.

⁸³ Honorary Professor of University of Queensland. He has written works such as O’Keefe, P.J. *Commentary on the 1970 Convention*. Buih Wells: Institute of Art and Law, 2nd Ed.2007 (hereinafter called *Commentary on the 1970 UNESCO Convention*); O’Keefe, P.J. Feasibility of An International Code of Ethics for Dealers in Cultural Property for the Purpose of More Effective Control of Illicit Traffic in Cultural Property. A report for UNESCO, Paris, 15 May, 1994; O’Keefe, P.J. State Ownership of Undiscovered Cultural Objects, A paper presented at the fifteenth session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its countries of origin or its restitution in case of illicit appropriation. Paris, UNESCO Headquarters, 11-13 May, 2009.

⁸⁴ Prott, L.V and O’ Keefe, P.J. 1992. ‘Cultural Heritage’ or ‘Cultural Property’? *International Journal of cultural Property*. 1: 307 – 320 doi: 10, 1017/S094073919200033X

⁸⁵ O’Keefe P.J & Prott L.V., *Law and the Cultural Heritage*. Vol. 1. London: Butterworths: O’Keefe P.J & Prott L.V. 1990. *Law and the Cultural Heritage, Volume III Movement*, London: Butterworths; O’Keefe, P. J. and Prott, L.V. Eds. 2011. *Cultural Heritage Conventions and Other Instruments. A Compendium with Commentaries*. Great Britain: Institute of Art and Law Ltd.; O’Keefe, P.J. & Prott, L.V. 1989. *Law and the Cultural Heritage: Movement*. London: Butterworths Volume III: 373; Prott L. V and O’Keefe P. J. 1983. National Legal Control of Illicit Traffic in Cultural Property, Paris, UNESCO: 2

None of their numerous works is an outright analysis of the provisions of the two Conventions on return and restitution of cultural property with particular reference to Africa.

Very few of the comparatively large body of literature on return and restitution of Cultural Property are written from an Africanist perspective.

Izuakor,⁸⁶ a Nigerian, carried out an exposition of the museum and its role as a custodian of cultural heritage. Arhuidese⁸⁷ traced the evolution of the National Commission of Museums and Monuments in Nigeria and the duties it was established to carry out. Izuakor and Arhuidese discussions were not from the legal perspective.

Maher Abd El Wahed,⁸⁸ an Egyptian addressed the issues implicated in the 1995 UNIDROIT Convention from the Egyptian angle.

Ekpo Eyo⁸⁹ in 1979 looked at the Nigerian situation and the loss the country has suffered in the area of illicit trafficking of cultural property. He opined that restitution can bring about the lowering of temperature in the heat of human contact and interaction. He equally commended the efforts of UNESCO in paying attention to the issue of return and restitution.

Ibidapo-Obe⁹⁰ examined the issues of repatriation of Africa's plundered cultural property in the light of the possible legal and social problems militating against it. He carried out an examination of the international law regime governing repatriation of cultural property. He reviewed the possible international fora where repatriation demands could be enforced or implemented but he limited his discussions only to the wrongful acts of states and totally excluded the illicit private trafficking in African artifacts which has been ongoing at an alarming rate in the international art market and has been the bedrock of the lootings in museums, shrines, homes and palaces of several

⁸⁶ Izuakor, L.I. 1998. Nigerian Historiography: The Museum as a Resource. *Nigerian Heritage*. Vol. 7: 21 – 31

⁸⁷ Arhuidese, J.E. 1996. The National Commission for Museums and Monuments as a Legal Instrument for Safeguarding Nigerian Cultural Heritage. *Nigeria Heritage*. Vol. 5: 115 -124;

⁸⁸ Maher Abd El Wahed. 2003. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: a view from Egypt; *Uniform Law Review*. NS-Vol. VIII: 529 – 540;

⁸⁹ Ekpo, Eyo. 1979. Nigeria, Return and Restitution of Cultural Property, *Museum* Vol. XXXI, No. 1,; 18 – 21

⁹⁰ Ibidapo-Obe A. 2002. A legal agenda for the repatriation of plundered African art in *Essays in honour of Professor D.A. Ijalaye*. Ile-Ife, Obafemi Awolowo University Press. 139-166

African countries. This aspect which he excluded from his work is very germane to the discussions in this research work.

A notable African scholar in this field of cultural property is Folarin Shyllon.⁹¹ He has published a lot of works in the field of cultural heritage law. In one of his works,⁹² he discussed the evolution of cultural heritage legislation and management in Nigeria which he traced to seventy years ago. He also brought to limelight the fact that cultural heritage has an ideological basis which is sustaining the identity of a people. He has pointed out the fact that the cultural heritage management of Nigeria is not well organised nor coordinated which has amounted to the large scale looting of Nigeria's cultural property. In another article,⁹³ his discussion bothered on the wealth and diversity of Nigeria's sculptured antiquities which accounts for at least nine-tenths of the sculptured antiquities of African countries south of the Sahara which are now publicised by the collections of Europeans and Americans who have collected them. He has advocated for the extensive use of subordinate legislation to achieve an effective management of Nigeria's cultural property.⁹⁴ In yet another article,⁹⁵ Shyllon described the licit and illicit trade in African ethnographic art. Shyllon has also highlighted the Report of the Inter-Ministerial Committee inaugurated in 1996 by the Minister of Information and Culture to look into the Looting of Nigeria's cultural property.⁹⁶ It is rather unfortunate that up till now, the recommendations of the committee have not been implemented.

⁹¹ Professor, Faculty of Law, University of Ibadan, Ibadan, Nigeria. He has written articles such as Shyllon, F. 1999. Constitutional Provisions for the Preservation of Cultural Heritage in Africa. *Art, Antiquity and Law*, Vol. 4, Issue 1: 65 – 68; Shyllon, F, Heritage Law in Africa: the Neglect of Monuments and Sites in Sub-Saharan Africa. Workshop on *The Legal Tool for World Heritage Conservation*. Siena, Italy 11-12 November, 2002; Shyllon, F. Museums and Universal Heritage: Right of Return and Right of Access. Retrieved 6th July, 2014 from http://blackherbals.com/museums_and_universal_heritage.htm; Shyllon, F Negotiations for the Return of Nok Sculptures from Nigeria – An Unrighteous Conclusion. Retrieved 6th July, 2014 from <http://portal.unesco.org>; Shyllon, F.2003. Private Law Beyond Markets for Goods and Services: The Example of Cultural Objects, *Uniform Law Review*. NS-Vol. VIII: 511 – 527; Shyllon, F. 2011. Return of Makonde Mask from Switzerland to Tanzania – A Righteous Conclusion? *Art Antiquity and Law*. Vol. XVI, Issue 1: 79 – 83; Shyllon, F. 2002.The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration. *Uniform Law Review*: 219 – 240 etc.

⁹² Shyllon, F. 1996. Cultural Heritage Legislation and Management in Nigeria. *International Journal of Cultural Property*. Vol.5. No. 2: 235 – 265

⁹³ Shyllon, F. 1998. One Hundred Years of Looting of Nigerian Art Treasures 1897–1996. *Art, Antiquity and Law*. 3(3): 253–266

⁹⁴ Shyllon F., 1999. Towards a Proactive Protection of our Monuments. *The Nigerian Field*, vol.64, parts 1-2: 43-50

⁹⁵ Shyllon F. 2000. International Standards for Cultural Heritage: An African Perspective. *Art, Antiquity and the Law*. Vol. 5, Issue 2: 159-175

⁹⁶ Shyllon F., Report of the Inter-Ministerial Committee on the Looting of Nigeria's Cultural Properties. *International Journal of Cultural Property*, Vol. 7, No. 2, 1998: 572-574

In another work,⁹⁷ Shyllon gave an account of the expropriation of African cultural objects in colonial times which coincided with the development of academic disciplines such as anthropology and archaeology whereby the material evidence of the newly discovered cultures were studied, catalogued and displayed in European museums to illustrate the greatness of the colonial empire. The point was made in that article that these expropriated objects were chiefly serving an academic purpose in Europe while they are wanted for the cultural life of the countries where they were taken from. He further made the point that in showing a little sensitivity in a matter that touches the soul and spirit of formerly colonised people, the criteria for restitution and return of objects taken in colonial times should be focussed on the symbolic value and ritual importance or historical importance of the objects to the creators, to enable the unravelling of the history of the people. This research work though mentions objects taken in colonial times and the body set up by UNESCO (i.e. the UNESCO Intergovernmental Committee) to look into such claims of repatriation if brought before it but is not focused mainly on objects taken in colonial times as the two Conventions under focus do not act retrospectively.

Shyllon has also attempted a sensitisation of the African authorities in Africa to the advantages to be derived from joining the UNESCO and UNIDROIT Conventions while placing emphasis on the issues of legal aid to cover costs of presenting claims in foreign courts to recover cultural objects and what the conceptual framework of the arbitration regime permitted under Article 8(2) of the UNIDROIT Convention should be.⁹⁸ The scope of this research work is however wider than this.

This thesis will therefore examine African participation in the 1970 UNESCO and 1995 UNIDROIT Conventions. Bearing in mind the dangers in ‘broad prognostications’, and ‘sweeping conclusions’ on return and restitution issues in Africa, given the internal dynamics of individual countries and variations in political and ideological orientations, this thesis will be of interest to the academia, legislature, museum professionals and policy makers in Africa.

⁹⁷ Shyllon F., 2009. Unravelling History: Return of African Cultural Objects Repatriated and Looted in Colonial Times in Nafziger, J.A.R and Nicgorski A.M (Eds.) *Cultural Heritage Issues: The Legacy of Conquest, Colonisation and Commerce*, Leiden, Martinus Nijhoff Publishers: 159-168

⁹⁸ Shyllon, F. 2002. The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration. *Uniform Law Review*: 219 – 240.

2.2 The Concept of Cultural Property

*“The issue of cultural return remains a perennial one which arouses passions and emotive language, often because it is connected more with a restitution aspect than any other, and connected too with the existential dilemma of identity. There are cynical and material aspects, but the issue also has something to do with the charisma of objects and their language, or semiology. They represent creativity, continuity, and concreteness in the face of what is evanescent.”*⁹⁹

The term ‘culture’ originates from the Latin verb *colere* which means ‘cultivate’.¹⁰⁰ Culture is a word that is capable of more than one interpretation because it is an entanglement of components that have an effect on one another.¹⁰¹ Stavengen suggests that ‘culture has various distinct conceptions which are not often well spelt out in texts and are often used rather loosely in general discourse.’¹⁰² Different writers have viewed culture either as ‘capital, creativity or as a total way of life.’¹⁰³

⁹⁹ Greenfield J. 1989. Preface. *The Return of Cultural Treasures*. Cambridge: Cambridge University Press: xviii

¹⁰⁰ Lenzerini, F. 2013. Suppressing and Remediating Offences against Culture in Vrdoljak, A.F. Ed. *The cultural dimension of Human Right*. United Kingdom: Oxford University Press: 240-272 at 240

¹⁰¹ Oyewo, O.O. 2012. Human Communication, Language and Culture. *African Cultures and Civilization, A Textbook for GES 102*. Ibadan: Afrika-Link Books-The General Studies Programme (GSP) Unit, University of Ibadan: 90

¹⁰² Stavengen, R. 1998. Cultural Rights: A Social Science Perspective in *Cultural Rights and Wrongs*. Leicester: Institute of Art and Law UNESCO: 3

¹⁰³ For a detailed examination of the definitions of culture from different perspectives, its aspects and characteristics, see the following: Stavengen, R. *ibid*; Jokilehto, J. 2005. The Concept of Cultural Heritage, ICCROM Working Group 'Heritage and Society', 15 January. Retrieved 17 October, 2014 from http://cif.icomos.org/pdf_docs/Documents%20on%20line/Heritage%20definitions.pdf; Edo V.O. 2012. Concepts of Culture and Civilization. *op.cit*: 1; Benedict R., *Encyclopaedia Americana*, Vol. 8: 315 – 318; Preswick, R. 1978. The place of intercultural relations in the study of international relations. *Year Book of World Affairs* 32: 251; Thompson, L.A. 1991. Origin and Development of the Concepts of Culture and Civilization. *Culture and Civilization. op.cit*: Oduwole, E.O., Anyiam-Osigwe on Culture and Economic Development in Africa in Irele, D., Ekanola, A.B. Eds. *The Development Philosophy of Emmanuel Onyechere Osigwe Anyiam-Osigwe, Economic Existence Awareness and Responsibility*. Vol. 3: 104; Anyanwu, K.C. *The African Experience in the American Marketplace*. New York: Exposition Press, 1983: 21; Anyiam-Osigwe, E. O. 2005. *The Mindset Factor in Creative Transformation: All Minds at Work: All Minds on Deck*. Lagos: Anyiam-Osigwe Foundation: 30; Ajani O.A. & Adeniran A.I. 2012. The Role of Cultural Diversity in Sustainable National Development in Nigeria, in Jegede A.S., Olutayo, O.A., Omololu, O.O., Owumi, B.E. Eds. *Peoples & Cultures of Nigeria*. Ibadan: Department of Sociology, Faculty of Social Sciences, University of Ibadan: 180; see generally: Billington, R., Strawbridge, S., Greensides, L., Fitzsimonds A., *Culture and Society*. London: Macmillan Press Ltd; Jegede, A.S. 2012. Preface in Jegede, A.S., Olutayo, O.A., Omololu, O.O., Owumi, B.E. Eds. *op.cit*: ix; See UNESCO, *Declaration on Cultural Policies*, World Conference on Cultural Policies, Mexico City, 26 July–6 Aug. 1982, Retrieved 17 October, 2014 from http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf Communication: An Introduction to the Study of Human Communication, 1995, Boston: Allyn and Bocon: 82; Dzurgba. 1987. *The Sociology of Religion*. Ibadan: Adult Education Department, University of Ibadan, Ibadan cited in Ayantayo J.K., & Fatokun S.A., *African Religion and Culture* (last accessed 6

Understanding the meaning of the term ‘Cultural Property’ is one of the most difficult tasks facing anyone engaged in preparing or administering international instruments or legislation on the subject matter.¹⁰⁴ The terms ‘cultural property’, ‘cultural heritage’, ‘cultural goods’ and ‘cultural objects’ are often used interchangeably.

Heritage and cultural property may be defined as

*‘valued things (or ‘assets’) that have been passed down from previous generations or items of current cultural significance’ some of which may be intangible; such as cultural practices, languages, music and sport but much of which is ‘material’ and touchable such as historic sites and ruins, shipwrecks, buildings, parks and gardens and objects (or ‘cultural property’) such as paintings, jewelry, literature, sculpture and ceramics.’*¹⁰⁵

Merryman¹⁰⁶ has stated that the proper definition of cultural property for legal and policy purposes is a ‘large and unruly one.’

Cultural heritage has been referred to as ‘*a pillar of civilization and of peoples’ identities.*’¹⁰⁷ Geoffrey Lewis is of the opinion that

*‘It represents in tangible form some of the evidence of man’s origins and development, his traditions, artistic and scientific achievements and generally the milieu of which he is a part. The fact that this material has the ability to communicate, either directly or by association, an aspect of reality which transcends time or space gives it special significance and is therefore something to be sought after and protected.’*¹⁰⁸

Oct. 2010), at 6th preambular para.; Trenholm S., Thinking through in Jegede A.S., Olutayo, O.A., Omololu, O.O., Owumi, B.E., (eds.) Peoples & Cultures of Nigeria, *op.cit.* p.68; Mbiti J. 1979. *Introduction to African Religion*. London: Heinemann Educational Books: 161; Aluko, B. A. 2000. Philosophy, Culture and the Quest for Social Order in Africa in Issues and Problems in Philosophy. Ibadan: Grovacs (Network): 41-43

¹⁰⁴ O’Keefe P. J. Commentary on the 1970 UNESCO Convention, *op.cit.*:34.

¹⁰⁵ Heritage and Cultural Property Crime National Policing Strategic Assessment 2013. United Kingdom. Retrieved 17 October, 2014 from <http://www.museumsassociation.org/download?id=1038797>

¹⁰⁶ Merryman, J.H. 1986. Two ways of thinking about Cultural Property. *AJIL* 80: 83

¹⁰⁷ Diener Max. 2013. Preface. The 1970 UNESCO Convention New Challenges. Jorge A.S. Ed. Mexico: Universidad Nacional Autonoma de Mexico: xi-xiv at xi

¹⁰⁸ Definition given by the director of Museum Studies at Leicester University Geoffrey Lewis. The definition is written in ‘Icelandic manuscripts.’ 1922. *Islandica*, vol.xix, Cornell University Library, Ithaca, New York. Adopted from Greenfield J., *op.cit.*, p.252

A definition that has been referred to as being too ornate¹⁰⁹ was given by Mr Salah Stetie, a onetime delegate of Lebanon and Chairman of the UNESCO Intergovernmental Committee for the Return of Cultural Property thus:

“A cultural object is not just any kind of object. In the definition given by the Intergovernmental Committee- a definition which was both restrictive yet at the same time extensive- an object likely to provoke a call for restitution is defined as that object which is highly charged with cultural or (natural) significance. It therefore follows that the removal of this object from its original cultural context irrevocably divests that culture of one of its dimensions. Through the loss of this essential link in the chain the culture is no longer able to perceive itself in the natural logic of its own evolution. In other words, what is at stake is the loss not just of a possession but of part of the very essence of that culture. For it is through this cultural object that the creative and spiritual character of a human, ethnic, racial, religious or national community is transmitted - a community for whom this object is a fundamental symbol of expression.”¹¹⁰

No single universal definition exists for the term ‘cultural property’. The specific definition is however sought in the national legislation or in the international Conventions applicable to the subject matter¹¹¹ that is, from one state legislation or treaty (International Convention) to another.

This chapter deals with Cultural Property and its importance; the basis, causes and effects of displacement of cultural property from its country of origin and the restoration through Reparation, Repatriation, Return or Restitution.

¹⁰⁹ Greenfield J., *ibid* where Greenfield J referred to the definition as such.

¹¹⁰ *Ibid*: 253

¹¹¹ Legal and Practical Measures Against Illicit Trafficking in Cultural Property, UNESCO Handbook, International Standards Section Division of Cultural Heritage. 2006: 4.

2.3 The Evolving Nature of the Concept

The 1954 Convention¹¹² coined the concept ‘cultural property’.¹¹³ Before 1954, the concept was not an established one in common law.¹¹⁴ The phrase ‘cultural heritage’ was first used in 1972 in the Convention Concerning the Protection of the World Cultural and Natural Heritage.¹¹⁵ The preamble gives a special attention the change of name by referring to ‘the existing international Conventions, recommendations and resolutions concerning cultural and natural property’ while cultural heritage was used throughout in the body of the text of the Convention. The manner in which human life operates and is affirmed has been ascribed to cultural heritage.¹¹⁶ The cultural heritage reflects identity. Its preservation helps to rebuild broken communities, re-establish their identities, and link their past with the present and future.¹¹⁷ Cultural heritage, apart from comprising the few selected objects enumerated by national legislation¹¹⁸ of a state also includes the heritage of the whole world. Cultural heritage refers to all the diverse ways the culture of human beings inherited from their ancestors is easily understood and recognised.

These manifestations include, for example, art, architecture, rural and urban landscapes, crafts, music, language, literature, film, documentary and digital records, folklore¹¹⁹ and

¹¹² Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, Article 1

¹¹³The 1954 Convention protects cultural property in armed conflicts. For materials on the implementation of the 1954 Convention and its Protocols see generally: Woundenberg N. and Lijnzaad L. Eds. 2010. *Protecting Cultural Property in Armed Conflict, An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*. Leiden-Boston: Martinus Nijhoff Publishers; Kila J., 2012. *Heritage under Siege, Military Implementation of Cultural Property Protection following the 1954 Hague Convention*. Lessiden: Brill NV; Petrovic J. 2013. *The Old Mostar and Increasing Respect for Cultural Property in Armed Conflict*. Leiden-Boston : Martinus Nijhoff Publishers; O’Keefe R. 2006. *The Protection of Cultural Property in Armed Conflict*. New York. Cambridge University Press; Toman J. 2009. *Cultural Property in War: improvement in Protection*. Paris: UNESCO.

¹¹⁴ Manlio F. 2004. Cultural Property Cultural Heritage: “A Battle of Concepts” in International Law? *IRRC* . vol. 86 N854: 367-377.

¹¹⁵ Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO, Paris, 16 November, 1972) (hereinafter 1972 Convention).

¹¹⁶ Prott L.V and O’ Keefe P. J, (1992). ‘Cultural Heritage’ or ‘Cultural Property.’? *IJCP* 1, pp. 307-320 at 307

¹¹⁷ www.unesco.org

¹¹⁸ Nahlik S.E, International Co-operation to Prevent Illicit Traffic of Cultural Property {1981-1983} 51-53 *Annuaire de l’ A.A.A.* 73,76- Here some lawyers put forward a notion that cultural heritage consists solely of a few select objects singled out by national legislation.

¹¹⁹ For indigenous communities, folklore constitutes the basis of their cultural identity, and its protection today is the subject of a discussion within the more general framework of their right to self-determination. ‘For every ethnic group, folklore is its identity; for a country, it is the root of the nation’s cultural tradition; for all mankind, it is the rich and varied but non- regenerative resources as well as the incomparably valuable heritage of human society’. Statement by Terlumun A Yagba, quoted in Adebambo Adewopo, Protection and Administration of Folklore in Nigeria, www.law.ed.ac.uk/ahrb/script-ed/vol3-1/editorial.asp. Also in Agnes Lukas- Schloetter, Folklore in Indigenous Heritage and Intellectual Property. Genetic Resources, Traditional Knowledge and Folklore, 2nd Edition, Silke von Lewinski, Kluwer Law International, Netherlands, 2008, p.344.

oral history, culinary traditions, traditional medicine, ceremonies and rituals, religion, sports and games, recreational practices such as hunting and fishing, and dance and other performing arts.¹²⁰

The 1972 Convention has a verge for protection that supersedes what existed before it, which is ‘**outstanding universal importance**’. This makes cultural heritage to have better acceptability than cultural property.

The 2001 Convention¹²¹ defines underwater cultural heritage as all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.

The 2003 Convention on the Safeguarding of Intangible Cultural Heritage¹²² defines intangible cultural heritage as ‘*the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.*’ This intangible cultural heritage while steadily renewed, is passed on from generation to generation by communities and groups in reaction to their environment. Under the 2003 Convention, human creativity is manifested in the following domains: oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; traditional craftsmanship.

The breadth of Intangible Cultural Heritage covered by the 2003 Convention covers a broad range of immaterial elements and their material expression ranging from ‘practices, representations, knowledge, skills,’ i.e. things that people do, the products or manifestations of these, knowing ‘about’ and knowing ‘how to’; to the instruments, objects, artefacts¹²³, and cultural spaces¹²⁴ associated with them. Scovazzi has pointed

¹²⁰ Nafziger J., Paterson R. and Renteln A., *Cultural Law. International, Comparative and Indigenous*. Cambridge University Press, New York, 2010, p.207

¹²¹ Convention on Underwater Cultural Heritage, 2001

¹²² UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage

¹²³ ‘Instruments’ being tools you use to create Intangible Cultural Heritage, ‘objects’ being any items of movable material culture and ‘artefacts’ being man-made items.

¹²⁴ This term is defined in the official documentation of the Proclamation programme (for which it is one of the criteria for listing Masterpieces of Oral and Intangible Heritage) as physical or temporal spaces that owe their existence to cultural activities that have traditionally taken place there and where the temporal spaces are generally characterised by periodicity i.e. cyclical, seasonal or calendrical. See: UNESCO Doc. 1255 EX/15 (25 Aug.1988), Annex IV ‘*Procedure d’évaluation*’.

out that ‘the intangible cultural heritage must be manifested to the external world and to someone else and cannot be confined to a person’s private thoughts or kept secret in his private home.’¹²⁵

At this point the reader begins to wonder why the terminology changed from property to heritage and remained so as the preferred choice. The next subheading provides the answer.

2.4 The Crystallization of the Concept

The different ideology associated with the word ‘property’ is responsible for the change in nomenclature to ‘heritage’. Property law deals with the protection of the rights of the possessor, whereas cultural heritage is fundamentally involved with the protection of the heritage for the enjoyment of present and future generations. ‘Property’ did not fit into the context of the relationship between indigenous peoples and their tribal lands.¹²⁶ Also, a hindu family idol could not be seen as a mere chattel which was owned but as a legal entity with rights and duties.¹²⁷

Cultural manifestations are better referred to using the word ‘heritage’ as they do not fall under any centralised system of property law.¹²⁸ In professional practice and in the academic sphere of heritage studies, the terminology of cultural heritage is preferred to cultural property. The use of the term ‘cultural property’ is common among lawyers.¹²⁹ Civil law systems ascribe different levels of ownership and ergo, protection to cultural resources owned by the state, individuals and religious bodies. The use of the word ‘property’ can, as such, make it difficult to determine whether an object is public or private as was the case in Arne Magnussen’s Trust (The Arne Magnussen Foundation v. Ministry of Education).¹³⁰

¹²⁵ Scovazzi T., The Definition of Intangible Cultural Heritage in *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*. Borelli S. and Lenzerini F., (eds.) 2012, Martinus Nijhoff Publishers, Leiden. Boston, pp.179-200 at 180

¹²⁶ *Millirrup v. Nabalco Pty. Ltd.* (1971) 17 F. L. R. 141

¹²⁷ *Mullick v. Mullick* (1925) LR LII Indian Appeals 245

¹²⁸ See the Strehlow collection case in *Prot L.V and O’Keefe P. J.*, ‘Cultural Heritage’ or ‘Cultural Property.’? *op.cit.* 314

¹²⁹ Woodhead C. 2013. Art, Culture and Heritage: Law in context. *Art, Antiquity and the Law*. Vol.XVIII, Issue 1:1-6 at 2

¹³⁰ The facts of this case is reported by O’Keefe P.J & Prot L.V. 1990. *Law and the Cultural Heritage, Volume II Movement*, Butterworths, London. Pp878, 912; see also generally: Greenfield J. 1989. *The return of Cultural Treasures*. Cambridge University Press. The issue in this case whether manuscripts compiled by Magnussen qualified as private or public property. If it were public property, then the Government had the right to deal with the property as it wished. If it were private, it could only take over the property if such action were in the public interest and subject to compensation. If this is the

These issues therefore, shows that cultural property is narrower than cultural heritage which belongs to a specialised field of law that is *sui generis*, where public law and private law intersect.

Finally, going by the functionalist rather than the object-oriented approach to cultural heritage,¹³¹ the value of the subject matter, which is referred to as heritage, is seen as the important thing worthy of protection even though the physical manifestation equally needs protection.¹³²

2.5 Importance of and need to protect Cultural Property

Man has over the years been fascinated by objects of art and culture. Cultural artefacts have been created by every developed civilisation in the world right from the Incas and Mayas, from Mesopotamia, Egypt and Greece to the Romans. Works of art adorn the surroundings of Caesars, Popes, Kings and dictators. Scholars and Critics adopt several views as to the importance of cultural property and why protection of it is extremely important.

*Quatremère de Quincy*¹³³ has stated in ancient times that

‘...monuments are connected diversely, extensively and in a highly significant manner with the history of the human intellect and its discoveries, errors and prejudices, and with the sources of all human knowledge. For discovering ancient customs, religious beliefs, laws and social institutions and for correcting, verifying and interpreting history, resolving its inconsistencies, making good its omissions and casting light on its obscurities, these monuments of antique art are an even greater source of inspiration than they are to the imitative arts. Thus philosophy, history, the science of languages, an understanding of the poets, a chronology of the world, scientific astronomy, and criticism are so many different parts of what is called the republic of the arts – all with an interest in the whole. Hence, where an artist may admire the genius who endows material with life, the scholar may discover a masterpiece of astronomy, a

case, new questions would arise as to how to measure the ‘public interest’ (of a particular country? or of the world?) and compensation (commercial value? scholarly value? heritage value? and who should pay it?).

¹³¹ Loulanski T., 2006. Revisiting the concept of cultural heritage: the argument for a functionalist approach. 13 *International Journal of Cultural Property* (IJCL) 207 at 215

¹³² Woodhead C. *op.cit.* p.3

¹³³ *Quatremère de Quincy A-C*, 1796. Extracts from Letters to General Miranda (Letter No. 2 p.20-21) in Prott L.V, *Witnesses to History...op.cit.* 19

decision at a sad juncture in history, new scientific inductions, or parallels leading to a hitherto unknown truth. It is therefore in the interests of science, no less than art, that nothing should muddy, obstruct or dry up the source of this reproduction of the treasures of antiquity.'

To Schonenberger,¹³⁴ Cultural property served as a means of demonstrating power and representation in ancient times. It also stirs up strong feelings in people. For example Picasso sees art as a cleanser of everyday dust from the soul and Merlina Mercouri views the Elgin Marbles as '*an embodiment of the very soul of Greece.*'¹³⁵ Archaeological finds in Israel creates very important formulation of abidance with the past, a fulfilment of national legitimacy and the reaffirmation of roots e.g. the Dead Sea Scrolls.¹³⁶ Cultural property forms an important documentary record of history which is highly important to the people whose identity it is related to.

According to Shyllon,¹³⁷ '*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. The identity of peoples is inseparably bound up with their material culture.*'

The symbolic and inspirational value of Cultural Property cannot be too exaggerated. Some of the attractions derivable from cultural property has been categorised as follows:¹³⁸

1. Preservation- the interest to preserve cultural objects exists indirectly to accomplish other interests as it is only when an object exists that it can be the subject of any discussion.
2. Scientific interests are shown by professionals like art experts, historians, archaeologists and anthropologists for research purposes.
3. Access by the general public is advocated by museums for the edification of the populace

¹³⁴ Schonenberger B. 2009. *The Return of Cultural Assets*. Berne: Eleven International Publishing: 1

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Shyllon F., *The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*.*loc.cit*; see also Muller M, *Cultural Heritage Protection: Legitimacy, Property and Functionalism*.(1998) 7 *International Journal of Cultural Property*, p.395 at 405

¹³⁸ See Schmidt, A. C. 2000. *The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action*. 23 *B. C. Int'L & Comp. L. Rev.*; 185, 192 – 194

4. Integrity is the interest that arises from keeping a collection together in aid of academic research and documentation.
5. Affiliation interest is related to respecting and protecting the cultural bond of the object through ties to a specific group of people, a nation, an ethnic group or a community. Kevin Chamberlain is of the opinion that *'by protecting cultural property, one is attempting to protect not only monuments and objects, but a people's memory, its collective consciousness and its identity, and indeed the memory, consciousness and identity of all the individuals who make up that people'*.¹³⁹
6. Emotive interests stirred up in the respect accorded to cultural property by the general public.
7. Ownership interests which showcases the fact that theft is frowned at all over the world
8. Economic interests arises out of free trade of cultural objects and also manifests through the financial interests in tourism.

Schmidt categorises China's specific interests in Cultural Property protection as nationalistic, economic, historical, cultural and educational as well as for prestige purposes.¹⁴⁰

Prott & O'Keefe argue that Cultural Property advances appreciation and understanding of a culture in the eyes of others, inspiration, as well as a source of knowledge and access to the cultural past and traditions.¹⁴¹

Historic Interest – The reconstruction of the history of a family, village or nation can take place if cultural property is protected in its natural and social setting leading to the potential for a deeper understanding and appreciation of that people's past.¹⁴²

A global interest in protecting cultural property was declared by the signatories to the 1970 UNESCO Convention thus:

The interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilisation of Man, enriches the

¹³⁹ Chamberlain K. 2004. *War and Cultural Heritage*. Great Britain: Institute of Art and Law: 6

¹⁴⁰ *ibid.*

¹⁴¹ See Prott, L. V. & O'Keefe, P. J. 1989. *Law and the Cultural Heritage*. Movement Vol. III: 11-14

¹⁴² Afigbo, A. E and Okeke C. S, Weaving Tradition in Igbo Land 17-110 adapted from Izuakor L. I. 1998. *Nigerian Historiography: The Museum as a Resource*, *Nigerian Heritage* Vol. 7: 23.

*cultural life of all peoples and inspires mutual respect and appreciation among nations... [and] that cultural property constitutes one of the basic elements of civilisation and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.*¹⁴³

In protecting cultural property, a balance must be struck between access to scholarly study and preservation.

2.6 Displacement of Cultural Property and its Effects

The vicissitudes of history have robbed many peoples of a priceless portion of the inheritance in which their enduring identity finds its embodiment.

*Architectural features, statues and friezes, monoliths, mosaics, pottery, enamels, masks and objects of jade, ivory and chased gold - in fact everything which has been taken away, from monuments to handicrafts- were more than decorations or ornamentation. They bore witness to a history, the history of a culture and of a nation whose spirit they perpetuated and renewed.*¹⁴⁴

Avarice and force stands out as the enemies of cultural property. Avarice causes displacement while force causes a destruction of it.¹⁴⁵ Displacement entails movement out of a place or position. Without displacement of cultural property, the issues of return and restitution cannot arise. Displacement of cultural property can arise through trafficking (theft or unauthorized export), wartime plunder, or appropriation or trades between dealers in colonial times or occupation.¹⁴⁶

As Françoise Rivière¹⁴⁷ succinctly puts it:

“Theft, destruction, looting and smuggling of cultural property continue to distort our collective memory and peoples’ identities despite the constant efforts of the international community.”

¹⁴³ Preamble to the 1970 UNESCO Convention

¹⁴⁴Statement of M. Amadou-Mahtar M’Bow. 1978. Extract from Prot L.V. Ed. 2009. *Witnesses to History*. Paris: UNESCO Publishing: iii

¹⁴⁵ Williams S.A. 1978. *The International and National Protection of Movable Cultural Property. A Comparative Study*. New York: Oceana Publications, Inc, Dobbs Ferry: vii

¹⁴⁶ Cornu M. and Marc- Andre R. 2010. *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*. *IJCP* 17: 1-31

¹⁴⁷Rivière F. Preface. Prot L.V. Ed. *Witnesses to History. op. cit.*: xii

The basis of displacement of cultural property are poverty, institutional weakness and poor understanding of the social and scientific value of cultural property, non-enforcement of the relevant regulatory mechanisms, lack of clear cut policies and unscrupulous practices by certain entities and segments of the international antiquities market as well as private individuals.

In source countries such as Africa, Latin America, Asia, Oceania, the high prices of antiquities in the Art market has led to speculations, inciting traffickers and plunderers to cash in on local ignorance and take advantage of any conspiracy they find.

Displacement of cultural property has both good and bad results. It is however a paradox that displacement of an object can be conducive to its preservation than if it had been left *in situ* as we have in the Elgin marbles.¹⁴⁸The good results are the advantages to the acquiring state while the bad results are the disadvantages suffered by the source state losing them.

Some of the positive effects are:

1. European art and scholarship was greatly touched by the treasures removed from the sites of classical antiquity or the various African sites. Felix Von Luschan, a German Africanist described Benin art works in 1919 thus:

*'Benvenuto Cellini could not have cast them better... and nobody else either before or since Cellini. These bronzes are technically of the highest quality possible.'*¹⁴⁹

2. Also, Picasso and Braque had no choice but to use Benin art as a model for conceptual art as opposed to imitative art.¹⁵⁰
3. The Elgin marbles permanently changed the perception towards ancient art.¹⁵¹

Williams Sharon¹⁵² has laconically stated that:

'A reserve of artistic securities has a three-fold advantage for the state that possesses it. Firstly, there is a cultural advantage. Such objects enhance the art collections of the acquiring country-both public and private. Secondly in wartime, certain types of objects serve as evidence of victory, when brought home. They also constitute a political advantage when negotiating peace treaties. In other words, cultural property can be used as a political

¹⁴⁸ Williams S.A., *loc.cit.*

¹⁴⁹ Greenfield J., *op.cit*: 295

¹⁵⁰ Williams S.A. *loc .cit*

¹⁵¹ *ibid*

¹⁵² *Ibid*: 15

weapon. Lastly, and of extreme importance, they represent an economic advantage. Art has an intrinsic value as a basis for financial speculation, and as a reserve of securities easily negotiable in the world markets. The medium of exchange is as good as gold and can be used to provide foreign currency for the importation of needed equipment or raw materials. Above all, it is a reserve of fixed value entirely unaffected by the fluctuations in the cost of raw materials and unaffected by the lowering or the manipulation of world currencies.'

The following are the negative effects:

1. The primary consequence of displacement would be to block and destroy the source of creative inspiration.
2. It prevents the assimilation and circulation of knowledge about ancient peoples and civilisations.
3. Violence against cultural property leads to the irretrievable loss of valuable information on mankind.
4. Displacement of cultural property involves organised crime.
5. Displacement deprives invaluable archaeological artefacts of their cultural, historical and symbolic essence turning them into simple merchandises and curiosities.
6. It deprives a group of the central core of its own art just like the Benin people in Nigeria.
7. When parts of a whole are placed outside their native lands, displacement strips cultural property of that harmony that enhances them; that accompaniment that adorns them, the concert of things and ideas, forms and sentiments, public admiration, affections, sympathy, which form the very atmosphere of the models of beauty.¹⁵³
8. It leads to losses to artistic understanding, science and education.¹⁵⁴
9. A division of monuments or sculptures through displacement leads to a situation where one country or museum would lose what the other would not gain. The museum of origin would lose the figures that form the crowning glory of its collections, that precious addition of lessons in parallels that produces the practical theory of beauty. The museum that would be formed elsewhere from

¹⁵³ *Quatremère de Quincy A-C*. 1796. Extracts from Letters to General Miranda (Letter No. 4): 53 in Prott L.V, *Witnesses to History...op.cit*: 19

¹⁵⁴ *ibid*

these dismembered pieces, would not acquire the whole that can give the requisite value to the fragments thereby leading to a deprivation of the world of the full admiration of the artwork.¹⁵⁵

10. It prevents the perfecting of the means of attaining happiness and pleasure, for the advancement and progress of education and reason.
11. The general education of source countries is sacrificed on the altar of ignorance and barbarism.
12. Dispersing the elements and materials of a science is a perfect means of destroying and killing that science. Hence, the displacement of cultural objects from its whole heralds the death of all the knowledge rooted in its totality.¹⁵⁶
13. It prevents the younger generation from ever having the chance to see, at close quarters, a work of art or a well-made item of handicraft fashioned by their ancestors.¹⁵⁷

Due to the fact that we are in a world troubled by poverty, famine, war and displacement of people, issues of returning cultural property is not on the frontline of human priorities. Despite this, cultural property dislocated needs to be returned as ignoring the psychological and spiritual importance of history, continuity and tribal memory personified in the objects should not be.

2.7 Definition under the Conventions

2.7.1 Cultural Property under the 1954 and 1970 Conventions

Cultural Property can be viewed in two ways by the two Conventions that have defined it. The first view sees it as components of a universal human culture no matter where it may be located presently while the second view sees it as part of a nation's cultural heritage. This second view gives the attribute of national character to cultural property and hence, the demands for their restoration.

The 1954 Hague Convention is the first universal Convention that deals only with protecting cultural property. It incorporates the principle of individual international responsibility established at Nuremberg.¹⁵⁸ The 1954 Hague Convention has as its

¹⁵⁵ *ibid*

¹⁵⁶ *ibid*

¹⁵⁷ M'Bow A-M. A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It. in Prott L.V, *Witnesses to History...op.cit*: 32

¹⁵⁸ Article 28, 1954 Hague Convention states:

predecessor the Lieber Code¹⁵⁹ which happens to be the first attempt to state a comprehensive body of principles governing the conduct of belligerents in enemy territories.¹⁶⁰

The 1954 Convention defines cultural property for the purposes of that Convention as follows:

“... the term ‘cultural property’ shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.”

The 1954 Hague Convention can therefore be said to be an embodiment of the first view on cultural property.

The second view is an encapsulation of the definition found in the 1970 UNESCO Convention¹⁶¹ which has defined Cultural Property as follows:

“The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”.

¹⁵⁹ Lieber F, a German émigré professor at Columbia College in New York assisted Henry Wager Halleck, General-in-chief of the Union Armies, in defining guerrilla warfare. Lieber prepared a proposed “code of conduct by belligerent forces in war” which was issued by the Union command as General Orders No. 100 on April 24, 1863, to apply to the conduct of the Union forces in the American civil war. See Merryman J. H, The Protection of Cultural Property: 1509 – 1528, Retrieved 17 October, 2014 from www.biblio.juridicas.unam.mx/

¹⁶⁰ *Ibid*: 1510

¹⁶¹ 1970 UNESCO Convention, Article 1

*“For the purposes of this Convention, the term ‘cultural property’ means property which, on **religious or secular grounds**, is specifically designated by each State as **being of importance** for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:*

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;*
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;*
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;*
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;*
- (e) antiquities **more than one hundred years old**, such as inscriptions, coins and engraved seals;*
- (f) objects of ethnological interest;*
- (g) property of artistic interest, such as:*
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);*
 - (ii) original works of statuary art and sculpture in any material;*
 - (iii) original engravings, prints and lithographs;*
 - (iv) original artistic assemblages and montages in any material;*
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;*
- (i) postage, revenue and similar stamps, singly or in collections;*
- (j) archives, including sound, photographic and cinematographic archives;*
- (k) articles of furniture more than one hundred years old and old musical instruments.”*

It is noteworthy that the 1970 UNESCO Convention lists eleven specific categories in which property must fit to be deemed cultural property which include: rare specimens of flora, fauna, or minerals, products of archaeological excavation; elements of historical monuments; original statutory art and sculpture; and rare manuscripts or old books.¹⁶² It

¹⁶² *ibid*

can be broadly said that cultural property refers to any tangible, historical object that has some scholarly, historical or artistic value.¹⁶³

The above definition has however been criticized. Describing cultural property by listing its categories has been criticized by Bator as too extensive; imposing ‘no meaningful constraints’ on the coverage of the Convention.¹⁶⁴ The other criticism bothers on the principle of international relations to the effect that the cultures of individual nations are equal and each contributes its own quota to the heritage of humankind. On this point, Carducci sees this definition as belonging to a mixed approach one¹⁶⁵ that is, the object must be of importance and it must fall into the defined categories.¹⁶⁶

In an attempt to determine whether there is a particular relationship between the general descriptive words at the beginning of the definition in the 1970 Convention and the specific categories, Fraoua¹⁶⁷ is of the view that the enumerated categories in the definition illustrate the particular nature of the cultural property to be protected. For example, fauna, flora, minerals and anatomical and palaeontological objects¹⁶⁸ are objects of importance for science, whereas those comprised in Articles 1 (b), (c), and (d) are of archaeological, historical, prehistoric or artistic interest. He further noted that a particular item may belong to more than one category while also interpreting ‘science’ in its widest sense.¹⁶⁹

From the definitions of cultural property adopted by the 1954 and 1970 Conventions, it can be deduced that the 1954 Convention is exemplary while the 1970 Convention is exhaustive. The 1954 definition is specifically meant for general protection of cultural property in situations of armed conflicts while the 1970 Convention relies on a

¹⁶³ Dutra M. L. 2004. How much is that Ming Vase in the Window? Protecting Cultural Relics in People’s Republic of China. *Asian-Pac L & Pol’y J.* 5: 62, 66-67

¹⁶⁴ Bator P.M. 1982. An Essay on the International Trade in Art. *Stanford Law Review* 34: 275, 377

¹⁶⁵ Carducci, G. 1997. *La restitution internationale des biens culturels et des objets d’art*. Paris: L.G.D.J : 218-220

¹⁶⁶ *ibid*

¹⁶⁷ O’Keefe P.J. Commentary on the 1970 UNESCO Convention...*op.cit.*: 35 quoting Fraoua .R., *Convention concernant les mesures a prendre pour interdire et empecher l’importation, l’exportation et le transfert de propriete illicites des biens culturels*: 53

¹⁶⁸ Article 1(a).

¹⁶⁹ ‘science’ should be read in the widest sense, since antiquities, ethnographic objects and furniture may be of as much interest to the study of humankind, its evolution and history (‘science’ in the sense of scholarly research) as a paleontological object may be to the physical sciences. A fossil may be of importance for the physical sciences, but also for the study of prehistory and archaeology. See Fraoua .R. *op.cit.*; also ‘Commentary on the 1970 UNESCO Convention’, *op.cit.*, p.36

compromise between exporting and importing states. Thereby specifying and limiting the scope within which objects are to be selected for export and import controls.

2.7.2 Introducing the concept of Cultural Object – 1995 UNIDROIT

Convention

During negotiations for the 1995 Convention, an expert disliked the use of the word ‘property’ which in English language, had misleading connotations¹⁷⁰ and suggested the use of the word ‘heritage.’ This was objected to on the platform that the word ‘heritage’ is capable of arousing emotions. The use of the word ‘object’ which still retained the French term ‘*biens culturels*’ was finally conceded to.¹⁷¹

The UNIDROIT Convention¹⁷² defines cultural objects for the purpose of the Convention as

“...those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.”

It is significant however that the categories of cultural property as stated in the 1970 UNESCO Convention were adopted in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. The only difference is that while the element of ‘importance’ was retained the requirement of ‘designation’ does not appear, thereby making room for individual owners not designated by the state to have the opportunity to bring an action under the UNIDROIT Convention.¹⁷³ This is favorable to many states that do not designate large amounts of cultural property.¹⁷⁴ Even though it has been argued that this definition in the UNIDROIT Convention is too wide,¹⁷⁵ it must be noted that the full breadth of the definition applies only to stolen cultural objects and has nothing to do with illegally exported cultural objects.¹⁷⁶

¹⁷⁰ *ibid.*

¹⁷¹ UNIDROIT Doc. 10 § 9; Doc. 18 § 20; Doc. 30 § 21

¹⁷² UNIDROIT Convention, 1995, Article 2

¹⁷³ Commentary on the 1970 UNESCO Convention, *op.cit.*, p.35; Prott L.V., Commentary on the UNIDROIT Convention: 26

¹⁷⁴ Commentary on the UNIDROIT Convention..., *ibid*

¹⁷⁵ Fitzpatrick, J. 1997. Against UNIDROIT. *The Art Newspaper*, January. 66: 19

¹⁷⁶ 1995 UNIDROIT Convention, Articles 5 and 7; Commentary on the UNIDROIT Convention, p.27

2.8 Approaches to Cultural Property

The 1954 Hague Convention sees Cultural property as the cultural heritage of all mankind whilst the 1970 Convention takes the view that it is the cultural heritage designated by each country. This leads us to the issue that there are two approaches to cultural property viz the internationalist view and the nationalist view. These approaches have been used to characterise nations theoretically in the International arena into Source nations with nationalistic interests and Market nations with internationalism concerns.¹⁷⁷

John Henry Merryman¹⁷⁸ succinctly summarises the broad classification thus:

“...the world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artefacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and United States are examples.

Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.”

Many countries are both source states and market states.

Australia doubles up as the source of Aboriginal remains and artefacts, (priced by archaeologists for their historical relevance) and houses a small but healthy market in international antiquities.¹⁷⁹ Asia now has a lot of auctions going on within the continent now.

Much of archaeological debates in the United States are focused on the looting of Native American graves. The United Kingdom is rich in a wide variety of antiquities including

¹⁷⁷ Murphy J. D. 1995. Plunder and Preservation: Cultural Property Law and Practice in the People's Republic of China 2 –3, 155; Schmidt A. C. 2000. The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action, 23 B. C. *Int'L & Comp. L. Rev.*: 185, 192 – 198; Prott L. V and O'keefe P. J. 1983. National Legal Control of Illicit Traffic in Cultural Property, Paris, UNESCO: 2; Merryman J. H. *loc. cit.*

¹⁷⁸ Merryman J. H. *op.cit.*: 80 at 831

¹⁷⁹ Mackenzie S. R. 2005. *Going, Going, Gone: Regulating the Market in Illicit Antiquities* Leicester: Institute of Art and Law: 8

many from the Roman Empire. Both the US and the UK house prosperous markets in internationally-sourced antiquities.¹⁸⁰ Hong Kong is now a place where auctions go on.

China is a classic example of a source nation¹⁸¹ with nationalistic approach that ‘gives nations a special interest in the cultural objects; implies the attribution of national character to objects independently of their locations or ownerships; legitimizes national export controls and demands for the ‘repatriation’ of cultural property emanating from a source state which belongs to that particular state and uniquely reflects that country’s history and heritage.’¹⁸² China is however, becoming a market nation.

The internationalist view sees cultural property as the common heritage of mankind.¹⁸³ This view cannot have any bearing to the issue of return and restitution as cultural property found within a state’s sovereignty cannot be regarded as *res nullius* (property belonging to no one), or *res communis* (property belonging to the whole world). Moreso, making cultural property universal contradicts the notion of ‘return’.

2.9 Nomenclature for acknowledgement of past injustices in relation to Cultural Property

*Restitution strictly refers to the return of the specific actual belongings that were confiscated, seized, or stolen, such as land, art, ancestral remains, and the like. Reparations refer to some form of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity. Apology refers not to the transfer of material items or resources at all but to an admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims. However, these are all different levels of acknowledgment that together create a mosaic of recognition by perpetrators for the need to amend past injustices.*¹⁸⁴

¹⁸⁰ *Ibid.*

¹⁸¹ Schmidt A. C, *The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action*, (2000) 23 B. C. Int’L & Comp. L. Rev.: 185, 192 – 194 at 190

¹⁸² *Ibid.*

¹⁸³ This concept of culture as common heritage of mankind was proposed by Brazil and rejected at the Dumbarton Oaks Conference 1945 as an amendment to the UN Charter.

¹⁸⁴ Balkan E. 2001. *Making Amends: A New International Morality?* Edited Extracts from *The Guilt of Nations: Restitution and Negotiating Historical Injustices*. Baltimore: Johns Hopkins University Press: xvi–xli, 309–49 in Prot L.V. *Witnesses to History...op.cit.*79

Arguments about ‘restitution’ of cultural materials first arose in the context of war plunder and in that context are very old.¹⁸⁵ The handing back of property to the original owners is variously referred to as restitution, recuperation, repatriation, retrieval, return and repatriation. These terms though often used interchangeably by writers have different legal connotations¹⁸⁶ in the sense that some issues are dealt with under public law while others are addressed under private law.¹⁸⁷ For instance, the Directive adopted by the European Union on the ‘restitution’ of cultural heritage illicitly exported from one member State to another does not relate to stolen property but the French version made use of the word ‘restitution’ while the English version made use of the word ‘return’.¹⁸⁸ Repatriation is another word found in the *Draft UNODC Guidelines*: Guideline 54 uses the three terms return, restitution and repatriation.¹⁸⁹

2.9.1 Restoration of Cultural Property

The result of the Second World War led to the creation of an intergovernmental centre for the study and improvement of methods of restoration. ICCROM (The International Centre for the Study of the Preservation and Restoration of Cultural Property) is an intergovernmental (IGO) and autonomous organisation dedicated to the conservation of cultural heritage.¹⁹⁰ The organisation was created by UNESCO in 1956 and established in Rome in 1959. Its activities are however outside the scope of this thesis. This organisation has carried out restoration projects in its early days which include the preservation of ancient tombs in the Nile Valley, restoration of mural paintings in the churches of Moldavia, development of the national conservation research centre in India, and protecting cultural heritage following floods or earthquakes in Guatemala, Italy and Montenegro.

¹⁸⁵ Prott L.V & O’Keefe P.J. 1989. *Law and the Cultural Heritage*, London and Edinburgh: Butterworths: 803

¹⁸⁶ Stamatoudi I. 2001. *Cultural Property Law and Restitution*. Massachusetts: Edward Elgar Publishing Inc: 14

¹⁸⁷ *ibid*: 2

¹⁸⁸ See Directive 93/7/CEE du Conseil, du 15 mars 1993, relative a la restitution de biens culturels ayant quitte illicitement le territoire d’un Etat member, *Journal officiel n° L 074*. The European Commission has submitted a proposal for the revision of this Directive. The text of the proposal is Retrieved 17 October, 2014 from <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2013:0311:FIN:EU:PDF>.

¹⁸⁹ Draft Guidelines on Crime Prevention and Criminal Justice Responses with respect to Trafficking in Cultural Property. The unedited version of 24th April 2012 is Retrieved 17 October, 2014 from http://www.unodc.org/documents/organised-crime/UNODC_CCPCJ_EG.1_2012/Draft_Guidelines_24_April_2012.pdf.

¹⁹⁰ Guide to Archives of International Organisations. Retrieved 20 August, 2015 from http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1042

In recent times, restoration of cultural property is observable in the rebuilding of the ruins in Mali, carried out with UNESCO's assistance.¹⁹¹

2.9.2 Repatriation and Reparation

Repatriation is a form of restitution to either the country of origin or to the ethnic group that owns it. This is a term often used for claims by indigenous peoples. Reparation seems to be wider in scope than restitution. 'Reparation' is appropriate in English only where one state is responsible for a breach of international law to another's detriment. Reparation order is either a compensation order or a restitution order.¹⁹² It may take the form of:

- a. A compensation order which is made where an offender is made to make a compensation payment to the victim of the crime.
- b. A restitution order which requires that property is returned to the victim.¹⁹³ Restitution is the "action of restoring or giving back something to its proper owners", generally used to refer to the return to an individual.¹⁹⁴

Repatriation generally refers to the return of cultural objects to their country of origin. Repatriate has been defined as "to return again to one's native country".¹⁹⁵

Ulph and Smith¹⁹⁶ state that

"Repatriation" refers to the return of human remains or other property of cultural significance either to its country of origin or to a group of indigenous people. It does not suggest that the state has requested the return of the object. It is often used in situations where an object is returned at the request of a particular group, or where the object is simply purchased and taken back to its country of origin.

Ibidapo- Obe¹⁹⁷ states that Reparation is much wider than repatriation in that it is a claim for compensation for the obvious deleterious effects of the triple scourges of slave trade,

¹⁹¹Re-building Cultural Heritage in Mali. Retrieved 20 August, 2015 from <http://www.unesco.org/new/en/brussels/european-union/re-building-cultural-heritage-in-mali/>

¹⁹²Restitution & Reparation. Retrieved 17 October, 2014 from http://www.courts.dotag.wa.gov.au/R/restitution_reparation_print.aspx

¹⁹³ *ibid*

¹⁹⁴ The Oxford English Dictionary. 1993. Vol. VIII: 551

¹⁹⁵ *Ibid.* 460

¹⁹⁶ Ulph J. and Smith I. 2012. *The Illicit Trade in Art and Antiquities. International Recovery and Criminal and Civil Liability* Oxford and Portland, Oregon: Hart Publishing: 7

¹⁹⁷ Ibidapo-Obe A. 2002. A legal agenda for the repatriation of plundered African art in Essays in honour of Professor D.A. Ijalaye. Ile-Ife, Obafemi Awolowo University Press. 139-166 at 140

colonialism and neo-colonialism. Repatriation is much more specific, relating to the return or restitution of African works of art, wrongfully appropriated in the process of colonialism.

Renold¹⁹⁸ is of the opinion that repatriation should relate to cases which do not fall under the UNESCO and UNIDROIT Conventions because of their non-retroactive nature. She is of the opinion that the cases decided through diplomatic negotiations between States and not necessarily purely legal constraints could well be classified as repatriation.¹⁹⁹ She recounted the example of the Shinagawa bell case²⁰⁰ where Geneva repatriated to Shingawa in Japan, a gong that had been taken from a temple in Shingawa. The gong was meant to be melted and made into cannon in a place close to Aarau in German-speaking Switzerland. A very well-known Geneva collector and philanthropist, Gustave Revillod, bought the gong and placed it in his private collection thereby saving it from destruction. His entire collection was donated to the city of Geneva and a museum after his death. The gong was used to announce the opening and closing of the museum and placed outside the museum.²⁰¹ Early in the 1920's, Japanese tourists visited Geneva and recognized the gong from the Buddhist temple of Shinagawa. The Japanese and Swiss authorities were informed and negotiations started the Council of the City of Geneva debated on the matter and in 1958, it was decided to repatriate (the term restitution was used at that time) the gong to Shinagawa. In 1990, the City of Shinagawa, to thank Geneva, offered the city a perfect copy of the beautiful gong which now hangs in the park outside the museum. The *Association of Friends of Geneva and Shinagawa* was created which organizes cultural and educational exchanges between the two cities. This repatriation led to much more than the physical return of the cultural object.²⁰²

¹⁹⁸ Renold M. 2013. International Tools: Return, Restitution and Beyond in Manacorda S & Visconti A (*a cura di*) *Beni Culturali e sistema penale*. Milano: V&P Vita E Pensiero: 127-137 at 128.

¹⁹⁹ *ibid.*; see also Renold C., Chechi A., Renold M., Case Saral Baartman- France and South Africa, Platform Ar Themis, Art-Law Centre, University of Geneva. Retrieved 17 October, 2014 from <http://unige.ch/art-adr>; Merrill W.L. Ladd E.J., Ferguson T.J., The Return of the Ahayu:da to Zuni Pueblo, in Prott L. V. Ed. 2009. *Witnesses to History: A Compendium of Documents and Writings on the Return of Cultural Objects*. Paris: UNESCO: 255-257

²⁰⁰ See Bandle A.L., Contel R., Renold M. A. ,Affaire Cloche de Shinagawa- Ville de Geneve et Japon Platform Ar Themis, *loc.cit.*

²⁰¹ See the history of the *Ariana Museum* at the official website of the City of Geneva. Retrieved 17 October, 2014 from <http://www.ville-ge.ch/ariana/index.php?content=1.2.1.4.2.&langue=eng>; see also Burkhard E., Coullery M. T., Grange D., Klopmann. Eds.1996. *Geneve-Shinagawa Shinagawa-Geneve*, Association d'Amitie Geneve- Shinagawa, Geneve: 13-39.

²⁰² Renold M. *op.cit.*... :131

2.9.3 Return

‘Return’ may refer in a wider sense to restoration, reinstatement and even rejuvenation and reunification.²⁰³ According to Greenfield,²⁰⁴ Return is part of a wider movement of cultural treasures and need not only mean restitution in the sense of reparation for wrongful taking. The issue of return should be determined on the criteria of the means of acquisition and the nature of the object.

Return is basically used for unlawful exports and the objects displaced by colonial powers from their place of origin. In reference to colonial powers, the movement will not be referred to as unlawful except when carried out in defiance of national and international laws in force at that time. As regards objects taken by colonial powers, return is to ensure that irreplaceable cultural heritage gets back to those who created them. Unlawful exports lead to return to state of origin.

Greenfield²⁰⁵ is of the opinion that the issue of return should be determined on the basis of two main criteria which are the means of acquisition and the nature of the object. This is because she believes it should be possible to legally lay claim to materials taken by force, by unequal treaty, by theft or deceit as the objects in this category are often held in the public sector by states’ institutions. Title to property such as historic manuscripts or records of a nation including the narrative representation of its history in an art form which has been dismembered and objects torn from immovable property forming part of the sovereign territory of a state where they were taken from and paleontological materials should not be deemed to have passed.

Ulph and Smith are of the opinion that “return” is neutral and doesn’t suggest contravention of any law. To them, a state seeking return of an object may simply be doing so on the basis of cultural co-operation, rather than because the object has been misappropriated in the past. It may even be as a result of an *ex gratia* act from the donor.²⁰⁶

²⁰³ Greenfield J. 1989. *The Return of Cultural Treasures*. Cambridge: Cambridge University Press: 256

²⁰⁴ *Ibid*: xvii

²⁰⁵ Greenfield J. *loc.cit.*

²⁰⁶ Ulph J. and Smith I. 2012. *The Illicit Trade in Art and Antiquities. International Recovery and Criminal and Civil Liability*. Oxford and Portland, Oregon: Hart Publishing: 7

The merits of return ought to be evaluated not only according to historic disapprobation but in accordance with the sense of cultural property ‘going back’ usually to its homeland, for aesthetic and historic reasons.²⁰⁷

The case of *Union de l’Inde contre Credit Agricole Indosuez (Suisse) SA* came up before the Swiss Supreme Court.²⁰⁸ The subject matter was two giant ancient Mogul Gold coins (of more than 10 and 1.2 kilograms) which had belonged to the Nizam of Hyderabad in India before the unification of India.¹⁶ These two coins, after moving around with other property eventually ended up deposited in a Swiss bank where they had been used as a security for a loan made to the grandson of the Nizam who lived in Australia. The loan, which happens to be for over S20 millions, was never reimbursed and interest on it was not paid, so that the bank decided to sell the security. The Indian government’s claim before the Swiss courts, among other things, that the coins had left India without any authorization and should therefore be returned to India (as it is often the case in such matters, the issue of ownership was also argued and India claimed that the coins were actually transferred to the central government when the principality of Hyderabad joined India upon independence, but this claim was rejected for lack of evidence of the transfer of ownership).²⁰⁹

The courts had to decide whether to order the return to India of the gold coins or not. The order for return was refused by the Supreme Court in 2009, mainly because for it the return of cultural property must be based on an international Convention and also because a court cannot automatically apply foreign public law.²¹⁰ Since there was no international agreement between India and Switzerland and India’s rules on the protection of cultural heritage are public law, Swiss courts will not apply them automatically.²¹¹

The above shows the problem of foreign public law restraining the export of cultural goods.

²⁰⁷ Greenfield J. *op.cit.*: 367

²⁰⁸ *Union de l’Inde contre Credit Agricole Indosuez (Suisse) SA*, Supreme Court Decision, April 8, 2005: ATF 131 III 418. For a commentary on this case, see. Renold M.A. 2006. An Important Swiss Decision Relating to the International Transfer of Cultural Goods: The Swiss Supreme Court’s Decision on the Giant Antique Mogul Gold Coins, *International Journal of Cultural Property*. 13 (3): 361-369; see also Contel, R., Chechi A. and Renold M.A., *Affaire Pieces d’or geantes – Union de L’Inde contre Credit Agricole Indosuez SA*, Platform ArThemis, *loc.cit.*

²⁰⁹ See generally Renold M. *op.cit.*: 132

²¹⁰ See Renold *op.cit.*

²¹¹ *ibid*

2.9.4 Restitution

‘Restitution’ unlike ‘Return’ is much more controversial. Restitution is an old common law concept that has become transformed into the new common law science which in recent years has emerged in textbooks, law journals and law articles, lectures and conferences where none had existed before. The modern law of restitution resembles the civil law principles of quasi-contract found for centuries in Scottish civil law. This is fascinating to civilians in countries with codified laws.

In civil law, unjust enrichment is one of the quasi-contracts (others being *negotiorum gestio*²¹² and the reception of what is not due) which triggers restitution. The principle of unjust enrichment now unites claims for restitution at common law.²¹³ In common law, the law of restitution developed mainly through the action, *indebitatus assumpsit* under the implied contract theory²¹⁴ as the common law used to be restricted to specific forms of action which did not include a general restitution claim for unjust enrichment. The abolishment of the forms of action led to the abandonment of the concept of unjust enrichment which has however been recently replaced by a substantive principle of unjust enrichment which underlies, according to Goff & Jones,²¹⁵ not only quasi-contractual claims (as in the civil law) but also the other related causes of action which trigger a claim for restitution.

Restitution refers majorly to war pillage and stolen property or any unlawful situation. To Kowalski,²¹⁶ ‘restitution’ is seen in relation to takings in wartime and belligerent occupation.

Barkan,²¹⁷ applies the word ‘restitution’ to include the entire spectrum of attempts to rectify historical injustices, including not only the return of the specific belongings that were confiscated, seized, or stolen, such as land, art, ancestral remains, and so on but also ‘reparations’ (some form of material recompense for that which cannot be returned,

²¹²See Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. Which defines *negotiorum gestio* under the civil law to mean a doing of business or businesses. A species of spontaneous agency, or interference by one in the affairs of another in his absence, from benevolence or friendship, and without authority. 2 Kent, Comm. 010, note; Inst. 3, 28, 1 available at <http://thelawdictionary.org/negotiorum-gestio/#ixzz2pLuJpZTK> accessed on 3rd January, 2014.

²¹³ Lord Goff of Chieveley & G. Jones. 1993. *The Law of Restitution*. London: Sweet & Maxwell, 4th ed.: 12.

²¹⁴ *ibid.* at 5-12.

²¹⁵ *ibid.* at 11.

²¹⁶ Kowalski W.A. Restitution: Art Treasures and War in *Prott L.V Witnesses...*:163

²¹⁷ Barkan E., Making Amends: A New International Morality? The Guilt of Nations: Restitution and Negotiating Historical Injustices in *Prott L.V Witnesses...* :78

such as human life, a flourishing culture and economy, and identity), and ‘apology’ (an admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims). He sees the concept from the angle of ‘making amends’ as the result of a sentiment of guilt. To him, restitution is both a legal and also as a cultural concept.

According to Ulph and Smith, “restitution” has been used contextually in the international arena in reference to disputes between states. The UNESCO’s IGC Guidelines for the use of the Standard Form Concerning Requests for Return or Restitution has it that “restitution” should be used in cases of illicit appropriation”.²¹⁸ Thus depicting objects unlawfully taken in contravention of the laws in the source countries or the Conventions. Museum directors however, dislike the use of the word restitution because they claim all objects in their custody were lawfully obtained which is not realistic.

The holocaust represents an unlimited number of cases of restitution.²¹⁹ A famous restitution case took place between Austria and a US citizen, Mrs Maria Altmann in relation to six paintings by Gustav Klimt which belonged to her great aunt Adele Bloch Bauer in Vienna.²²⁰ The case that led to the restoration of five out of the six paintings started from the US Supreme Court and ended before an international arbitration. Austria, after attempting to finance the repurchase of the paintings had to respect the arbitral tribunal’s order.

In the extraordinary case of *Iran v Barakat Galleries*²²¹ decided in 2007 by the Court of Appeals in England, the English court ordered, in the end, the restitution of several very old (at least 2000BC) chlorite artefacts from the area of Jiroft in Iran. These artefacts were the product of an illicit excavation. After being sent to various countries, where they were allegedly acquired in good faith, the artefacts ended up in the Barakat Gallery, a highly reputable gallery in London. Iran claimed the restitution of these

²¹⁸ Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UNESCO 1986 (Revised 1996).

²¹⁹ See generally Bandle A.L., Chechi A., Renold M.A. Case 200 Paintings- Goudstikker Heirs and the Netherlands, Platform Ar Themis *loc.cit*; Gabus P., Renold M.A. Eds. 2004. Claims for the Restitution of Looted Art/ La revendication des oeuvres d’art spoliees, Studies in Art Law, vol.XV, Geneve-Zurich-Bale: Schulthess.

²²⁰ Renold M. *op.cit.* :131

²²¹ Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd. [2007] EWCA Civ. 1374. On this case, see Chechi A., Contrel R. and Renold, M.A. case Jiroft Collection-Iran v. The Barakat Galleries Ltd., Platform ArThemis *loc.cit*; D. Fincham, Iran v. Barakat: Iran Wins Barakat Appeal, in Pratt, *Witnesses to History...* : 388-390

ancient artefacts on the ground that, like many States, it owns the archaeological objects that are under its ground. At the end of the complex case involving very different issues, the restitution was ordered to Iran, contrary to precedents going the other way in the UK before this case.²²²

2.9.5 Return and Restitution in the 1970 UNESCO and 1995 UNIDROIT Conventions

Under the Conventions, only the terms return and restitution are used. Return would be based mainly on Article 7b of the UNESCO Convention and on chapter III of the UNIDROIT Convention which provides for the return of objects exported contrary to the laws of the country of origin, provided certain interests are damaged.²²³ Restitution is based on Art. 7b of the UNESCO Convention and on Art. 3 of the UNIDROIT Convention.

The title of the 1995 UNIDROIT Convention deals precisely with these two topics and it has two separate chapters on the two issues: Chapter II deals with stolen cultural property and its restitution and Chapter III deals with illicitly exported cultural property and its return. Restitution relates to stolen cultural property and return to illicitly exported cultural property. This makes the terminology on the topics ‘return and restitution’ to be clear and unified.

2.10 Rationales for Return and Restitution

Restitution as used by Vrdoljak and Ekpo Eyo under this head is used to denote all kinds of restoration as discussed above.

*Vrdoljak*²²⁴ identified three distinct rationales for the restitution of cultural objects in international law which are:

1. *“...to restore the ‘sacred’ link between people, land and cultural heritage. Lord Castlereagh acknowledged perceptively the symbolic value of these objects as: ‘the title deeds of the countries.’ In the colonial relationship, the possession of these cultural objects was central to the collective imaginings of the occupier and the occupied. For colonial occupiers, these objects represented the possession of people, territories and*

²²² Attorney General of New Zealand v. Ortiz [1982] 3 QB 432, rev’d, [1984] A.C. 1, add’d, [1983] 2 All E.R. 93.

²²³ 1995 UNIDROIT Convention, Art. 5.3

²²⁴ *Vrdoljak A.F.* 2006. *International Law, Museums and the Return of Cultural Objects*. Cambridge: Cambridge University Press: 13,299. Also in Prot L.V, *Witnesses to History...op.cit.*

resources within an empire. Their centralization and public display reinforced and projected a national imperial imagining. Conversely, for colonized peoples, the removal of these cultural objects represented the dispossession of their lands, autonomy and identity. Independence movements were often accompanied by claims for the restitution of cultural objects held in imperial collections, in order to reconstitute and revitalize an autonomous collective cultural identity.

2. *The second rationale promotes the restitution of cultural objects as a means of ameliorating or reversing internationally wrongful acts, including discrimination and genocide. Those seeking to eliminate a group usually target its cultural manifestations – ‘the very essence of its being’ – through its systematic destruction and confiscation.²²⁵ The Allied restitution programme, following the Second World War, affirmed the importance of restitution of cultural heritage as a means of addressing the effects of such policies and ensuring the continuing contribution of the group to the ‘cultural heritage of all (hu)mankind.*
3. *The third rationale for restitution of cultural objects in international law is intimately tied to the broader notion of the right to self-determination that evolved following decolonization. It is argued that restitution of cultural objects held by the museums of former metropolitan and national capitals is an essential component of a people’s ability to maintain, revitalize and develop their collective cultural identity. This rationale draws from the preceding two rationales for restitution. It emphasizes that self-determination is a process that includes the return of land, ancestral remains, cultural heritage and resources. In addition, these claims also call for the recognition and amelioration of the ongoing effects of colonial policies of discrimination, assimilation and genocide.”*

According to her, all these rationales are bound by a common purpose which is to ensure the continuing contribution of a people and their culture – not cultural objects *per se* – to the cultural heritage of all humankind.²²⁶

²²⁵ *ibid.* quoting Hamilton to Elgin, 15 October 1815, cited in Smith, A. 1916. Lord Elgin and his Collection. *Journal of Hellenic Studies* 36:163 at 332

²²⁶ *ibid.*

Ekpo Eyo²²⁷ has opined that what should be realized is that restitution can bring about the lowering of temperature in the heat of human contact and interaction. It is therefore worth the attention which the United Nations and its specialized Agency, UNESCO, is paying to it.

P. H de Sila in his own words states as follows:

*I believe I am voicing the opinion of several others in the 'deprived' 'Third World countries that we are not requesting the return of every single object, document, etc., taken away. We think that the cultural image of our countries abroad is as important as it is in our own countries. We are asking for the restitution of only those unique and specially significant items which express to the world and to our own countrymen the unique cultural heritage that is ours and our craftsmanship par excellence.*²²⁸

2.11 Provisions for Restitution and Return in National Laws

In countries where the 1979 UNESCO and the 1995 UNIDROIT Conventions do not have force of law either because the countries concerned have not ratified the Conventions or because they have ratified but have not domesticated their provisions, the way issues on return and restitution will be handled will follow different considerations from those set down in the Conventions.

In purely national settings, restitution under civil law, would be based on the principle of the restitution of stolen property, which is to the effect that subject to certain conditions, the good faith purchaser may be protected, even if he acquired stolen property.²²⁹ Whereas in common law states restitution would be based on the *nemo dat quod non habet* rule (which can be summarized by “once something is stolen, it remains stolen forever”) which will enable restitution in almost all cases.²³⁰

Also, the general rules of private international law is to the effect that states generally apply the law of the place where the object is located at the time of acquisition. This is

²²⁷ Ekpo E. 1979. Nigeria, in Return and restitution of cultural property, *Museum*. Vol XXXI, n° 1:18-21

²²⁸ de Sila P..D.1979. Sri Lanka, in Return and restitution of cultural property, *Museum op.cit* :22-25

²²⁹ See art. 714.2 of the Swiss Civil Code of 10 December 1907 (RS 210) and art. 1153 and 1155 of the Italian Civil Code (Royal Decree No. 262 of 16 March 1942, published on Gazzetta Ufficiale No. 79 of 4 April 1942)

²³⁰ Renold M.A., Stolen Art: The Ubiquitous Question of Good Faith, in Prott, *Witnesses to History...* 309-313.

the *lex rei sitae* principle based on the *lex originis*, the place of origin, instead of the place of situation. This leads to other complications outside the scope of this thesis.²³¹

In national laws, return could be based on the principle of taking into consideration of foreign laws that protect cultural heritage from illicit export and that is generally quite difficult. Sometimes the foreign laws are taken into consideration, based on specific mechanisms of private international law, such as the specific conflict of law rule applicable to foreign imperative rules (see e.g. art 19 of the Swiss Private International Law Act²³² or the Rome Convention on the law applicable to contractual obligations).²³³

Harmonisation of laws is another problematic area. In respect of archaeological objects, some States – Italy, Switzerland, Greece, Iran – have adopted the rule that whatever is in the subsoil, if it is of archaeological interest, belongs to the State. This is not a uniformly applied principle because the UK, the United States and France do not have rules similar to this. This brings to fore a strong need for harmonization of the laws in this field. Harmonisation in this regard will lead to the avoidance of protracted disputes such as the one in the Barakat case, because in the Barakat case the Iranian legislation and the possible ownership by the State were very difficult to interpret. There were complex archaeological issues bothering on laws and changes at different levels of the State, which made their interpretation by the UK judge very difficult. Harmonisation of legislation in this aspect will make it easier for other States to understand and apply the laws more easily than what obtains today. For countries that have ratified the UNIDROIT Convention, this would enable an appropriate interpretation of Art. 3.2 to the effect that archaeological objects, which are the product of illicit excavations, are to be considered as stolen objects.²³⁴

The issue of foreign public law restraining the export of cultural good is also fundamental as national judges sometimes refuse to apply the law of a foreign state in a

²³¹ See Carl M.H. 2004. *Legal Issues Associated with Restitution- Conflict of Law Rules Concerning Ownership and Statutes of Limitation*, in Resolution of Cultural Property Disputes, the Permanent Court of Arbitration/ Peace Palace Papers, PCA International Law Series. The International Bureau of the Permanent Court of Arbitration. Ed. Kluwer Law International: 185-192

²³² Swiss Private International Law Act, Art. 19. 18 December 1987 (RS 291).

²³³ Rome Convention on the law applicable to contractual obligations. Convention 80/934/EEC, 19 June 1980, *Official Journal* L266

²³⁴ Art. 3.2 of the *UNIDROIT Convention* states that “for the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.”

domestic court. In *Attorney- General of New Zealand v. Otiz*,²³⁵ the court held that foreign public law rules do not enjoy extra-territorial application. Also, in the 2004 case of *Federal Republic of Nigeria v. Alain de Montbrison*,²³⁶ the Paris Court of Appeal rejected a claim by Nigeria under Article 13 of the 1970 UNESCO Convention for the return of the Nok Statues illegally exported from its territory by a French antique dealer on the basis of the argument of the non-extraterritorial application of foreign public law.²³⁷

At this juncture, there is no doubt that the question of restitution or return of cultural property raises a myriad of complicated problems, particularly legal problems. The way the 1970 UNESCO and the 1995 UNIDROIT Conventions have fared regarding these issues is the bane of the next chapter.

²³⁵ *Attorney- General of New Zealand v. Otiz* (1984) AC 1

²³⁶ *Federal Republic of Nigeria v. Alain de Montbrison*, JurisData No. 2004-238340; and Court of Cassation, *l ere civ.*, 20.9.2006, No. 04-15.599, JurisData No. 2006-034988

²³⁷ This was the case despite the fact that both countries have ratified the UNESCO Convention.

CHAPTER THREE

THEORETICAL FRAMEWORK AND INTERNATIONAL INSTRUMENTS ON RETURN AND RESTITUTION OF CULTURAL PROPERTY

3.0 Introduction

The epidemic of displacement of cultural property is evidence that national legislation has proved inadequate to combat the incidences. The moment an object that qualifies as cultural property is found and identified outside its country of origin, the international regime comes into play.²³⁸ Once there is the likelihood of recovering illegally exported cultural property items, the attraction that the objects have to the buyers will be lessened, as well as the hunger to prospect for heritage objects.

At the international level, legal and ethical measures abound to take care of situations of illegal exportation. These measures serve preventive²³⁹ and curative²⁴⁰ purposes and they have emerged from restitution in war and peace times.

In this chapter, our discussion will start with the jurisprudential theories which form the theoretical framework for this thesis before discussing the legal provisions and issues concerning restitution in peace time as provided by the UNESCO and UNIDROIT Conventions in a comparative manner under different themes in a bid to determine whether these Conventions have been able to take care of the issues adequately.

3.1 Theoretical Framework

Jurisprudence and Legal Theory provide the theoretical framework for legal issues. There exists schools of thought with different proponents and legal scholars associated with each. The schools of thought are Legal positivism,²⁴¹ Natural Law School,²⁴² Scandinavian and American School of Realism,²⁴³ Culture based school of

²³⁸ See *First legal Development*: The Conventional response of the International Community within UNESCO and UNIDROIT, to promote the Return or the Restitution of Cultural Property, UNESCO Information Kit.

²³⁹ This is carried out through adequate legislation and updated inventories including pictures of the objects.

²⁴⁰ Curative purpose is done by facilitating restitution.

²⁴¹ This school sees law as the command of the sovereign backed by sanctions. Its proponent is John Austin.

²⁴² Here, emphasis is placed on the law handed down by the Supreme Being and discernible by human reasoning.

²⁴³ This school has as its leading proponent, Oliver Wendel Holmes and Law is seen as what the courts do based on what they regard as being fair.

Historicism,²⁴⁴ Functionalist Sociological School,²⁴⁵ Ultra Conservative Pure Theory School,²⁴⁶ Dialectical – Materialist Marxist School ²⁴⁷and the Pessimistic or Nihilistic School of Anarchism.²⁴⁸

Three schools of thoughts appear to have particular bearing on this thesis and are apt. They are, Historical school, Natural Law school and the sociological school.

3.1.1 Historical school

F. K Von Savigny is regarded as the founder of this school. Sir Henry Maine regarded Montesquieu as the first jurist to follow the historical method. Other jurists of this school are Hugo, Burke, Herder, Puchta, Gierke and Sir Henry Maine.

Salmond has stated that historical school of law

‘...deals with the general principles governing the origin and development of law and with the influences that affect the law...historical jurisprudence is the history of the first principles and conceptions of legal system.’²⁴⁹

Lee G.G,²⁵⁰ while considering the nature and functions of the Historical School of Law states that:

‘Historical jurisprudence deals with law as it appears in its various forms at its several stages of development. It holds fast the thread which binds together the modern and the primitive conception of law, and seeks to trace through all the tangled mazes which separate the two, the line of connection between them. It takes up custom as enforced by the community and traces its development. It also seeks to discover the first emergence of those legal conceptions which have become a part of the world’s common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to

²⁴⁴This approach to the study of anthropology and culture dates back to the mid-nineteenth and early twentieth centuries. It encompasses two distinct forms of historicism: diffusionism and historical particularism. Franz Boas is seen as its lead proponent.

²⁴⁵This school of thought tries to explain social institutions as collective means to meet individual and social needs. Emily Durkheim is the proponent of this school.

²⁴⁶This school is of the view that validity of each law, or legal norm, is traced to another legal norm. Ultimately, all laws must find their validity in the society’s basic norm known as grundnorm. Hans Kelson is its proponent.

²⁴⁷Dialectical materialism is a philosophy of science and nature developed largely in Russia and the Soviet Union. Karl Marx and Friedrich Engels are the main proponents.

²⁴⁸For a detailed understanding of this school of thought see Nihilism. Retrieved 24 October, 2014 from www.conservapedia.com/Nihilism

²⁴⁹ Mahajan’s V.D, 1987, *Jurisprudence and Legal Theory*. Lucknow: Eastern Book Company: 483-508 at 403

²⁵⁰*ibid*

point out those conditions and influences which modified them in the various course of their existence...'

The Historical School is relevant to this research as it emphasizes culture and gives a historical origin to law or legal concepts which are part and parcel of a people's culture.

3.1.2 Natural law school

Lord Lloyd of Hampstead portrays natural law thinking as occupying a pervasive role in the realms of ethics, politics and law from ancient times. Natural law has been conceived as a mere law of self-preservation or as an operative law of nature constraining man to a certain pattern of behaviour.²⁵¹ The basis of natural law and its essential features were laid down by Greek thinkers. Socrates, Plato, Aristotle, the Stoics, Gaius, Cicero, Aquinas, Grotius and others also theorized in this school. Emphasis on the supernatural and Justice gives Natural Law School an acceptance with customs and traditional practices.

3.1.3 Sociological school

Sociological jurists see law as a phenomenon. Sociological jurisprudence points law towards social justice and assumes law must seek to attain certain ends. It also emphasizes the task of balancing interests in the society. Its proponents are Dean Roscoe Pound, Ehrlich, Montesquieu, Auguste Comte, Durkheim, Herbert Spencer, Duguit, Max Weber and Prof. Allen.

Sociological School emphasises the point that law must be studied in relation to society.²⁵² It also emphasises the conflict resolution roles of law.

These three schools are adopted as theoretical framework for the discussions in this research work.

3.2 Return and Restitution Provisions under UNESCO and UNIDROIT Conventions

3.2.1 Considerations Preliminary to the Conventions

Plans for the 1970 UNESCO Convention was set in motion in April 1964 when UNESCO appointed a committee of Experts to draft preliminary recommendations for a Convention. After series of meetings and consultations, a final draft was prepared in

²⁵¹ *Ibid* at 595

²⁵² *Ibid* at 558

April 1970 by a Special Committee of Governmental Experts and the Convention was adopted at the 16th General Conference of UNESCO in November 1970 with some sixty one states in attendance.²⁵³

The Special Committee of Governmental Experts that prepared the final draft did not have any representative from the major art market states.²⁵⁴ The secretariat amended the draft to accommodate the requirements of the United States of America as other delegations wanted them to participate.

After UNESCO had observed the application of the 1970 Convention for nearly two decades, the International Institute for the Unification of Private Law (UNIDROIT) was invited to initiate the detailed instrument to address the private law aspects of return and restitution that are not covered by the UNESCO 1970 Convention. Expert studies were carried out²⁵⁵ and a group of experts was put together by UNIDROIT for the drafting of a preliminary text.²⁵⁶ The text was deliberated upon at the meetings of Governmental Experts and the Diplomatic Conference took into consideration the relevant rules of public international law; private international law; trade law; the 1970 UNESCO Convention; and all other relevant rules in the different legal systems and philosophies; the various national interests and points of view of cultural specialists, dealers and art collectors. The long process culminating in the UNIDROIT Convention ended at its adoption on 24th June 1995 at the Diplomatic Conference held in Rome.²⁵⁷

3.2.2 Comparative Analysis of the Provisions of the UNESCO AND UNIDROIT Conventions

Comparative exercise involves the act of looking at the ways things are alike or different.²⁵⁸ Having two Conventions on same subject matter arouses curiosity in this regard. There are obviously reasons for having one Convention following the other. When a law or Convention comes after another, where certain provisions or pattern or

²⁵³ O'Keefe, P. J. 2007. *Commentary on the 1970 UNESCO Convention*. 2nd Ed. Great Britain: Institute of Art and Law: 7

²⁵⁴ e.g. Switzerland and United Kingdom were not represented

²⁵⁵ Reichelt, G. 1985. International Protection of Cultural Property. *Uniform Law Review*, 43; The International Protection of Cultural Property: Second Study 1988. UNIDROIT, Rome. both quoted in Prott L.V. 2007. *Commentary on the UNIDROIT Convention...* Great Britain: Institute of Art and Law:12

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*; See UNIDROIT, The Acts and Proceedings of the Diplomatic Conference (hereafter referred to as "Acts". See also, UNIDROIT documents for each of the meetings of the study Group and group of Governmental Experts.

²⁵⁸ Merriam-Webster Dictionary

forms are similar, there is usually a good reason for retaining such provisions or form, on the other hand, if there are differences or changes, there are also good reasons for these. It is without doubt that the UNIDROIT Convention is a build up over the UNESCO Convention. There are obvious similarities in the way they are drafted or in their provisions and there are dissimilarities in the appearance as well. The following section or portions of this chapter deal with the similarities and dissimilarities in the provisions of the two Conventions while opinions will be given on them.

3.2.3 Similarities

There are similarities in the UNESCO and UNIDROIT Conventions in certain particulars. They are as shown or discussed herewith in paragraphs 3.2.1.1 to 3.2.1.4

3.2.3.1 Categories of items forming cultural property

It will be observed that categories of items that form Cultural Property as stated in Article 1 of the UNESCO Convention 1970 were adopted in the 1995 UNIDROIT Convention as Annex 1. The reason for this retention of this categorization apparently is because the UNESCO is a foundation for the UNIDROIT Convention which only is to consolidate efforts on preservation of the priceless cultural property.

3.2.3.2 Non Retroactivity Provision

International Law by custom and also by Article 28 of the Vienna Convention on the Law of Treaties does not give room for retroactivity in international agreements.

The 1970 UNESCO Convention has no provision for retroactivity in its operation or application. This point led to the one negative vote recorded at the adoption of the Convention as the Convention's provision of future control did not mean much to the country that gave the negative vote because all its major objects of cultural significance were already in the other countries. Despite the fact that the Convention will not act retrospectively, some states still erroneously feared to ratify the Convention because they had in their possession cultural property that they displaced during occupation of other countries.²⁵⁹

²⁵⁹Nagashima, M. 2002. *The Lost Heritage: The Reality of Artifact Smuggling in South East Asia* Bangkok: Post Books: 160 quoted by O'Keefe P. J, *Commentary on the 1970 UNESCO Convention...* *op. cit.*: 9 where Thailand feared that if the provision of Article II were applied retroactively, some cultural assets in its possession would have to be returned.

The UNIDROIT Convention on its part also states²⁶⁰ that the Convention does not act retroactively and the State where the claim is brought must have been a party to the Convention at the time of theft. Prott²⁶¹ explains that this is an assurance that no claim can be brought for any object stolen before six months after the deposit of the appropriate instrument of participation, meaning that no claim can be brought in respect of any object stolen before 1998. The Convention however, was designed to put purchasers on notice by the time it comes into force as they will be responsible for return if they do not make efforts to ensure that cultural objects which they are acquiring is not stolen after whatever date will apply in that jurisdiction.

According to Article 10(2),²⁶² the Convention must be in force in the state of location of the cultural object and the State of illegal export at the time the illegal export took place. Article 10(3)²⁶³ provides that the UNIDROIT Convention does not legitimize illegal transactions carried out before its coming into force in that territory neither does it prevent a claim for the return of the aforesaid objects through any procedure.²⁶⁴

3.2.3.3 Scope of Transactions Dealt with

Both Conventions do not deal with all transactions bothering on illicit trade but deal only with international transactions.²⁶⁵ That is, the transactions must involve more than one country and should not be a domestic transaction.

3.2.3.4 Lack of strict provisions on Penal Sanctions

The UNESCO and the UNIDROIT Conventions do not have strict penal provisions. Their penal provisions are vague. The UNESCO Convention, while widening the object of protection, made the punitive scope of the instrument weakened: in explicit terms, the actions for which the adoption of penal sanctions is required are few and extremely

²⁶⁰ 1995 UNIDROIT Convention, Article 10

²⁶¹ Prott, L.V, *Commentary on the UNIDROIT Convention...* : 82

²⁶² 1995 UNIDROIT Convention, Article 10(2)

²⁶³ *Ibid*, Article 10(3)

²⁶⁴ The procedures likely to be adopted in reclaiming such items include private law, bilateral negotiation, inter institutional arrangements or through UNESCO Intergovernmental Committee.

²⁶⁵ Prott, L. V. *Commentary on the UNIDROIT Convention, op.cit:* 16.

generalized and also as the express provision of an alternative recourse of administrative sanctions.²⁶⁶

The 1995 UNIDROIT Convention, in line with the premise inspiring it and within the range of the institution which drew it up, concentrates entirely on ameliorating the instruments in the field of private law, without giving the least attention to the criminal or, more broadly, punitive element. This fact however, does not prevent Party States from adopting penal sanctions.²⁶⁷

The lack of strict penal sanctions in the above Conventions has led to the United Nations *Model treaty for the prevention of crimes that impinge on the cultural heritage of peoples in the form of movable property*, adopted in the course of the United Nations 8th Congress on crime and criminal justice in 1990.²⁶⁸ This instrument, unlike other *model treaties* adopted at Havana, has not been accepted by any Resolution of the General Assembly, and as such has no binding juridical value and simply represents a scheme which could be helpful in relations between States who wish to cooperate in combating crime in the sector of movable cultural property.²⁶⁹

Developments in the area of introducing criminal law/ penal sanctions into the protection of cultural property will be looked into in the next chapter under the work of UNODC.

3.2.4 Differences

There are some differences in the UNESCO and UNIDROIT Conventions in certain particulars. These differences are reflected in the form and contents of the two Conventions. The notable differences are highlighted below:

3.2.4.1 Structure and Layout

The 1970 Convention has its provisions arranged as articles. The UNIDROIT Convention even though has its provisions as articles, however, further arranges the articles into chapters. It is quite significant that the later Convention which is arranged in chapters quite easily puts together provisions on particular specialized issues in focus

²⁶⁶ UNESCO Convention, Articles 7(a) & (b), 8, 10 and 13. See also Manacorda, S., *Criminal Law Protection of Cultural Heritage: An International Perspective* in Manacorda S. & Chappell D. Eds. 2011. *Crime in the Art and Antiquities World, Illicit Trafficking in Cultural Property*, New York: Springer: 30

²⁶⁷ UNIDROIT Convention, Article 10, paragraph 3. See also Manacorda S. *ibid* : 34

²⁶⁸ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chapter I, section B.1, annex

²⁶⁹ Manacorda, S. *Criminal Law Protection of Cultural Heritage:...* *op.cit*: 36

concerning return and restitution of cultural property and related matters. The chapters make the provisions of the UNIDROIT Convention very lucid and apt.

3.2.4.2 Classification of Convention

The 1970 UNESCO Convention is a public law instrument while the 1995 UNIDROIT Convention is a private law instrument. With this dichotomy, the UNIDROIT Convention becomes very dynamic and usable for a larger spectrum.

3.2.4.3 Principles behind the Conventions

The principles behind the Conventions are found majorly in the preambles. As opposed to the erroneous belief that the preamble to an International Convention is insignificant,²⁷⁰ the Vienna Convention on the Law of Treaties²⁷¹ provides that the preamble is part of the context in terms of which treaties are to be interpreted. O'Keefe²⁷² opined that the preamble should be seen as establishing general principles to guide interpretation. As such, the preamble to the 1970 UNESCO Convention brings to the fore the fact that

In becoming party to the 1970 Convention, states signify that they appreciate the following principles: The interchange of cultural property in spreading knowledge of other cultures - what has sometimes been called the ambassadorial role of art - is important. But it is not to be seen as being of primary significance. The preamble points out that an object as an item of cultural property can be properly appreciated and wholly contribute to its civilizing mission only when all the information it contains or represents is extracted. Information is of primary importance because it is only this which allows full appreciation of the object and its contribution to history. Theft, clandestine excavation and illicit export either destroy that information or prevent access to it. States thus have a moral obligation to prevent these activities and to co-operate with other states in so doing. Illicit import is an obstacle to understanding between states. States should look to action on both the national and international planes. Collecting institutions must support states by not contributing to such import either directly by buying unprovenanced material from dealers or indirectly by accepting tainted gifts. The Convention

²⁷⁰ Bator, P.M. 1982. An Essay on the International Trade in Art. *Stanford Law Review* 34: 275 at 377 where the words 'Conventional boilerplate' were used in reference to the preamble.

²⁷¹ Vienna Convention, Article 31(2)

²⁷² O'Keefe, P.J. *Commentary on the 1970 UNESCO Convention...*: 32

*lays great stress on cooperation and its text is designed to achieve this among member states.*²⁷³

Moreover, Article 2 of the UNESCO Convention has two major statements of principle which are that:

1. States Parties recognize that illicit traffic in cultural property is a main cause of the impoverishment of the cultural heritage of many countries and that international co-operation is one of the most efficient means of protection against it;²⁷⁴ and
2. State Parties will oppose illicit traffic with all the means at their disposal.²⁷⁵

This Article 2 has been commented on by different writers. Fraoua²⁷⁶ is of the view that the article creates no obligation on States Parties but only restates the seriousness of the problem of illicit trafficking.²⁷⁷ O'Keefe is therefore of the opinion that the literal translation of the wordings of Article 2(2) from the French text has created ambiguity that can only be solved by reading the French text.²⁷⁸ To Bator,²⁷⁹ Article 2 is theoretical. Chamberlain,²⁸⁰ while stating that the Article 2 is theoretical, goes further to state that the content forms part of the objects and purpose of the Convention and should be considered in interpreting the Convention. Rascher *et al*²⁸¹ sees the provision as though not legally binding but is an obligation on States to enable implementation within their legal systems.

The UNIDROIT Convention on the other hand, specifically mentions the underlying importance of cultural exchanges for promoting understanding between peoples and the dissemination of culture for the well-being of humanity and the progress of civilization

²⁷³ *Ibid* : 33

²⁷⁴ Article 2(1); see also O'Keefe P.J. *Commentary on the 1970 UNESCO Convention, loc.cit.*

²⁷⁵ Article 2(2); *ibid*

²⁷⁶ See Fraoua, R. 1986. *Convention Concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels* (UNESCO Doc.CC-86/WS/40,) at p.53.

²⁷⁷ O'Keefe, P.J. *Commentary on the 1970 UNESCO Convention, op.cit* p. 39

²⁷⁸ The ambiguity bothers on interpreting '*notamment*' to mean 'particularly' rather than 'in particular' and '*effectuer les réparations qui s'imposent*' for 'make the necessary reparations'.

²⁷⁹ see Bator, P. M. 1982. *loc.cit.*

²⁸⁰ Chamberlain, K. 2002. UK Accession to the 1970 Convention. *Art Antiquity and Law*. Vol.VII: 231 at 242;

Rascher, A. F., Bauen, M., Fischer, Y. and Zen-Ruffinen, M.N. 2005. *Cultural Property Transfer*. Brussels, Zurich: Bruylant, Schulthess: 15 quoted in Prott L.V. *Commentary on the UNIDROIT Convention*

²⁸¹ *ibid.*

in its preamble.²⁸² Also the irreparable damage continually caused by the illicit trade to the objects and the cultural heritage of national, tribal, indigenous, or other communities are referred to.²⁸³ The Convention aspires to achieve common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all.²⁸⁴

The above shows that the 1970 Convention is a preventive mechanism while the 1995 Convention is a curative mechanism.

3.2.4.4 Definition

It is fundamentally settled that the UNESCO and the UNIDROIT Conventions are both focused on Cultural Property. Agreeing on what qualifies as Cultural Property is one of the most difficult tasks facing those engaged in preparing or administering any legislation. The definition of the term 'Cultural Property' for the purpose of the 1970 UNESCO Convention is the crux of Article 1.²⁸⁵ To Bator, the description by categories is seen as being overbroad and imposing no meaningful constraints on the scope of the Convention.²⁸⁶ Carducci, in line with the principle of international relations that the cultures of individual nations are equal and each contributes its own share to the heritage of humankind states that each state has the right to determine the scope and content of the definition of its cultural property.²⁸⁷ Carducci goes further to describe the definition in the 1970 Convention as a mixed definition because it has an element allowing a state to define its own cultural heritage and another element stating that the item must be of importance within the defined categories.²⁸⁸ The designation of cultural property by a state subject to the two limiting criteria does not affect the designation of cultural property by another state and its right to recover cultural property.

The categories in the 1970 Convention were adopted in the 1995 UNIDROIT Convention while defining cultural objects in a significant way from the 1970 Convention by not making use of the words; 'specifically designated by each state.'²⁸⁹

²⁸² See UNIDROIT Convention, Preamble, para.2.

²⁸³ *ibid*, para. 3

²⁸⁴ *ibid*, para. 4

²⁸⁵ 1970 UNESCO Convention, Article 1 (a-k)

²⁸⁶ Bator, P.M, *loc.cit*

²⁸⁷ Carducci, G. 1997. *La restitution internationale des biens culturels et des objets d'art* Paris: L. G. D. J. :218-220 quoted by O'Keefe, *Commentary ...*, *op.cit*,

²⁸⁸ *ibid*.

²⁸⁹ UNIDROIT Convention, Article 2

The element of ‘importance’ was retained while the requirement of ‘designation’ was expunged to enable individual owners whose cultural property has been stolen without being designated by the state to bring an action under UNIDROIT Convention.

3.2.4.5 Categories of Stolen Objects Protected

The UNESCO Convention requires stolen cultural property to be in inventory by the state seeking return for it to qualify for protection under the Convention whereas the UNIDROIT Convention does not require cultural objects to be in the State inventory before it is covered by the Convention. The UNIDROIT Convention however, applies to all stolen objects, either inventoried or not, whether belonging to public collection, individual collection or communal collection.²⁹⁰

The UNIDROIT Convention however, has a broader provision on inventories in Article 3(7)²⁹¹ which states that a “public collection” consists of a group of inventoried or otherwise identified cultural objects owned by:

1. A Contracting State
2. A regional or local authority of a Contracting State
3. A religious institution in a Contracting State; or
4. An institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognized in that State as serving the public interest.

Shyllon F²⁹² is of the opinion that the phrase “otherwise identified cultural objects” means any other satisfactory means or evidence of identification would be admissible in court proceedings other than Conventional inventories and this will prove very advantageous to African states. Also, cultural objects stolen from private homes, all kinds of religious buildings, private collections and traditional communities which are not in state inventories or designated as cultural objects by the state can be recovered under the UNIDROIT Convention.²⁹³

²⁹⁰ UNIDROIT Convention, Article 3(8)

²⁹¹ *ibid*, Article 3(7)

²⁹² Shyllon F. 2012. Why African States Must Embrace The 1995 UNIDROIT Convention. Presented at the First meeting on the practical operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Paris, UNESCO Headquarters, 19 June. p.3 Retrieved 20 October, 2014 from <http://www.unidroit.org/english/Conventions/1995culturalproperty/1meet-120619/pres-speakers/shyllon.pdf>

²⁹³ Prott L.V. 1996. UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects. *Uniform Law Review*: 59-71 at 63(hereinafter Prott L.V. UNESCO and UNIDROIT...)

Article 3(8) that puts objects serving sacred or communal importance belonging to and used by a tribal or indigenous community as being subject to the time limitation applicable to public collections was inserted in the Convention to cater for many traditional communities which become devastated to the point of destruction of their traditional culture by the loss from the communities of sacred or secret objects which cannot be subsumed under the umbrella of public collection.²⁹⁴

3.2.4.6 Categories of Items Protected by the Conventions as Part of a Nation's Cultural Heritage

Under the 1970 UNESCO Convention, the categories of cultural heritage items classified as part of a nation's cultural heritage are listed.²⁹⁵ The categories are:

1. *Cultural Property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;*
2. *Cultural Property found within the national territory;*
3. *Cultural Property acquired by archeological, ethnological or natural science missions, with the consent of the component authorities of the country of origin of such property;*
4. *Cultural Property which has been the subject of a freely agreed exchange;*
5. *Cultural Property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.*

It is very clear from the provisions above that cultural property items that were given out as gifts as Nigeria did to the Queen of England under the scope of the 1970 Convention forms part of England's cultural property.²⁹⁶

This categorization has been criticized by the American lawyer Bator²⁹⁷ to the effect that it seems to have no operative effect. This criticism can be said to have arisen due to the fact that United States(US) has made no legal effort to define its cultural heritage leading

²⁹⁴ *ibid.*

²⁹⁵ 1970 UNESCO Convention, Article 4

²⁹⁶ In 1973, General Yakubu Gowon, then Head of State of Nigeria, on a State visit to England, presented Queen Elizabeth II with a seventeenth century bronze head from Benin. See generally, Shyllon, F. 2013. Negotiations for the Return of Nok Sculptures from France to Nigeria: An Unrighteous Conclusion. *Cultural Heritage Law and Management in Africa*. Lagos: Centre for Black and African Arts and Civilization (CBAAC): 209; also in 2003. *Art, Antiquity and Law*. Vol. 8, Issue 2:133-148

²⁹⁷ Bator. *loc.cit.*

us to conclude that United States legislation²⁹⁸ protecting only archaeological objects over 250 years is not in conformity with the obligations that United States should fulfill under Article 4.

The UNIDROIT Convention however has no such categorization.

3.2.4.7 Strict Definition of Stolen Object

The UNESCO Convention has no definition of what a stolen object is. It is therefore possible for anyone to be accused of dealing in stolen object to prevaricate or present arguments that should not avail a dealer in stolen cultural object to escape the arm of the Law. The UNIDROIT Convention, however defines stolen cultural object as “*a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the place where the excavation took place.*”²⁹⁹ This is no doubt stiff and as such, ensures the move to secure return or restitution of stolen cultural heritage to be more pragmatic.

3.2.4.8 Distinction between Stolen Objects and Illicit Exportation

The UNESCO Convention makes no distinction between stolen objects and illicit exportation.

Articles 3 and 4 of the UNIDROIT Convention constitute Chapter 2 of the Convention and they deal with stolen cultural property.

Article 3 is conceivably the dominant article of the UNIDROIT Convention. Issues relating to stolen cultural objects were separated from those relating to objects illicitly exported. Article 3(1) places an absolute duty on the possessor of a stolen cultural object to return it considering the fact that provision of financial compensation to the one who acquires the object may not prevent or reduce illegal activities because of the especial element of the object.

3.2.4.9 Laundering of Cultural Objects

The 1970 UNESCO Convention is silent on the issue of laundering of cultural property. The UNIDROIT Convention³⁰⁰ however, states that the Convention addresses claims of an ‘international character’. Though not well worded, the phrase created a situation

²⁹⁸ *Convention on Cultural Property Implementation Act 1983*, 19 U.S.C. 2601, ss. 2601 (2)(C)(i)(II), 2602(a)(1)(A); see generally, O’Keefe *op.cit.*,

²⁹⁹ UNIDROIT Convention Article 3(2)

³⁰⁰ UNIDROIT Convention, Article 1

where cases such as *Winkworth v. Christie Manson and Woods Ltd*³⁰¹ would be decided differently. In this case, the cultural objects of an English collector were stolen from him and sold in Italy to an Italian who, some two years after the theft, offered them for sales at Christie's Auction house in London. Opinions are divergent as to whether the Convention should apply in cases as this. While some Governmental Experts thought that the Convention should not apply in such a situation, good reasons abound to ensure that in situations where an international transaction has taken place, the Convention should apply, even if the litigation takes place in the first jurisdiction. Prott³⁰² opines that if it does not, there will be an incentive for dishonest dealers to "launder" goods through any convenient foreign jurisdiction and return the goods with impunity to the jurisdiction where the original owner was deprived of them. The majority³⁰³ concede that the UNIDROIT Convention solves this problem thereby addressing the problem of laundering which the Convention was designed to counter. The result of *Winkworth v. Christie* would be decided differently today.³⁰⁴

3.2.4.10 Attitude towards clandestinely excavated and unlawfully exported Cultural Property

Article 7(a) of the UNESCO Convention is a highly detailed one as it imposes an obligation on States Parties:

To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another state party which has been illegally exported

Nafziger³⁰⁵ opines that the present provision was a compromise between a 'weak' amendment, which would have required parties, inter alia,(1) to transmit to museums and other institutions the text of the Convention, and (2) to make every effort to obtain the support of such museums and institutions for the principles of ethical acquisition,

³⁰¹ *Winkworth v. Christie Manson and Woods Ltd* (1980) 1 Ch. 496 (England) where the court held that the issue of title was to be settled by reference to Italian Law- the *lex rei sitae*.

³⁰² Prott, L.V. *Commentary on the UNIDROIT Convention*, op.cit: 37

³⁰³ *ibid*.

³⁰⁴ Droz, G. 1997. *Convention d'UNIDROIT sur les biens volés ou illicitement exportés* in *Revue critique de droit international privé*: 15; Lalive P. 1996. *Une Avancee du Droit International: LA Convention de Rome d'UNIDROIT sur les Biens culturels volés ou illicitement exportés* 1 *Uniform Law Review*: 13, 57; Reichelt, G.1993. takes the contrary view in the article *Die Rolle von UNIDROIT für den Internationalen Kulturguterschutz* in *Europa im Aufbruch; Festschrift Fritz Schwind* : 205, 210. All adapted from Prott L.V, *Commentary on the UNIDROIT Convention* :12,13,16

³⁰⁵ Nafziger, J.A.R Article 7(a) of the UNESCO Convention in DuBoff, L.D. 1975. *Art Law: Domestic and International*. South Hackensack: Fred B.Rothman & Co.:387 at 388-89.

and a ‘strong’ amendment which would have prohibited acquisition of cultural property by any museum within the territory of a state party unless accompanied by an export certificate from its state of origin.³⁰⁶

Article 7(b)(i)³⁰⁷ has a very limited application because it provides that states should prohibit import of cultural property that are stolen from a museum, a religious or secular public monument or similar institution in a state party to the Convention, provided that the property is documented in the inventory of this institution. Some customs service, while preparing to accede to the 1970 Convention suggested that the implementation of Article 7(b) (i) would involve each state party having a detailed list of all specific objects stolen from the institutions within its borders. To be effective, the list must comprise the objects that were stolen before the Convention came into force and imported after that date.

The gap created by this article in regard to whether this provision is relevant to the argument whether cultural property clandestinely excavated and unlawfully exported is ‘stolen’³⁰⁸ has been filled by the UNIDROIT Convention³⁰⁹ under Article 3(2), where the question of how to handle clandestinely excavated cultural objects was laid to rest. If proof of identity can be established, the person in whom title to the objects is vested can sue. State ownership of illicitly excavated objects are protected if specified in the national legislation of the State Party. Article 5(3)(a)(b) and (c)³¹⁰ makes it possible for actions for the return of objects from archaeological sites to be brought either according to the provisions on stolen objects or those on illicit export.³¹¹

3.2.4.11 Export Certificate and Export Control Issues

Article 3,³¹² dealing with transferring ownership of cultural objects contrary to the 1970 Convention is, according to O’Keefe,³¹³ one of the most difficult provisions of the 1970 Convention. Bator³¹⁴ is however of the opinion that the section needs not be interpreted. He stated thus:

³⁰⁶ *ibid.*

³⁰⁷ 1970 UNESCO Convention

³⁰⁸ O’Keefe, P.J. & Prott, L.V. 1989. *Law and the Cultural Heritage: Movement*. London: Butterworths Volume III: 373; see also O’Keefe, Commentary, *op.cit.* :59-60

³⁰⁹ Article 3(2) UNIDROIT Convention

³¹⁰ UNIDROIT Convention

³¹¹ Prott L.V. UNESCO and UNIDROIT...p.65

³¹² 1970 UNESCO Convention, Article 3

³¹³ O’Keefe, P.J. *Commentary on the 1970 UNESCO Convention, op.cit.* :41

³¹⁴ Bator, *loc.cit.*

Article 3, declaring that transfers of ownership of cultural property contrary to the Convention are 'illicit', is a mysterious provision that will not be operative in the United States, which expressed its understanding that it does not modify domestic property law.³¹⁵

According to the rules of International Law,³¹⁶ 'an interpretation which gives a provision some meaning is preferred to one which renders it meaningless'. Armed with this, the Preamble emphasizes that the true value of cultural property "can be appreciated only in relation to the fullest possible information regarding its own origin, history and traditional setting". Illicit export therefore prevents access to this information. Making import illicit is a way of fighting exportation. On this premise, O'Keefe,³¹⁷ states that it is preferable to interpret Article 3 to mean that

'States Parties are required in their national law to render imports 'illicit' when they are 'illicit' export from another State. One cannot split State obligations. What one decides is an 'illicit' export should be an 'illicit' import for other State Parties. This goes beyond Article 7(b). It is not sufficient for States to implement only that Article. Article 3 creates obligations in its own right'.³¹⁸

This interpretation is supported by Article 6 of the Convention which requires State Parties to introduce export certificate for cultural material leaving their territory. A reading of the two articles together brings to fore the fact that State Parties should have in their national laws, a provision declaring the import of goods exported from another State Party in a manner contrary to its export provisions as unlawful.

According to the UNIDROIT Convention, Article 5(1)³¹⁹ makes it clear that it is the contracting state that makes request for return of illegally exported material. Article 5(2) equates illegal export to failure to return after legal export. It is in line with ICOM Code of Ethics which provides that museums should not acquire any object which has been illegally exported from its country and/or any intermediate country in which it may have been legally owned and that exhibition should be in accordance with the stated policy of the museum³²⁰ Article 5(3) makes room for a state to order return of an illegally exported

³¹⁵ *ibid.*

³¹⁶ Vienna Convention on the Law of Treaties, 1969, Article 31

³¹⁷ O'Keefe, *Commentary on the 1970 UNESCO Convention*, *loc.cit.*

³¹⁸ *ibid.*

³¹⁹ UNIDROIT Convention, 1995

³²⁰ ICOM Article 3 (2)

object which export would be physically defective to the object or its context;³²¹ affect the integrity of the object;³²² impair the preservation of information of a scientific or historical character;³²³ affect the traditional or ritual use of the object by a tribal or indigenous community by removing it from the custody of the community thereby destroying the living tradition of the people and humanity as a whole.

In applying this article, each case will be determined on its own merit. Article 5(4) requires relevant information which will assist the court in reaching an informed decision on the provisions of the preceding sub sections to be adduced in evidence.

Article 6³²⁴ provides for the introduction of export certificate for cultural property,³²⁵ to prohibit export unless accompanied by such a certificate³²⁶ and to publicize this prohibition.³²⁷ Abramson & Huttler³²⁸ have stated that since import controls are restricted to property stolen from public institutions,³²⁹ property from such institutions which is not 'stolen' and culturally important property, even if stolen, from private collections is not protected.³³⁰ They are therefore of the opinion that illegally exported property can be legally imported and will not be subject to the Convention's forfeiture provisions.³³¹ The above point according to O'Keefe is in direct opposition to the principle accepted in Article 3.

Whether an object is subject to export control or not is not an easy task. UNESCO has outlined the export control laws in a study³³² while UNIDROIT has set out with the task of putting them on line for ease in updating.

Article 6(3) (a) of the UNIDROIT Convention does not include an exporting owner in the category of those that can retain ownership of cultural heritage illegally acquired. Article 6(3) (b) gives the owner the option of transferring ownership of the object to

³²¹ e.g. the causing of physical damage to delicate objects by unprofessional handling.

³²² e.g. by dividing triptyches

³²³ e.g. by loss of information by destroying an inventory.

³²⁴ 1970 UNESCO Convention

³²⁵ *ibid.* Article 6(a)

³²⁶ *ibid.* Article 6(b)

³²⁷ *ibid.* Article 6(c)

³²⁸ Abramson, R.D. & Huttler, S.B. 1973. *The Legal Response to the Illicit Movement of Cultural Property. Law and Policy International Business.* 5: 932 at 961 quoted from Prott L.V. *Commentary on the UNIDROIT Convention, op.cit*

³²⁹ 1970 UNESCO Convention, Article 7(b)(i)

³³⁰ See O'Keefe, P.J. *Commentary on the 1970 UNESCO Convention, op.cit:* 54

³³¹ Abramson, R.D. & Huttler, S.B. *loc.cit*

³³² Prott, L. V & O'Keefe, P. J. 1983. *National Legal Control of Illicit Trafficking in Cultural Property* commissioned by UNESCO and discussed by a consultation of experts on illicit Trafficking. Paris 1-4 March

someone (who provides the necessary guarantees) resident in the country to which it is returned and not to settle ownership claims. The provision is mainly to ensure a return of the object to its country of origin.

Article 7(a)³³³ is simply to prevent the situation where an object which no longer qualifies as an illegal export because of change in the law, would be taken from a person and end up being re-exported by another person. Article 7(b) was worded to allow for creativity by an artist and the fifty years period was reached by taking into consideration the provisions of national legislation. Prott³³⁴ has stated that *'the effect of 7(2) now is that the provisions of Article 5 shall apply, i.e. there can be a claim for a cultural object, which was illegally exported during the lifetime of its creator or within 50 years of his or her death if the object was made by a member of an indigenous community for the use of that community'*.

3.2.4.12 Establishment of National Service

1970 UNESCO Convention³³⁵ specifies that national services be established for the protection of cultural heritage and stipulates the functions the body is to carry out. The State Party must also keep its operation under review and publish annual reports.³³⁶ An inventory of important public and private cultural property whose export will constitute an appreciable impoverishment of the national cultural heritage³³⁷ must be kept. The phrase 'public and private ownership' depicts that ownership questions are not the main concern of the Convention but the heritage value of the property.

O'Keefe³³⁸ has stated that such an inventory should reveal, for example, the rarity and quality of objects of a particular type and allow judgments to be made as to their need for protection. The making of such a scientific inventory places a very large burden on state poor in resources. However, the inventory need not, as pointed out by the secretariat, be a single volume as "... each museum, town or region can establish the sections relating to their respective cultural property."³³⁹ The inventory should be

³³³ UNIDROIT Convention, Article 7

³³⁴ Prott, L. V. Commentary, *op.cit.*, :70

³³⁵ UNESCO Convention, Article 5

³³⁶ O'Keefe, *op.cit.* :47

³³⁷ Article 5(b).

³³⁸ O'Keefe, *Commentary... op.cit.* :49

³³⁹ UNESCO Doc. SHC/MD/5 Annex II at p. 5.

updated as new discoveries are made, new masterpieces fashioned and important repatriated objects are brought in.

Schneider³⁴⁰ has pointed out that inventories serve as an essential safeguard against the looting of sites. The Getty Information Institute in 1993 initiated a collaborative project with government administrators, museums, dealers, police, customs, the insurance industry and appraisers which led to the birth of 'Object ID'. 'Object ID' was adopted by the 30th General Conference of UNESCO in November 1999, following a Recommendation by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, as the international standard for recording minimal data on movable cultural property which should be maximally utilized by all Member States.

On the other hand, the UNIDROIT Convention is not particular about inventories.

3.2.4.13 Issues of Inalienability of Cultural Property

Under UNESCO Convention, Article 13 is the only one that has a subsection that deals with transfer of ownership in the Convention. According to O'Keefe,³⁴¹ the requirement of Article 13(b) which provides that States should ensure their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner, is ambiguous as there might be issues as to who the rightful owner is. For example, in the case of *King of Italy and Italian Government v. Marquis de Medici and Christie's*,³⁴² the papers Christie's were preparing to auction had been collected by the Medici family and dated from the eleventh to the eighteenth century. They included letters to and from Lorenzo the Magnificent and others belonging to the state of Florence. About half of the 800 lots were State papers. The other half were of great historical interest; their export was forbidden and the Italian State had a right of pre-emption. The judge granted an injunction, pending the trial of the action, to prevent the sale of the State papers, on the basis that there was a *prima facie* case that the action would succeed, since the Italian Government was entitled to prevent the disposition of its property by someone who was not entitled to it. An interlocutory injunction was not

³⁴⁰ Schneider, E.C. 1982. Plunder or Excavation? Observations and Suggestions on the Regulation of Ownership and Trade in the Evidence of Cultural Patrimony. *Syracuse Journal of International Law and Commerce*. 9:1at17.

³⁴¹ O'Keefe, *Commentary, op.cit.* :83

³⁴² *King of Italy and Italian Government v. Marquis de Medici and Christie's* (1918) 34 T.L.R. 623

granted in respect of the other papers, on the ground that the court would be unlikely to grant an order requiring their return to Italy. Those papers were subsequently sold at auction, despite the judge's warning that this might expose the vendors and the purchasers to an action for damages. A decision on the merits was never given.

O'Keefe³⁴³ believes it is probable that the phrase 'rightful owner' in Article 13(b) refers only to material which is described as 'inalienable' in terms of Article 13(d). The provision as to 'rightful owner' clearly also refers to practice in a number of Civil Law jurisdictions where important cultural property is in public hands and cannot legally be transferred. In the case of *Republic of Ecuador v. Danusso*³⁴⁴ it was shown that the State of Ecuador had a special right of dominion, a sort of co-ownership, with the holders of archaeological material.

O'Keefe³⁴⁵ further asserts that if the property has been exported by someone other than the rightful owner, (e.g. after theft from a private owner or in breach of inalienability), then remedies would already seem to be open in respect of theft (or conversion, or fraud). Article 13(b) could mean rendering assistance by indicating the appropriate procedures to be undertaken, or, where possible, by direct action by the importing State itself, as was taken by the United States in the case of *United States v. Hollinshead*.³⁴⁶ There the defendants had been charged by the United States of America with conspiracy to transport stolen property in interstate commerce under the National Stolen Property Act. It was alleged they had cut a Mayan stela from immovable monument in Guatemala and exported it to California in boxes marked 'personal effects'. Under Guatemalan law, the stela was State property and it was found that the defendants knew this. The court held that it was 'stolen' within the terms of the Act.

O'Keefe³⁴⁷ has rightly observed that apart from the limited circumstances of Article 7(b) (i), article 13(c) is the only provision in the 1970 Convention dealing specifically with stolen cultural property. The concept of 'stolen' is not defined, thus leaving its scope of application to be decided by each national legal system where the question is raised. UNIDROIT Convention has however delineated unlawfully excavated and retained

³⁴³ O'Keefe, *Commentary...*, *op.cit.* p.83

³⁴⁴ *Republic of Ecuador v. Danusso*. District Court of Turin, 4410/79; Court of Appeal of Turin, 593/82.

³⁴⁵ O'Keefe, *Commentary...*, *loc.cit*

³⁴⁶ *United States v. Hollinshead* 495 F.2d 1154. 1974

³⁴⁷ O'Keefe, *Commentary...*, *loc.cit*

cultural objects as stolen.³⁴⁸ In *United States and Schultz*,³⁴⁹ the prosecution of an American dealer by the US Government for conspiracy to deal in stolen property led to his conviction and sentencing for conspiracy to receive stolen property. The federal Judge during sentencing said that Schultz knew he was stealing “in every sense of the word” and was not different from “an ordinary thief”.³⁵⁰

Article 13(d) brought about the issue of inalienability which de Visscher³⁵¹ has pointed out as having a consequence of the goods concerned being claimable at any time if found in a state which declares them as inalienable leading to that state disregarding any transactions which occurred in another State and would normally be recognized as valid according to the *lex rei sitae* (the law of the place where the last transfer of ownership occurred).³⁵²

In *Frias v. Pichon*,³⁵³ silver ciborium, recognized as inalienable under Spanish law, had been taken from Spain and sold to Pichon in France. Frias sued in France to recover the ciborium but the *Tribunal de la Seine* held that only French, not foreign, rules as to inalienability would be applied and, as the goods were not inalienable under French law, the title of the purchaser was recognized.

During the negotiations for the UNIDROIT Convention on stolen or Illegally Exported Cultural Objects, the issue of inalienability came up as a major one and was dealt with by allowing states to declare certain time limitations on actions.³⁵⁴

3.2.4.14 Institution of Action

Under the UNESCO Convention, claims can be formulated only on a Government to Government basis as the 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.”³⁵⁵ The UNIDROIT Convention operates quite

³⁴⁸ Article 3(2)

³⁴⁹ *United States and Schultz*. 178 F.Supp.2d 45 (2002); 333 F.3d 393. 2003

³⁵⁰ Anon. *United States and Schultz*. 2002. The Art Newspaper, No. 127, July – August :5

³⁵¹ Visscher, C. 1935. *de La protection international des objects d’art et des monuments historiques. Revue de droit international et de législation*: 39 quoted by O’Keefe, *Commentary...loc cit.*

³⁵² *ibid*; For example, in *Winkworth v. Christie Manson and Woods Ltd, supra*, a collection of Japanese miniatures was stolen in England, sold to a bonafide purchaser in Italy and then sent back to London for auction. The English court held that the matter of title was to be settled by reference to Italian law- the *lex rei sitae*.

³⁵³ *Frias v. Pichon*.1886. *Chunet*: 593.

³⁵⁴ Prott, L.V. 1997. *Commentary on the UNIDROIT Convention*. Leicester: Institute of Art and Law: 38.

³⁵⁵ UNESCO Convention, Article 7(b)(ii)

differently as it provides in Article 8(1) that a claim for restitution of stolen and for return of illegally exported cultural objects “*may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located.*”

Thus, 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 a similar action for the restitution of an illegally exported cultural object.³⁵⁶

3.2.4.15 Procedure and Burden of Claim Processing

Under UNESCO Convention,³⁵⁷ the importing state will only act or ‘take appropriate steps to recover and return’ at the request of the state party of origin. In other words, the commitment and competence of the exporting country’s national government and an appreciation of international politics in bilateral requests will affect the processing of its claim. Documentary and other evidence necessary to sustain its claim should equally be provided by the requesting party at its expense. Also, all expenses incidental to the recovery of the item will be borne by the requesting party. This may turn out to be burdensome considering the nature of the item.

O’Keefe³⁵⁸ commenting on the 1970 Convention has stated that taking appropriate steps to recover and return on the part of the importing state can range from seizure of the object according to their custom power, or on the basis of special seizure provisions in the legislation implementing the 1970 Convention as we have it under the Australian Legislation.³⁵⁹ The importing state may prosecute the importer in seeking conviction as Canada did in respect of the Nok sculpture.³⁶⁰ In *Republic of Ecuador v Danusso*³⁶¹ Italy felt her obligation was fulfilled by awaiting the outcome of litigation between Ecuador (the state of origin) and the possessor of the Ecuadorian material held in Turin. Italy’s stance was questioned by Ecuador who complained to the Second Session 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 1981 of the extremely slow pace of the judicial process.”³⁶² Italy responded that the objects illegally

³⁵⁶ Prott L.V. 1996. UNESCO and UNDROIT: A Partnership against Trafficking in Cultural Objects. *Uniform Law Review*: 57, 65-66

³⁵⁷ UNESCO Convention, Article 7 (b) (ii)

³⁵⁸ O’Keefe, P.J. *Commentary, op.cit.*: 62

³⁵⁹ Protection of Movable Cultural Heritage Act 1986, s.14(1)

³⁶⁰ *R v Heller* (1983) 27 Alta. L. R (2d) 346; appeal decision (1984) 51 A.R. 73.

³⁶¹ *Republic of Ecuador v. Danusso* (1982) 18 *Rivista di diritto internazionale private e processuale* 625

³⁶² UNESCO Doc. CC-81/CONF.203/10 at p.5

exported from Ecuador in 1974, had been sequestered by the public prosecutor in Genoa in 1975 and passed with the agreement of the Ecuadorian government to a museum for safekeeping pending the civil proceedings to establish ownership. The Ecuadorian authorities communicated their concerns through their foreign ministers to the Italian Minister for Justice but the Italian authorities made it known to them that the executive cannot pressurize the judiciary and the Ecuadorian counsel should ensure that the case is settled timeously. Having done this, the Italian Government felt it had fully discharged its responsibilities.

Ecuador became a party to the 1970 Convention in 1971. The proceedings in Italy began in 1975. Italy ratified the Convention in 1978 so the proceedings were pending when Italy's obligation began under the Convention. Assuming aid was to be sought from the Italian authorities, they would have to take steps in assisting recovery and return as stated in the wording of Article 7(b) (ii) which no existing legal process has made provision for.

Under UNIDROIT, the cost of returning the cultural object will be borne by the requesting state without prejudice to the right of that State to recover costs from any other person.³⁶³ Article 8(1) of the UNIDROIT Convention is express that claims can be brought either in the jurisdiction where the object is located or any other jurisdiction with competence to try the offender. Article 8(2) gives the parties the choice to determine the forum to use in resolving disputes including arbitration. According to Prott,³⁶⁴ Article 8(3) provides for applications for provisional measure from a court of the state of location of the object, even if the action is brought in another jurisdiction, to enable, in particular, the safeguarding of an object e.g. by prohibiting its further export during the course of legal proceedings or its disappearance or destruction by inappropriate handling. This is important because of the need to secure an object which is being offered for sale and to ensure that it is withdrawn, for example, from an auction. In present practice, auction houses do not disclose the names of buyers. Unless there is the possibility of a court order securing the object pending the result of litigation, therefore, the object may well be lost before the claimant or requesting State has been able to get a Judgment.

³⁶³ UNIDROIT Convention, Article 6(4)

³⁶⁴ Prott, L.V, *Commentary, op.cit.* p.70

3.2.4.16 Provision on Compensation to Victims

Article 7(b)(2) of the UNESCO Convention makes provision for compensation to an innocent purchaser who has valid title to the property and this has caused problems in several civil law national systems. While in most common law systems, the good faith purchaser has no special protection. Frigo³⁶⁵ is of the opinion that unless action is taken to modify and unify national laws in this respect, the effect of the Convention on illicit traffic will remain limited.

The issue of quantum to be paid as compensation may be difficult to determine. Abramson and Huttler³⁶⁶ are of the view that the purchase price or the value at time of recovery should be used bearing in mind the rapid rate of inflation. The original draft³⁶⁷ specified 'fair compensation corresponding to the purchase price' but this was dropped and replaced with 'just compensation'. In practice, the French system³⁶⁸ requires only the payment of the purchase price as compensation. The British owners of a wooden effigy of Sir Roger de Burghfield retrieved the effigy from a dealer in Belgium who claimed to be a *bona fide* purchaser and compensation was paid to him.³⁶⁹

Basing compensation on international market value will encourage speculation in cultural heritage items, discourage purchasers from investigating properly before acquiring the item because there will be a handsome profit if the item is later reclaimed and a poor requesting state may be unable to afford the compensation demanded on the item.

The following cases³⁷⁰ are examples of an object rising in value after entering the international art market:

In 1972 a Maori dug up some carvings which had been buried by a member of one of the tribe in the Taranaki region of New Zealand in the 1820s or 1830s. He sold it to a visiting English dealer, Entwhistle, for NZ\$6,000. Entwhistle took them to New York without applying for a New Zealand export permit and sold them to Ortiz for US\$65,000.

³⁶⁵ Frigo, M. 1986. *La protezione dei beni culturali nel diritto internazionale*, Dott.A. Giuffrè Editore, Milan: 27 quoted by O'Keefe, *Commentary...*: 62

³⁶⁶ Abramson and Huttler, *op.cit.*:953

³⁶⁷ UNESCO Doc. SHC/MD/3, Annex, 4, Art, 10(d) quoted by O'Keefe, *Commentary...*:63

³⁶⁸ French Civil Code Article 2279

³⁶⁹ Facts are from a submission made by John Cherry, Deputy Keeper, Department of Medieval and later Antiquities, British Museum, to the Committee on Culture and Education. Council of Europe and reproduced in Council of Europe. *The Art Trade*, Strasbourg, 1988 at p.41; see also O'Keefe, *Commentary... op.cit.*:63-64

³⁷⁰ These cases are adapted from O'Keefe, *Commentary...*, p64

Some five years later Ortiz consigned them to Sotheby's for sale. They were then reputed to be worth more than £150,000.³⁷¹

The Shiva Nataraja at issue in *Bumper Development Corp. Ltd. V. Comr. Of Police*³⁷² was bought from the person who found it in 1976 for the equivalent of £12 and later valued in London at around \$250,000 when offered for sale six years later.

In order to get round the issue of funds, Sayre proposed amending the Convention to set up a World Cultural Heritage Fund financed by contributions from members. The 30th General Conference of UNESCO established a Fund at the recommendation of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of illicit Appropriation. So far the fund has received only a donation from one State Party which has not yet been utilized.³⁷³

A report incorporating the views of Professors Chatelain³⁷⁴ and Rodota³⁷⁵ on national legal control of illicit traffic in cultural property was sent to UNESCO in 1982 admonishing UNESCO to join forces with an international body specialized in private law³⁷⁶ in re-examining the issues of the protection of the bonafide purchaser which serves as a leeway for enabling illicitly traded cultural property gain entry into the licit trade. In line with the suggestions of the report, UNESCO involved UNIDROIT with the task which led to UNIDROIT's ability to improve the gap left by UNESCO in this regard.

In filling the gap, UNIDROIT Convention, while trying to strike a balance between requiring return from a bonafide purchaser which is contrary to the fundamental principle of law in some legal systems and doing so without compensation, a

³⁷¹ Cater, R.R. 1982. The Taranaki Panels- A Case Study in the Recovery of Cultural Heritage *Museum* 34: 256; Attorney-General of New Zealand v. Ortiz (1982) 1 Q.B. 349; (1982) 3 W.L.R. 571; (1983) 2 W.L.R. 809.

³⁷² *Bumper Development Corp. Ltd. V. Comr. Of Police* (1991) 4 All E.R. 638.

³⁷³ *ibid*, at p.88.

³⁷⁴ Chatelain J. 1976. Means of Combating the Theft of and Illegal Traffic in works of Art in the Nine Countries of the EEC. Commission of the European Communities Doc. xII/920/79/ - E. quoted in Prot L.V, *Commentary on the UNIDROIT Convention, op.cit.* :12

³⁷⁵ Rodota. S. 1984. The Civil Law Aspects of International Protection of Cultural Property: 99; Explanatory Memorandum in Council of Europe, *The Art Trade* (1988) 1, quoted in Prot L.V, *Commentary on the UNIDROIT Convention, op.cit.* 12

³⁷⁶ Prot L.V. & O'Keefe, P. J. 1983. *National Legal Control of Illicit Traffic in Cultural Property* commissioned by UNESCO and discussed at a Consultation of Experts on Illicit Traffic, Paris, 1-4 March, UNESCO Doc. CLT/83/WS/16 (UNESCO, Paris) 1983 quoted in Prot L.V, *Commentary on the UNIDROIT Convention, op.cit.* p.12

compromise was reached to make provision for compensation, but only for acquirers who could prove their diligence. The principle of compensation also served the role of encouraging potential acquirers to refrain from purchasing objects in the absence of adequate information so as not to suffer losing compensation otherwise available. This would discourage theft, and, at the same time, alter the present practice of dealers and auction houses of not disclosing the names of sellers, and the practice of purchasers not questioning the statements of sellers.³⁷⁷

In deciding the value to be paid as compensation, the phrase ‘fair and reasonable compensation’ was settled for. To assist countries that are not too buoyant, a Fund is currently under consideration at UNESCO. Issues such as provision for the costs of restitution and reimbursement for restoration costs³⁷⁸ as operates under Japanese Law will be accommodated by a judge presiding over restitution claims under the ‘fair and reasonable compensation clause.’ The judge must however ensure that he is convinced that there was no ulterior motive taken and that the conservation measures have not caused the deterioration or loss in cultural or commercial value of the object and especially if lack of proper conservation would have led to a cultural deterioration endangering the survival of the object³⁷⁹.

In the case of *Webb v. A. G. for Ireland*³⁸⁰ a judge of the Irish High Court, while awarding title to the finders of a ninth century hoard which had been deposited with the national museum, took in to account the cost of conservation by the Museum which had substantially increased the value of the object. (The Supreme Court on Appeal, however, awarded title to the Irish State). However, where cultural objects are in the hand of private persons, it is important not to encourage a possessor to undertake activities which might in fact not be in the interests of the heritage: the dealer holding a well-documented Northern Kwakiutl Thunderbird headdress which was refused export permission in Canada used the period before the appeal for extensive “restoration” work. The action had the effect, which was for him convenient, of very substantially increasing the price (offered by a United States Client) while at the same time raising questions about the integrity of the object as so “restored”. At any rate, no Canadian museum was prepared

³⁷⁷ See Prott, L.V., *Commentary on the UNIDROIT Convention*, *op.cit.*: 41-50

³⁷⁸ The person in possession of an object belonging to another is entitled to compensation for the amount of the costs of maintenance and conservation of the object whether or not he knew or should have known that the object was stolen.

³⁷⁹ Prott, L.V., *Commentary on the UNIDROIT Convention*, *op.cit.* : 44

³⁸⁰ *Webb v. A. G. for Ireland* (1988) 8 ILRM (Irish Law Reports Monthly) 565.

to pay the asking price.³⁸¹ The Archaeological Institute of America, in its comments on the preliminary draft Convention, said ...

*'no compensation should be paid for any restoration or conservation work on a cultural object. Members of the committee had consulted professional conservators who also shared this belief and pointed out that in some instances compensation might have to be paid for restoration work of poor quality, on work that actually detracted from or damaged the integrity of the object, while in other cases the possessor of a cultural object that is to be returned might engage in restoration work in the hope of receiving additional from the country of origin.'*³⁸²

Buyers should take precautions and make adequate inquiries into the provenance of objects to be entitled to the compensation payable immediately on return. If the payment arrangement is not settled by the courts, it may end up being negotiated.

In *Union of India v. The Norton Simon Foundation*,³⁸³ here, the return of a stolen Siva Nataraja to India was postponed to enable the acquirer, a United States Collector, to display it for ten years. Prott³⁸⁴ opines that such an arrangement may enable an owner which has difficulty raising the compensation immediately to ensure the return of the item even if delayed. It may also be a solution for an owner who finds a difficulty of principle in paying over money for what it regards as its own property.

Article 4(2) & (3) shows the right of the possessor to compensation on returning the object, not necessarily from the owner but from any other person in the transfer chain as the legal system where the case is brought may permit.

UNIDROIT has also provided clearly³⁸⁵ that compensation is only available to the person acquiring an illegally exported cultural object after exportation. Article 6(2) creates a standard lesser than that of stolen cultural objects³⁸⁶ for illicit export. In

³⁸¹ This case is discussed in Prott L.V, Commentary, *op.cit*: 43

³⁸² Professional Responsibilities Committee, Subcommittee on the Unidroit Convention. Comments on the Preliminary Draft Unidroit Convention on stolen or Illegally Export Cultural Objects. 22 September, 1993

³⁸³ *Union of India v. The Norton Simon Foundation* United State District Court, Southern District of New York, 74 Cir. 5331; United States District Court, Central District of California, Case No. CV 74-3581 – RJK. The case and the settlement were discussed in DuBoff, L.D. 1977. *The Deskbook of Art Law*: 109-14; Sayre. C.F. 1986. *Cultural Property Laws in India and Japan*. *UCLA Law Review* 33: 876-79 quoted by Prott L.V., *Commentary on the UNIDROIT Convention*, *loc .cit*: 44

³⁸⁴ *ibid*.

³⁸⁵ UNIDROIT Convention, Article 6(1)

³⁸⁶ Art. 4(4)

determining the circumstances for paying compensation, recourse will be had to case law.

In *Attorney-General of New Zealand v. Ortiz*³⁸⁷, George Ortiz bought Taranaki panels from the dealer Lance Entwistle and signed a contract of sale in New York which included a clause obliging him not to show the panels to any archaeologist of New Zealand extraction for two years and not to entrust a photograph of them to any third party.³⁸⁸ In cases as this, there can be no doubt that compensation would be excluded by Article 6(1).

In *R v Yorke*,³⁸⁹ the judge had this to say:

Yorke was . . . in the process of publishing a book on Aymara weavings to come out in April of 1988. From all the documentation and from his demeanour and questions, publications, Correspondence, it is very apparent that accused is extremely knowledgeable about the weavings . . .

. . . the accused conducted a portion of the cross-examination. His questions on cross-examination were lengthy and frequently amounted to an exposition rather than a question. By these questions he displayed his extensive knowledge of Bolivia, its government, its indigenous people, its culture and weavings. His discussion...were extremely enlightening on this vast knowledge of the textile industry.

I would find that the accused had a wealth of knowledge about native history and culture. He had a reliable business practice for recording and describing in detail his collection of antique weavings . . . The business connections in Bolivia indicate that the accused was or should have been aware of the laws and regulations pertaining to this industry.

3.2.4.17 Limitation Period

The UNESCO Convention has no provision on this matter. States are concerned about the effect of limitation periods which are not mentioned in the 1970 Convention as discussed above under the issue of inalienability.

³⁸⁷ *Attorney-General of New Zealand v. Ortiz supra*.

³⁸⁸ Details of the case is in Cater, R.R. The Taranaki Panels - A case study in the recovery of cultural heritage. *Museum* 34: 11-12; see generally Prott L. V., *Commentary*...

³⁸⁹ *R. v. Yorke*. Decision of the Supreme Court of Nova Scotia 20 June 1996. CR 11741, Decision 11 – 12. Adapted from Prott L. V., *Commentary, op.cit* : 65

Article 3 sections 3, 4, 5, 6, 7 and 8 of the UNIDROIT Convention deal with limitation periods for bringing action for recovery.

Article 3(3) provides a period favorable to the dispossessed than is obtainable in jurisdictions where time limit for claims begins from the date of theft or loss as operates in France³⁹⁰ and the date the good faith possessor acquired the object as is applicable in England.³⁹¹ Article 3(3) looks similar to the systems in New Jersey and California where the date of detection of the object is used in calculating the time³⁹² but is not as liberal as found in New York courts where limitation time is based on the date of demand and refusal.³⁹³

This provision is to ensure that instances where the diligent owner cannot easily trace the property due to the secrecy and international nature of the transactions is catered for. Article 3(4) of the UNIDROIT Convention, according to Prott,³⁹⁴ somewhat reflects the wording of Article 7 of the 1970 UNESCO Convention. Article 3(5) is an exception to the general rule in Article 3(4) as it creates a time limit of 75 years to claims for public collections.

In relation to Article 3(6) of UNIDROIT Convention, Prott³⁹⁵ has stated that

It is clear that State who holds strongly to the importance of limitation periods will all make the declaration suggested. If they do not, only the three year period from knowledge of location and identity of the possessor will apply, and claim can continue to be made ad infinitum. The effect is likely to be, therefore, that States with strong art markets will adopt the 75 year period as the maximum in which a claim can be brought under the Convention, and State which presently provide for imprescriptibility of some classes of cultural property will continue to apply that rule. They will not, however, be bound to extend this

³⁹⁰ Civil Code, Art.2279

³⁹¹ See Redmond- Cooper, R. 1995. Limitation periods in Art Disputes in Title and Time in *Art and Antiquity Claims*, U.K: Institute of Art and Law.

³⁹² O’Keeffe v. Snyder 405 A.2d 840 (1979) at first instance, reviewed 416 A. 2nd 862 where the Supreme Court of New Jersey decided that the cause of action accrued and hence the date from which the limitation should be measured was “when she first knew, or reasonably should have known through the exercise of diligence” of the cause of action; *The Regents of the University of California v. Salvato et al.* Action No. 1 BC 114151 Superior Court of Los Angeles discussed in Shapreau, C. 1996.

California’s Discovery Rule is applied to delay Accrual of Replevin Claims in Cases Involving Stolen Art. *Art Antiquity and Law*. 1:407; Prott L.V., *Commentary on the UNIDROIT Convention*, op.cit: 5

³⁹³ *Menzel v. List* 253 N.Y.S. 2nd 43 Misc. 2d 300; 267 N.Y.S.2d 804 aff’ d 298 N.Y.S. 2d 979 (1969); *Kunstsammlung zu Weimar v. Elicofon* 536 F. Supp. 829 (1981) 678 F. 2d 1150 (1982); *Solomon R. Guggenheim Foundation v. Lubell* 567 N.Y.S.2d 623 (1991).

³⁹⁴ Prott, L.V., *Commentary on the UNIDROIT Convention*, op.cit: 38

³⁹⁵ *ibid.*

longer period to claims under the Convention from States which do not provide a longer period for claims made in their own jurisdictions’.

3.2.4.18 Notion of Good Faith and Due Diligence Exercised by the innocent purchaser

The 1970 Convention has no provision for the recovery of a stolen object once it has been sold. The UNIDROIT Convention however, in Articles 3 and 5 challenges the legal obstacles preventing the recovery of stolen objects once it has entered the art market. Article 3(1) places the burden of proof on the holder of an object alleged to have been stolen by stating that he must return it without compensation³⁹⁶ unless there was no means by which he would have known that the object was stolen.

The notion of ‘good faith’ exercised by the ‘innocent purchaser’ is exemplified in the case of *Versicherung X v. A.M.*,³⁹⁷ where the Swiss Federal Court held that

“the degree of care required from an acquirer varies according to the circumstances and has to be evaluated in each case. Certain classes of goods had already been held to be subject to particular risks such as used luxury cars, where the buyer does not have to be alerted by particularly suspicious circumstances to make particular inquiries, but should be wary from the outset. The Court held that a heightened risk existed in the trade of second-hand goods generally and in all branches of the trade where goods of doubtful origin were particularly evident. This included antiquities such as the antique weapons concerned in this case.”

Also, in the English case of *De Prèval v. Adrain Ltd.*³⁹⁸ the court held that the buyer of two unique candelabra (stolen in 1986) was not in good faith because, being a dealer with experience in the area, he should have been alerted that their provenance might be doubtful.³⁹⁹

Article 4(4) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 has elaborately included these firmer rules on good faith.

³⁹⁶ UNIDROIT Convention, Article 4(1)

³⁹⁷ *Versicherung X v. A.M.*, BGE/ATF 122 III (Federal Court Lausanne 5 March 1996) also reported in *Neue Zürcher Zeitung* 6/7 April 1996, at p.41 quoted from Prott, L.V, *Commentary... loc.cit.*

³⁹⁸ *De Prèval v. Adrain Ltd.* (Unreported), Arden J., 24 January 1997; See Redmond-Cooper, R. 1997. Good Faith Acquisition of Stolen Art. *Art. Antiquity and Law* 2: 55-61

³⁹⁹ Redmond-Cooper, R. 1997. Good Faith Acquisition of Stolen Art. *Art Antiquity and Law*. Vol. II: 55.

Article 4(4) made use of the words ‘due diligence’ and the indicators specified as examples in determining it are:

1. “**all the circumstances of the acquisition**” which as elicited by Prot, ⁴⁰⁰

“...would cover factors such as an unusual place of the transfer (such as the bond area of an airport⁴⁰¹ or a trailer truck in a loading dock⁴⁰²) or time of day.⁴⁰³ Undue haste to conclude the transfer would seem to indicate caution. Antiquities whose original container also revealed woodchips, soil and caterpillars⁴⁰⁴ or mud and straw⁴⁰⁵ must surely suggest the need for further inquiries. Some areas such as Afghanistan⁴⁰⁶ or Iraq⁴⁰⁷, which have been massively looted, have been well publicized: objects which might have such an origin need to be especially carefully scrutinized. Finally there are certain classes of antiquities where illicit origin should be presumed unless a clear chain of title can be shown.”

Chippindale and Gill have opined that:

*The known corpus of Cycladic figures is now reckoned at about 1600; a few are casual finds, about 143 have been recovered archaeologically; the other 1400 or so have ... appeared on the market or in the possession of private collections inside or outside Greece with no declared recent history as to their movements between their places in the ground and the present proprietor ... About 90 per cent of the corpus, then is practically without history ...*⁴⁰⁸

In a situation where a list of objects exist and the items on sale was not listed, due diligence would be shown by the dealer taking steps to ensure the items were legally acquired. For example, news had it that “in December 1985, large numbers of *Apulian vases were offered sale at Sotheby’s. A three volume publication of more*

⁴⁰⁰ Prot, L.V, *Commentary.....,op.cit.*, :47-48

⁴⁰¹ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* 717 F. Supp. 1374 (1989); 917 F. 2d 278 (1990) (U.S.).

⁴⁰² D’Arcy, D. The Sevso treasure: who did what and to whom. *The Art Newspaper*, October 1993 31:14, 38.

⁴⁰³ *Reid v. Metropolis Police Comr.* (1973) 2 All E.R. 97 (U.K.).

⁴⁰⁴ The copper cauldron holding the late Roman silver hoard known as “The Sevso treasure” in D’Arcy, D. “The Sevso treasure: who did what and to whom” *op.cit.*: 38

⁴⁰⁵ *United States v. McClain* 545 F.2d 988 (1977); 593 F. 2d 658 (1979) U.S.).

⁴⁰⁶ Press Release by UNESCO 30 March 1994; 65 *The Art Newspaper*, December, 1996 1-3, 66 January 1997, 6.

⁴⁰⁷ Press Release by UNESCO 4 March, 1995, Notice of stolen Cultural Property (UNESCO) 1 August, 1995, Lost Heritage: Antiquities Stolen from Iraq’s Regional Museums; Gibson, M. & McMahon, A. 1993. Fascicle 1. Chicago; Baker, H. D., Matthews, R. J. & Postgate. N. 1994. Fascicle 2. Cambridge; Fujii, H. 1996. Fascicle 3. Tokyo.

⁴⁰⁸ Chippindale, C. and Gill, D. Cycladic figures: art versus archaeology? In Tubb, K.W., *Antiquities Trade or Betrayed* :131 at 132.

than 6,000 Apulian vases listed every known and legally excavated vase from the area up to 1983. One or two might have been missed, but not more. None of those offered for sale were listed”.⁴⁰⁹

Purchasing antiquities in areas notorious for selling fake or illegally excavated items increases the risk of not engaging in a legal deal.

2. *The “character of the parties”*- This will be an important element in the judge’s assessment of “due diligence”. Specialists exist in the big international auction houses and museums with knowledge about checking provenance of the items they deal in and a high standard will be expected of them. Prott⁴¹⁰ opines that “not to check a catalogue raisonnee of a major artist which would reveal prior ownerships clearly would not meet this standard. Specialized dealers also have particular knowledge of the art market which would enable them to suspect the origin of some cultural objects: those listed by INTERPOL or widely publicized in the general news media and in specialized publication, such as Malian ceramic⁴¹¹ or cultural losses in massive quantities from Afghanistan⁴¹² or Cambodia.”⁴¹³

Prott⁴¹⁴ reported a Swiss case that came before the courts, after the coming into force of the legislation requiring the return of property stolen from occupied territories, which gives a vivid illustration of the point under focus.

In this case of *Fischer v. Schweizerische Eidgenossenschaft*⁴¹⁵, Fischer was a dealer who had sold some valuable Impressionist paintings and had to reimburse the purchaser who was required to return them to their original owners. Swiss Law protected the bona fide purchaser and the special legislation allowed a good faith purchaser, who could not recover from the seller, to be reimbursed by the Swiss

⁴⁰⁹ *The Observer* 1 December, 1985, 1; *The Times* 7 December, 1985, 2, 10 December, 10. Quoted in Prott, L.V., *Commentary*....., *op.cit.*: 47-48

⁴¹⁰ *ibid.*

⁴¹¹ Sidibe, S. 1996. The Fight against the Plundering of Malian Cultural Heritage and Illicit Exportation in Schmidt P.R. and McIntosh R.J. *Plundering Africa's Past*: 79; Brent, M. A View inside the Illicit Trade in African Antiquities in same book: 63; ICOM One Hundred Missing Objects from African; Looting in Africa 1992: 109-111; Bedaux, R. An archaeologist’s appeal in Leyden, H. 1995. Illicit traffic in cultural property: Museums against pillage. Amsterdam: Royal Tropical Institute: 67-71; also the subject of an import ban imposed under the United States *Convention on Cultural Property Implementation Act*, 1983, 19 U.S.C., s.303.

⁴¹² Press Release by UNESCO 30 March 1994; *The Art Newspaper*, December, 1996. 65:1-3; January 1997. 66: 6.

⁴¹³ Widely publicized in the press and in ICOM, 100 Missing objects: Looting in Angkor 1st edition 1993, 2nd edition 1997.

⁴¹⁴ Prott, L.V., *Commentary*....:48

⁴¹⁵ *Fischer v. Schweizerische Eidgenossenschaft* (unreported decision) Federal Court, Booty Chamber – 25 June 1952 discussed by Thilo, E. 1952. *La Restitution des Rapines de Guerre* *Journal des Tribunaux*. 1: 386

State. Fischer sued the State. Fischer was awarded only about a third of the amount which he had to reimburse the collector, as the state held that Fischer should, in the circumstances, have been more prudent. The court made a careful analysis of the transactions concerned. It held that at the date of Fischer's purchases in 1941 and 1942, the illegally "confiscation" of Jewish property was not widely known and knowledge of it could not be imputed to him. As regards paintings bought by him from the curator of Goering's collection, the court held that since the views of senior members of the Nazi party that the Impressionists were representatives of "degenerate" art were well known even before the war, the sudden appearance of large numbers of top quality Impressionist paintings for sale by Goering's curator should have put him on enquiry. His failure to make a full investigation as to provenance justified the granting of the reduced amount to him by the State. It should however be noted as Elisabeth des Portes, Secretary General of ICOM has pointed out that

'It is evident that one can no longer rely on the fame of certain salerooms or dealers for assurance of the provenance of objects. The very efficient French Office pour la Repression de Vol des Oeuvres d' Art, which makes seizures both at the Hotel Drouot as well as at the big names of the market place, is there to prove it'.⁴¹⁶

Two very rare copies of a book by one of the survivors of the last voyage of Magellan, of which not more than ten copies exist in the entire world were offered for sale by the same person. The books were roughly disguised by the recent scratching out of several stamps and this should have alerted a major auction house to a possible illegal transaction. According to evidence given before the French court the books had been published in Paris in 1575 and were offered to Sotheby's Paris which sold them on, although inquiries could have established that three copies of this book had been stolen during the 1970s from three French libraries two of which were based in Paris.⁴¹⁷

This transaction contains factors which suggest that the level of diligence required by the UNIDROIT Convention were not met.

⁴¹⁶ *ibid*; *Le Monde* 14 January 1997: 15.

⁴¹⁷ *Noce, v. Liberation* 15 September 1995, 28; Prutt L.V. *Commentary on the UNIDROIT Convention ...op .cit*, p.49

According to Prott,⁴¹⁸ major collectors, especially those who collect in defined categories, such as African art or Indian bronzes with many years' experience, can be held to a high standard because they have professional advisers unlike smaller collectors and amateur buyers but facts which are notorious, such as massive losses mentioned, or the enormous illicit trade in icons, cannot be overlooked for them. The best protection an amateur can enjoy is the purchase from a reputable dealer on whose expertise he can rely on. The "character of the parties" includes, reference to the character of the seller because some reputable sellers are in the habit of repurchasing items they have originally sold after being stolen. A seller who has a police record, or with whom the purchaser has never previously dealt, or one who is selling objects completely outside his usual merchandise, or one who has no expertise at all in the subject, make it important for the purchaser to have made scrupulous inquiry into the provenance of the item.

3. *The "price paid"*-any time a buyer pays less than the market price for an object, there is the presumption of illegal deal. The buyer should inquire whether the seller has good title before purchase. In *Desportes still-life case*,⁴¹⁹ a Swiss case, the First Public Law Court refused an appeal against the decision of the cantonal court to return to France a painting which was proved to have been stolen. The possessor in Switzerland sought to prevent return, alleging his good faith acquisition. The Federal Court noted that the purchaser in Switzerland had bought the painting, estimated at a value of 3,200,000 FF for 1,083,000 FF or 1,700,000 FF (the purchaser gave varying assertions), clearly, in either case, far below the value of the painting. The lower court, with whose assessment the Federal court saw no reason to interfere, noted also that the purchaser was an experienced businessman and connoisseur who had in addition risked dealing with persons unknown and had not inquired into the legality of the importation of the painting into Switzerland⁴²⁰.
4. The phrase "**any reasonably accessible register of stolen cultural objects**" was included as a result of the developments relating to recording stolen cultural objects. Even though computerized registers exist, no consolidated database exists. Work is ongoing at UNESCO in achieving this feat.

⁴¹⁸ Prott, L.V., *Commentary on the UNIDROIT Convention*, *ibid*

⁴¹⁹ *ibid*.

⁴²⁰ *L. V. Ordonnance rendu le 1^{er} novembre par la Chambre d' accusation de Geneve (the Desportes still-life case) Le Cour de Droit public*, Decision of 1 April 1997.

5. The words “**other relevant information and documentation which it could reasonably have obtained**” aims at publications relevant to the objects such as excavation reports and duplicate museum catalogues. Prott⁴²¹ has stated that the *Musee Guimet* holds a duplicate catalogue for the *Kabul* Museum and the *Ecole Francoise de I’ Extreme Orient* holds one for the Angkor Conservation Centre: any buyer of object which could have an Afghan or Khmer provenance would be well advised, considering the huge amounts of material looted from those two countries in recent unsettled conditions, to check such sources of information. A well – known publication of the mosaics of Cyprus was relevant in the case of the Kanakaria mosaics.⁴²² An excavation report of a dig in Afghanistan listed a rare, perhaps unique, Bodhisattva with garnet eyes which was previously with other finds of this excavation in the Jellalabad Museum, but is now in the Metropolitan Museum, New York.⁴²³ The phrase would also cover computerized auction catalogues where these exist, either in a general data base such as “Thesaurus” or put on line by the auction houses themselves.
6. The last phrase of Article 4(4) which is- “**or took any other step that a reasonable person would have taken in the circumstances**” is according to Prott,⁴²⁴ clearly an answer to the exaggerated claim that it will be impossible to prove diligence. Judges in most legal systems are used to applying rules to determine what is reasonable in the circumstances, as is shown by the most recent Swiss case mentioned above. It is clearly wildly inaccurate to suggest that the Convention provides as stated by Lemmens that

*‘Good faith is established only by “consulting every register of stolen artefacts all over the world. One must also establish if the goods need an export licence and if this is available. The dealer has the right to compensation only if he can prove that he has consulted every possible source’.*⁴²⁵

⁴²¹ Prott, L.V. *Commentary on the UNIDROIT Convention, op .cit:*50

⁴²² *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc. supra*

⁴²³ Maier, T. 1995. The Met digs in *Newsday* (U.S.) 23 May: b37-38.

⁴²⁴ Prott, L.V. *Commentary on the UNIDROIT Convention, loc .cit*

⁴²⁵ Barker, G. and Stewart L. 1996. Maastricht- the last art fair? *Daily Telegraph* 4 March, quoting L.A. Lemmens, secretary- General of TEFAF.

In conclusion, the object will be the yardstick in determining the investigations to be made in exercising due diligence and the factors mentioned above are not exhaustive.⁴²⁶

Article 4(5) provides that *‘the possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.*

Prott⁴²⁷ states that this provision meets the situation, not infrequently encountered in some countries, where a collector might buy an object, not unaware that its provenance was suspect, and gain tax advantages by donating it to a museum.

Ela is of the opinion that *“accepting donations of undocumented antiquities is one way that museums can circumvent their own acquisitions policies, which might otherwise prevent them from purchasing material of suspicious origin.”*⁴²⁸

To buttress the above analysis and show that private rights over cultural objects are recognized under domestic and international law when the rights arise from licit acquisition of cultural property acquired in good faith was illustrated in the 2010 *Lissipo Bronze case* where the Pesaro judge stated that the Getty Museum had not legitimately acquired a Greek statute also known as the ‘Victorious Youth’ which was found by Italian fishermen in the Adriatic sea adjacent to the Italian coast in 1964. The Judge therefore concluded that its ownership should have been considered void from the onset.⁴²⁹

3.2.4.19 Introduction of Alternative Methods of Dispute Resolution

Unlike the UNESCO Convention, the UNIDROIT Convention offers Arbitration or other competent authority as an option to litigation for the recovery of stolen or illegally exported cultural objects.⁴³⁰

⁴²⁶ Lalive, P. 1997. *La Convention d’ UNIDROIT sur les biens culturels ou illicitement exportés* (du 24 juin 1995) *Revue suisse de Droit international et de Droit européen* 36, points out that Art. 4(4) does not require extraordinary diligence, but only that reasonable degree of prudence already required by Swiss law and which is, moreover, already required by numerous ethical codes.

⁴²⁷ Prott, L.V., *Commentary on the UNIDROIT Convention, loc .cit*

⁴²⁸ Elia, R. 1994. The world cannot afford many more collectors with a passion for antiquities. 41 *The Art Newspaper* October 1994.

⁴²⁹ *Lissipo Bronze case*, 2010. Order of 10th February 2010. available at http://www.europeanrights.eu/getFile.php?name=public/sentenze/1-LISIPPO_confisca_GIP_trib._pesaro.doc quoted by Vigni, P. 2013. The Enforcement of Underwater Heritage by Courts in *Enforcing International Cultural Heritage Law*, Francioni F. & Gordley J. Eds. Oxford: Oxford University Press: 127&132

⁴³⁰ 1995 UNIDROIT Convention, Article 8(2)

3.2.4.20 Flexibility in Handling Issues thereby preserving more beneficial rules

The UNESCO Convention has no provision giving courts the liberty to widen the scope of the Convention during adjudication. Under UNIDROIT Convention, Article 9(1) gives state parties before whose court the request for return and restitution is brought, the liberty to widen the scope of the provisions of the Convention to apply a more amicable treatment as the Governmental experts agreed to at the discussions leading to the Convention. These provisions as reproduced by Prott⁴³¹ include:

- (i) extending the provisions of Chapter II on theft to other wrongful acts such as conversion and fraud (which are included in the concept of theft in some jurisdictions but not in others);
- (ii) applying the Convention notwithstanding that the date of the theft or illicit export occurred before the entry into force of the Convention;
- (iii) extending the period within which a claim may be brought;
- (iv) disallowing the possessor's claim to compensation after return of a stolen article even when he or she has used the necessary diligence (this enables Common Law countries to retain their existing law concerning the *nemo dat* rule);
- (iv) in the case of an illegally exported cultural object, having regard to interests of the requesting State other than those listed in Article 5(3);
- (v) disallowing the possessor's right to compensation under Article 6;
- (vi) applying Article 5 even in cases excluded by Article 7;
- (vii) disallowing the possessor the options specified in Article 6(2);
- (ix) requiring that costs under Article 6(4) be met by a party other than the requesting State;
- (x) permitting claims outside the limitation periods set by Articles 3(3)-(8) and 5(5); and
- (xi) applying the Convention also in domestic transactions.

This provision resembles a discretionary power given to judges to be able to ensure that justice is done in every case that appears before them giving adequate recognition to the peculiarities of each case. It also enables states with more

⁴³¹ Prott, L. V. *Commentary on the UNIDROIT Convention op cit:* 76

favorable rules to restitution or return than that provided by the Convention to continue to apply its rules.

3.3 1995 UNIDROIT Convention - An Advancement beyond the 1970 UNESCO Convention

The similarities and differences in the preceding section has led to the following points showing an improvement on the existing order, after the 1970 Convention, by the coming into force of the UNIDROIT Convention.

Under UNESCO Convention, only objects designated by the state in institutions qualify as cultural property. The requirement of designation in the UNESCO Convention is favorable to states that designate large amounts of cultural property but many states do not designate large amounts of cultural property. For example, The United States and The United Kingdom do not have the classification system operational for classifying movables widely used in the French and similar systems thereby leading to a situation where very little of their cultural property will be protected. The UNIDROIT Convention made away with the requirement of designation to make room for individuals to bring action under UNIDROIT for their stolen objects not designated by the state.

UNESCO Convention deals with the problem of illicit traffic by means of administrative procedures and state action, while the UNIDROIT Convention provides direct access to the courts of one state by the owner of a stolen cultural object or by a state from which it has been illicitly exported.⁴³²

In addition to States, Individuals can now bring action under UNIDROIT Convention which operates on the basis of private law whereas only states can bring action under UNESCO Convention because the Convention operates on a State to State level.

The UNIDROIT Convention takes care of a notable difference in cultural administration between states with large amounts of cultural property in state hands and strong state cultural administrations able to administer detailed systems of classification, and States where it is the interest of private owners that need protection under the Convention because government ownership of cultural property is the exception rather than the general practice.⁴³³

⁴³²*Ibid*, p15.

⁴³³ *ibid*.

Under the UNIDROIT Convention, the differences between legal systems have been addressed in a sophisticated way by the provision on the protection of a ‘good faith’ acquirer.⁴³⁴ The UNIDROIT Convention has incorporated the international public policy principle that legal acquisition of a stolen cultural object must never be allowed and provides that the possessor of a stolen cultural object shall be bound to return it.⁴³⁵ This has made the principles of public international law the instrument to bridge the gap between incompatible domestic legal orders, establishing civil law on one side that the *bona fide* purchaser of a stolen moveable shall acquire the legal title, and on the common law system side, that the purchase *a non domino* of a stolen cultural object will never entail the acquisition of the legal title.⁴³⁶

The UNIDROIT Convention applies to all stolen cultural objects whether inventoried or not whereas Article 7 of the UNESCO Convention has been interpreted as restricting the obligation of return only to objects inventoried in institutions.

3.4 The Complementary Nature of the Two Conventions

The UNESCO Convention is the pioneer international Convention existing on the issue of Illicit Trafficking ratified by the highest number of States. Its role is three-fold in that it provides its State Parties with –

1. Preventive Measures through the use of Inventories, Export Certificates, Trade Monitoring, Imposing Penal or Administrative Sanctions and Educational Campaigns.⁴³⁷
2. Restitution Provisions⁴³⁸ under which State Parties are to assist requesting States in recovering Cultural Property items inventoried on payment of just compensations to an innocent purchaser or a person having valid title to the property. Such requests being made through diplomatic offices. This recovery however excludes objects of illicit excavations or objects stolen from private places.

Article 13 equally provides for restitution and cooperation indirectly and subject to domestic legislation.

⁴³⁴ *ibid.*

⁴³⁵ UNIDROIT Convention, Article 3

⁴³⁶ Francioni F., “Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law”, in Francioni & Gordley, Eds. *Enforcing International Cultural Heritage Law. op.cit.*: 14

⁴³⁷ 1970 UNESCO Convention, Article 7

⁴³⁸ *ibid.*, Article 7(b)(ii)

3. International Cooperation Framework: Strengthening cooperation among and between State Parties pervades the Convention. Article 9 protects Cultural Patrimony in jeopardy by calling on import and export controls. United States has used this provision as a basis for bilateral treaties.⁴³⁹

The UNIDROIT Convention is strongly promoted by the UNESCO Convention and as such complements the UNESCO Convention from a Private Law Perspective on its restitution mandate. UNESCO commissioned UNIDROIT to study the private law issues that though not directly regulated by the UNESCO Convention, but could hinder its implementation. These areas are:

1. Content – The UNIDROIT Convention unlike the UNESCO Convention
 - a. Focuses on treating restitution of stolen or return of illegally exported cultural objects uniformly
 - b. Processes claims directly through national courts or authorities competent in that regard and domiciled in the State Parties. Claimant in case of theft cuts across individuals, entities or State Parties while claimant for illicit export are exclusively State Parties.
 - c. Restitution claims are time bound⁴⁴⁰
 - d. All stolen or illicitly exported objects whether inventoried or not are covered by the Convention and are to be returned under relevant provisions.
 - e. Unlawful excavation of Cultural Objects are to be considered stolen and to be restituted if consistent with the law of the State where excavation took place
 - f. State Parties requesting return of illegally exported objects only need to establish the significant cultural importance of the object.⁴⁴¹
2. Good faith holders, innocent purchasers and compensation: the UNIDROIT Convention brings a moral dimension into trade by ensuring that payment of compensation of a third party who has acquired title in the object is conditioned by due diligence.⁴⁴²

⁴³⁹ Legal and Practical Measures Against Illicit Trafficking in Cultural Property, UNESCO handbook, International Standards Section Division of Cultural Heritage, 2006: 11

⁴⁴⁰ Articles 3 and 5

⁴⁴¹ Article 5(3)

⁴⁴² Articles 4(1) and 6

The UNIDROIT Convention therefore strengthens the provisions of the 1970 UNESCO Convention and supplements them by formulating minimum rules in terms of restitution and return of cultural objects. It guarantees the rules of private international law and of international procedure that allow the principles embodied in the 1970 UNESCO Convention to be applied.⁴⁴³

At this juncture, it can be rightly said that though there are still some issues not sufficiently taken care of by the two Conventions, the two Conventions compared have achieved minimum standards that they set out for. “Together the two Conventions,” as Lyndel Prott very well put it, “close many of the loopholes that had prevented courts from combating more forcefully the illegal trafficking of cultural objects.”⁴⁴⁴

Legal provisions may in the real sense be beautifully worded. However, without practical and administrative measures, the beauty cannot be seen or well appreciated. The practical and administrative measures in place to ensure the maximum benefits accruing from the 1970 UNESCO and 1995 UNIDROIT Conventions constitute the bane of the next chapter.

⁴⁴³Questionnaire on the practical operation of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Retrieved 24 October, 2014 from <http://www.unidroit.org/english/Conventions/1995culturalproperty/1meet-120619/quest-e.pdf>

⁴⁴⁴ Prott, L. V. *UNESCO Sources*, 72, September 1995 quoted from Shyllon F, 2011. The 16th Session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, 21–23 September 2010. *International Journal of Cultural Property*. 18:429–435

CHAPTER FOUR

ORGANS OF THE CONVENTIONS, UNESCO INTERGOVERNMENTAL COMMITTEE AND PARTNER INSTITUTIONS

4.0 Introduction

There is a practice at the international level of having a body follow up on the effectiveness of instruments after drafting. The 1970 UNESCO Convention did not make provision for this kind of body and so for many years the Intergovernmental Committee, though a separate body and not an organ of the 1970 Convention, had performed this role of following up on the implementation of the 1970 Convention until recently when the Subsidiary Committee was formed as the monitoring body of the 1970 Convention. Article 20 of the UNIDROIT Convention however makes provision for a follow up body for the Convention which is the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

To administratively achieve the goals of the UNESCO and UNIDROIT Conventions, UNESCO partners with other bodies in achieving its aim. In this regard, legal mechanisms, practical tools and ethical instruments have been developed by UNESCO, UNIDROIT and the partner institutions in order to contribute to the fight against displacement of cultural property. The partner institutions and the roles they are playing in assisting UNESCO achieve its goals as well as practical measures in place to facilitate the actualization of the goals of the UNESCO and UNIDROIT Conventions are discussed in this chapter.

4.1 The Organs of the Conventions

4.1.1 The Subsidiary Committee: A New Monitoring Mechanism for the Implementation of the 1970 Convention

4.1.1.1 Preliminary notes

The Extraordinary meeting of the States Parties to the 1970 Convention which took place on 1st July 2013 elected the Subsidiary Committee.⁴⁴⁵ The aim of the

⁴⁴⁵The Subsidiary Committee. Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/subsidiary-committee/1st-sc-session-2013/>

extraordinary meeting was to elect eighteen members of its newly created Subsidiary Committee charged with the main duty of considering for the first time in the history of the Convention, the draft Operational Guidelines for the implementation of the treaty.⁴⁴⁶ The Subsidiary Committee held its first session from 2nd to 3rd July 2013 at UNESCO Headquarters and the Rules of Procedure of the Committee were adopted there.⁴⁴⁷ The Committee is meant to be convened every year.⁴⁴⁸ The Subsidiary Committee comprise eighteen States Parties (three by regional group)⁴⁴⁹ to ensure the principles of equitable geographical representation and rotation is upheld. The eighteen state parties are Bulgaria, Chad, Croatia, Ecuador, Egypt, Greece, Italy, Japan, Madagascar, Mexico, Morocco, Nigeria, Oman, Pakistan, Peru, Romania, China and Turkey.⁴⁵⁰

4.1.1.2 Roles, Functions and Activities

The Subsidiary Committee is charged with the following functions:

1. To promote the objectives of the 1970 Convention;
2. To review the national reports submitted to the General Conference by the States Parties to the Convention;
3. To share good practices, prepare and submit to the Meeting of States Parties recommendations and guidelines that can help in implementing the Convention;
4. To identify difficult situations resulting from the implementation of the Convention, including topics regarding the protection and return of cultural property;
5. To establish and maintain coordination with the “Return and Restitution Committee” in connection with capacity-building measures to combat the illicit trafficking of cultural property;
6. To inform the Meeting of States Parties of the activities implemented.

⁴⁴⁶ Fighting against the Illicit Trafficking of cultural property: Statutory meetings of the 1970 Convention. Retrieved 25 October, 2014 from http://www.unesco.org/new/en/media-services/single-view/news/fighting_against_the_illicit_trafficking_of_cultural_property_statutory_meetings_of_the_1970_Convention/#.U5LtNSh33IU

⁴⁴⁷ *ibid.*

⁴⁴⁸ *ibid.*

⁴⁴⁹ Subsidiary Committee Rules of Procedure, Rule 1. Retrieved 25 October, 2014 from <http://unesdoc.unesco.org/images/0022/002212/221208e.pdf>

⁴⁵⁰ Shyllon F. 2013. First Session of the Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. *International Journal of Cultural Property*. 20:501–502

4.1.2 The Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

This body was formed in accordance with Article 20 of the 1995 UNIDROIT Convention as a mechanism to monitor the application of the Convention. The committee was saddled with the responsibility of reviewing the Convention's practical operation. This Article also places on the President of UNIDROIT the burden of convening the special committee, on its own initiative at regular intervals or at any time at the request of five Contracting States.⁴⁵¹ The 1995 Convention is silent as to the composition of this Committee. The President of UNIDROIT was given the authority to convene the special committee at the 90th session of the Governing Council of UNIDROIT.⁴⁵²

UNIDROIT felt it proper to convene the first meeting of the special committee at the UNESCO headquarters in Paris around the time State Parties to the 1970 UNESCO Convention will meet and the 18th session of the Intergovernmental Committee will hold. This arrangement was made to ensure that States Parties to the 1995 Convention, Signatory States and also all UNIDROIT and UNESCO Member States, whether or not Parties to the 1995 Convention, as well as a certain number of international intergovernmental and non-governmental organisations interested in the operation of the Convention are in attendance.⁴⁵³

The First Meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects therefore held at the UNESCO Headquarters in Paris on 19 June 2012. The meeting provided an opportunity to explain which international claims mechanisms are available for cultural property outside the international instruments so as to better understand the benefits offered by the 1995 Convention mechanisms and to assess the Convention's impact beyond the number of ratifications/accessions. It was a medium through which States

⁴⁵¹ 1995 UNIDROIT Convention, Article 20

⁴⁵² UNIDROIT 2011 – C.D. (90) Misc. 3.

⁴⁵³ Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1st meeting, Paris, UNESCO Headquarters, Room II Tuesday, 19 June 2012 Information Document UNIDROIT Secretariat. Retrieved 25 October, 2014 from <http://www.unidroit.org/english/Conventions/1995culturalproperty/1meet-120619/dc8-cs01-03-e.pdf>

exchanged ideas and views on their experiences, compared practices and discussed problems encountered in implementing the Convention.

4.2 UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

4.2.1 Preliminary notes

The issue of return and restitution generated two reactions: a legal and a political reaction. The legal reaction is the 1970 Convention while the political reaction, prompted by the non-retroactive nature of the 1970 Convention, was to cater for the return and restitution of objects taken before the Convention came into force.

Illicit operations that threaten national cultural property of states were addressed by the general conference of UNESCO in 1964 at its 13th session held in Paris and in 1978 at its 20th session.⁴⁵⁴

Meanwhile, twelve states, all African, sponsored the first United Nations General Assembly (UNGA) resolution (Resolution 3187 of 1973) on the subject of cultural property titled: “Restitution of works of art to countries victims of expropriation” The resolution in its preamble bemoaned “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.”⁴⁵⁵ In reaction to UNGA Resolution 3187 of 1973 under the auspices of UNESCO, a committee of experts met in Venice in 1976 to study the question of the restitution or return of lost cultural property, either due to foreign or colonial occupation, or following illicit traffic before the entry into force, for States concerned, of the 1970 Convention. This is in a bid to fashion out how to take care of

⁴⁵⁴ Shyllon F. 2011. The 16th Session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, 21–23 September, 2010. *International Journal of Cultural Property*. 18:429–435. (hereinafter referred to as Shyllon F, The 16th Session...)

⁴⁵⁵ Shyllon F. 2012. Implementation of the 1970 UNESCO Convention by African States: The Failure to Grasp the Nettle, Background paper for participants in the *Second Meeting of States Parties to the 1970 Convention*, Paris, UNESCO Headquarters, 20-21 June. (hereinafter referred to as Shyllon F, Implementation...)

cases, through bilateral negotiations, where international Conventions cannot be applied in particular because they do not apply retroactively.

The lack of international mechanisms to implement the 1970 Convention, made the experts invite the Director-General of UNESCO, at the time Mr M'Bow, to envisage the creation of an international body with the task to find ways that could facilitate bilateral negotiations between the concerned countries for the restitution or the return of cultural property and to encourage them to reach agreements to this effect. This step birthed 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 by the resolution 20 C4/7.6/5 at the 20th Session of the UNESCO General Conference. The Fund of the Committee was also established.⁴⁵⁶ This Committee is a permanent intergovernmental body, independent from the 1970 Convention.

The Committee, composed of 22 Member States of UNESCO elected by the General Conference at its ordinary sessions, took into account the need to ensure equitable geographical distribution and appropriate rotation, as well as the representative character of those States as regards the contribution they are able to make to the restitution or return of cultural property to its countries of origin. The body, is primarily a negotiating forum aimed at facilitating bilateral negotiations and agreements for the return or restitution of cultural property, particularly that resulting from colonization and military occupation to its countries of origin either when all the legal means have failed or where bilateral negotiations have proved unsuccessful.⁴⁵⁷

4.2.2 Functions

The functions of the Intergovernmental Committee⁴⁵⁸ are as follows:

1. seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin when they are undertaken according to the conditions defined in Article 9.⁴⁵⁹ In furthering its activities, the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned. The outcome of the mediation and

⁴⁵⁶ Historical Background Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/historical-background/>

⁴⁵⁷ Shyllon F. The 16th Session... *loc.cit.*

⁴⁵⁸ Statutes and Rules of Procedure, Article 4. Retrieved 25 October, 2014 from <http://unesdoc.unesco.org/images/0014/001459/145960e.pdf>

⁴⁵⁹ *Ibid*, Article 9

- conciliation process is not binding on the Member States concerned, so that if it does not lead to the settlement of a problem, it shall remain before the Committee, like any other unresolved question which has been submitted to it;
2. promoting multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin;
 3. encouraging the necessary research and studies for the establishment of coherent programmes for the constitution of representative collections in countries whose cultural heritage has been dispersed;
 4. fostering a public information campaign on the real nature, scale and scope of the problem of the restitution or return of cultural property to its countries of origin;
 5. guiding the planning and implementation of UNESCO's programme of activities with regard to the restitution or return of cultural property to its countries of origin;
 6. encouraging the establishment or reinforcement of museums or other institutions for the conservation of cultural property and the training of the necessary scientific and technical personnel;
 7. promoting exchanges of cultural property in accordance with the Recommendation on the International Exchange of Cultural Property;
 8. reporting on its activities to the General Conference of UNESCO at each of its ordinary sessions.

In conclusion, the committee could only bring together people of goodwill eager to find workable solution because its path is that of mediation and moral pressure.

4.2.3 Modalities of operation under the Intergovernmental Committee on return or restitution⁴⁶⁰

A Member State of UNESCO or an observer can make a request for return or restitution of cultural objects having a fundamental significance for such State and having been lost because of an illicit appropriation. To be eligible to bring an application before the Intergovernmental Committee, the requesting State must have initiated bilateral negotiations with the State in which the requested object is located and such negotiations must have failed or have been suspended. After fulfilling this condition precedent, a

⁴⁶⁰ Modalities of operation under the Intergovernmental Committee on return or restitution. Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/requesting-return-or-restitution/>

Standard Form Concerning Requests for Return or Restitution, which was devised in 1981 by the Intergovernmental Committee, will be filled out by both parties concerned. This request for return or restitution has to be submitted at least six months before the session of the Intergovernmental Committee for it to be examined.

4.2.4 Mediation and Conciliation⁴⁶¹ under the auspices of the Intergovernmental Committee

At its 16th session in September 2010, the Committee reviewed and adopted the Rules of Procedure for Mediation and Conciliation to assist in the performance of its functions and these rules are meant to be complementary to the work of the Intergovernmental Committee.

The elaborated procedures for mediation and conciliation are meant for only UNESCO Member States and Associate Members, but States may represent the interests of public or private institutions located in their territories, as well as those of their nationals. The mediators and conciliators are chosen from the States parties. The rules of confidentiality are upheld.

In conclusion, the Intergovernmental Committee is an intergovernmental body that provides a unique framework for discussion and facilitates negotiation for restitution of cultural property, thus contributing to non-judicial settlement of disputes.

4.2.5 Cases of return and restitution handled under the aegis of the Intergovernmental Committee

4.2.5.1 Successfully Concluded Cases⁴⁶²

The Intergovernmental Committee has assisted in several successful cases of restitution. They are as follows:

2011: Germany - Turkey

This case involving the Bogazkoy Sphinx was presented to the Committee in 1987. At the beginning of May 2011, the Secretariat was informed that a bilateral agreement has been reached between Germany and Turkey.

⁴⁶¹ Mediation and Conciliation. Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/mediation-and-conciliation/>

⁴⁶² Successfully concluded cases under the aegis of the Intergovernmental Committee. Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/committees-successful-restitutions/restitution-of-the-makonde-mask/#c219600>

2010: Barbier-Mueller Museum (Switzerland) – United Republic of Tanzania

Discussions in the framework of the Committee began in 2006 between the Barbier-Mueller Museum in Geneva and the United Republic of Tanzania for the restitution of a Makondé Mask to Tanzania. In May 2010, both parties agreed on the return.

1988: USA – Thailand

In 1988, there was the return of the Phra Narai lintel to Thailand from the United States. The case was resolved by mediation.

1987: German Democratic Republic – Turkey

In 1987, the German Democratic Republic effected the return of the 7,000 Bogazköy cuneiform tablets to Turkey. The case was resolved by direct return.

1986: Cincinnati Art Museum (USA) – Jordan

Within the framework of an exchange, and following a request submitted by Jordan in 1983 to the Intergovernmental Committee, the Cincinnati Art Museum (USA) and the Department of Antiquities of Amman (Jordan) decided, in 1986, to jointly exchange moulds of the respective parts of the sandstone panel of Tyche with the zodiac in their possession, in order to be able to present the work in its entirety. This case was resolved by mediation.

1983: Italy – Ecuador

In 1983, Italy returns over 12,000 pre-Columbian objects to Ecuador. The case was resolved after a seven-year litigation. The moral support expressed by the Committee was recognized by the Ecuadorian authorities as a significant factor in the success of their cause.

4.2.5.2 Cases Suspended and Pending ⁴⁶³

There is a case that is presently suspended before the committee. This case is between Iran and Belgium about archaeological objects from the Necropolis of Khurvin.

⁴⁶³ Restitution of Cultural Property. Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/cases-pending-before-the-committee/#c219712>

The case involving Greece and United Kingdom regarding the Parthenon marbles is still pending.

Since its inception in 1978 the Committee has handled eight cases with three solved through mediation. However, these few cases do not whittle down the success story of the Committee. However, Shyllon's ⁴⁶⁴ statement below is apt. According to him:

“Although merely eight cases have come before the committee since its inception, the success of the committee cannot be determined with this yardstick. On the contrary, the committee has been one of the most successful committees of UNESCO. The tens of thousands of returns that had taken place since 1970 attest to this assertion. Countries and individuals have been persuaded to make returns and restitutions through the influence of the committee, or what the committee's first chairperson called “moral pressure.” None of the databases, codes of ethics, import controls (as under the United States Convention on Cultural Property Implementation Act), improvements in national legislations, or mediations could have been achieved without the moral authority of the committee.”

4.3 The Partner Institutions as Administrative Agencies

UNESCO is not an island and as such, works with different bodies. The bodies work hand in hand with UNESCO in stemming the tide of illicit trafficking of cultural property even from angles where the UNESCO and UNIDROIT Conventions have exhibited weaknesses such as in the area of criminal law and internet transactions. Though not exactly a partner institution, the Art Market has been added to the list because of the role being played in recent times in the area of due diligence in assisting to stem the tide of illicit trafficking and ensuring return and restitution of cultural property to their countries of origin.

The partner bodies are as follows:

1. The International Criminal Police Organisation (ICPO / INTERPOL)
2. The World Customs Organisation (WCO)
3. United Nations Office on Drugs and Crime (UNODC)
4. European Union
5. The International Council of Museums (ICOM)
6. The Art Market

⁴⁶⁴ Shyllon F. The 16th Session...op.cit. p.435

4.3.1 The International Criminal Police Organisation ICPO/ INTERPOL⁴⁶⁵

4.3.1.1 Preliminary notes, functions and activities

The International Criminal Police Organisation, INTERPOL, is a governmental organisation currently consisting of 176 member countries. The organisation was created in the early part of this century in Europe, initially to encourage a greater liaison between police forces especially with regards to the exchange of criminal intelligence of an international nature. It was also created in an effort to streamline extradition procedures. Details of stolen property, criminal trends and details of modus operandi are part of the information exchanged between the member countries.

Each country has a central point known as the NCB (National Central Bureau) saddled with the duty of handling information.

The organisation assists only in matters of international significance as regards stolen art, antiques and cultural property trafficking.

The investigating Officers of INTERPOL are saddled with the tasks of trying and actually recovering the property/ subject matter of illegal trafficking and to arrest the offenders. Interpol has developed a series of forms called the CRIGEN ART forms which specifies the kind of information needed from the national country lodging a report on its cultural property item. The NCB of the country with a missing item may request that INTERPOL publishes an international stolen art notice. These notices contain information on the offence (place and date of crime), along with a description and photographs of the stolen items. After being published by the General secretariat, the notices are distributed to all NBCs with a view to further dissemination to local police services, auction houses, customs authorities, museums, and art galleries. The information is supplied directly to UNESCO and ICOM by the Interpol headquarters.

Apart from cases of theft, other crimes to which the police forces of the world are able to offer crime prevention advice such as Criminal malicious damage amounting to the spraying of graffiti exist either for political, religious or racial objection.

The transport of valuable works of art for exhibitions equally demands police security in form of escort, where a risk exists.

⁴⁶⁵For further information see The International Criminal Police Organisation ICPO/ INTERPOL. A paper presented by Romeo Sanga during the Regional Workshop on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property - held in Jomtien, Thailand, February 24-28, 1992

The organisation is also involved in the identification of trends because the communication between countries is in most cases received at the General Secretariat. The messages which are received can be in any one of the four languages used by the organisation which are French, English, Spanish or Arabic. The police officers trained in each field will then be made to act on the information received.

Organizing symposia, conferences and working groups on all types of criminal offences also fall under the scope of INTERPOL's duties as regards cultural property. The General Secretariat also supports the regional conferences and workshops on the subject jointly organized by UNESCO and ICOM.

4.3.1.2 Achievements

The ICPO has been of tremendous help in the task of the return and restitution of cultural property. It is on record that on the 15th November 1983, seven paintings, two by Raphael, valued at approximately 35 million US Dollars, were stolen from the Fine Arts Museum in Budapest, Hungary. The alert was given immediately through Interpol channels and the relevant notice published and circulated. The Hungarian, Greek and Italian police worked together closely which resulted in the arrest of the ten persons involved. All of the paintings were recovered in 1984.

Also, when it was discovered that a number of libraries situated at universities and similar institutions were being forcibly entered and extremely valuable books of a religious nature and published in the Hebrew and Latin languages stolen. A working group was organised to study the problem and to attempt to identify any common pattern leading to the identification of the place of disposal of the books.⁴⁶⁶

4.3.2 The World Customs Organisation (WCO)

4.3.2.1 Preliminary notes

In 1952, The World Customs Organisation (WCO)⁴⁶⁷ was established by 13 European countries as the Customs Co-operation Council (CCC). The body functioned as an independent intergovernmental body, based on the principles of the General Agreement on Tariffs and Trade (GATT).⁴⁶⁸ Its mission was to enhance customs' capacity to

⁴⁶⁶ *ibid*

⁴⁶⁷ WCO in brief. Retrieved 26 October, 2014 from <http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx>

⁴⁶⁸ This is with the belief that the achievements in respect of a customs body and the customs valuation of goods should be given tangible form; similar achievements should also be sort in the various other fields of customs technique. See Askerud P and Clement E, Preventing the Illicit Traffic in Cultural

implement effective and efficient cross border controls along with standardised and harmonised procedures to facilitate legitimate trade and travel and to interdict illicit transactions and activities.⁴⁶⁹ The WCO is the only intergovernmental organisation which deals exclusively and systematically with the study of matters of customs technique.⁴⁷⁰

After years of membership growth, in 1994 the Council adopted the working name World Customs Organisation, to more clearly reflect its transition to a truly global intergovernmental institution. Today, the WCO represents 179 Customs administrations across the globe that collectively process approximately 98% of world trade. As the global centre of Customs expertise, the WCO is the only international organisation with competence in Customs matters and can rightly call itself the voice of the international Customs community.⁴⁷¹

4.3.2.2 Relations with UNESCO

The founding Convention of WCO has terms which charge the body with the function of cooperating with other intergovernmental organisations and to maintain with them relations designed to help achieve its objectives. This provision has afforded WCO the opportunity of

establishing close relations with many organisations (either directly or through its Committees), exchanging observers or co-operating even more directly in the examination of questions of common interest. UNESCO is one of the organisations partnering with WCO.

UNESCO and WCO Secretariats have been working together since 1957. UNESCO has assisted WCO in drawing up the following six Conventions:

1. *Customs Convention on the Temporary Importation of Professional Equipment;* (1-7-1962)
2. *Customs Convention Concerning Facilities for the Importation of Goods for Display or Use at Exhibitions, Fairs, Meetings or Similar Events;* (13-7-1962)

Property, a resource handbook for the implementation of the 1970 UNESCO Convention, 1997, Paris: UNESCO, pp. 42 & 165

⁴⁶⁹WCO, Mission Statement. Retrieved 25 October, 2014 from http://www.wcoomd.org/en/about-us/what-is-the-wco/mission_statement.aspx

⁴⁷⁰ Diagne A, [WCO] at a regional workshop on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, held in Jomtien, Thailand, February 24 – 28, 1992.

⁴⁷¹ WCO in brief, *loc. cit.*

3. *Customs Convention on the ATA Carnet for the Temporary Admission of Goods;* (30-7-1962)
4. *Customs Conventions on the Temporary Importation of Scientific Equipment;* (5-9-1969)
5. *Customs Convention on the Temporary Importation of Pedagogic Material;* (30-6-1971)
6. And the last, the *Istanbul Convention on Temporary Admission;* (1990)

In addition, at UNESCO's request, the WCO prepared measures to facilitate application of the *1950 UNESCO Agreement Concerning Scientific Equipment (the so-called Florence Agreement)*.⁴⁷²

The WCO assisted UNESCO in the preparation of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, which is one of the two Conventions this thesis borders on.

4.3.2.3 WCO initiatives in respect of the combating of illicit traffic in Cultural Property

WCO's activities to combat the illicit traffic in cultural property fall in three categories:

1. *Activities directed at creating awareness of the issue in its members:* this was spearheaded by the council adopting a Resolution concerning action against smuggling of works of art and antiquities, at its June 1976 Sessions. Members' attention are also drawn to the growth in cases of smuggling and theft involving cultural property, as well as the serious harms that countries suffer as a result of these offences relating to the preservation of their artistic and cultural heritage. The Resolution further makes it possible to invite its members to accede to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
2. *Drafting legal instruments for co-operation:* In this area, the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Offences (also known as the Nairobi Convention) of 9 June 1977 is the most important.

⁴⁷² In 1967, the WCO took part in the meeting of the governmental experts instructed to examine the application of Agreements on the importation of educational, scientific and cultural materials. Subsequently, the WCO examined the Customs-technique implications of the proposals made in a Secretariat study to define the types of arts reproductions other than hand-made that might be granted exemptions from duties under the Florence Agreement.

At Customs level, Annex XI of this Convention deals with assistance in action against the smuggling of cultural property thereby supplementing the provisions of the 1970 UNESCO Convention. The Annex actually provides an important legal instrument which covers both the smuggling of cultural property and the financial operation undertaken in connection with such smuggling. The Annex has mechanisms set in place for:

- a. exchange of information between Contracting Parties as regards operations suspected to constitute smuggling of cultural property, persons engaged in such acts and the methods used for perpetrating the act.
 - b. providing a legal framework for assistance, on request, relating to surveillance as regards ingress or *egress* of suspected professional smugglers of cultural items, illicitly trafficked cultural items, means of trafficking the items.
 - c. Communicating a report of its discovery after investigation to the requesting Customs administration.
 - d. Assisting within or outside the territory of a state party to gather information concerning smuggling of cultural property.
3. *Setting up of an information pooling system:* WCO Secretariat has a computerised database, the Central Information System (CIS), for providing information and intelligence back up to the enforcement services of Member administration. This central index covers the various types of Customs fraud. The database contains details communicated by Members about cases of trafficking in cultural property, as well as of information furnished by UNESCO and ICPO/INTERPOL. The data in their possession are used to prepare summaries and studies on new or well-established trends in the smuggling of cultural property. That information is then circulated to Members, as well as to UNESCO and ICPO/INTERPOL via the *WCO Enforcement Bulletin*.

Operational information requiring urgent circulation such as cases of thefts of cultural property notified to the Secretariat by UNESCO and ICPO/INTERPOL, is sent out through a special 'alert' to Members.

WCO operates through regional offices to increase its efficiency through decentralization.⁴⁷³

4.3.3 United Nations Office on Drugs and Crime (UNODC)

4.3.3.1 Preliminary Notes

The United Nation's Commission on Crime Prevention and Criminal Justice (UNCCP) developed a surge of interest in combatting the illicit trade in art and antiquities.⁴⁷⁴ The UNCCP, comprising 40 elected nations from among the members of the UN, oversees the programme and activities of the Vienna-based UN Office on Drugs and Crime (UNODC). UNODC has recognised that the actions of illicit traffickers in art and antiquities have many similarities to those engaged in other organised transnational criminal activities, including drugs and arms trafficking. As such, illicit trafficking in art and antiquities are activities which might be better targeted by collaborative law enforcement efforts using the powers already given by an international instrument like the UN Convention against Transnational Organised Crime, agreed in 2000 in Palermo, Italy. The UNCCP has also given fresh consideration to the acceptance of a model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property – a model treaty whose terms were first proposed nearly two decades ago at the 1990 Eighth UN Congress on the prevention of crime and the treatment of offenders held in Havana, Cuba.⁴⁷⁵

Pursuant to Economic and Social Council resolutions 2004/34 and 2008/23, entitled "Protection against trafficking in cultural property", Commission on Crime Prevention and Criminal Justice (Crime Commission) requested UNODC in close cooperation with UNESCO, to convene an open-ended intergovernmental expert group meeting to submit

⁴⁷³ In 1996, Nine regional offices of WCO were set up by the end of 1996 as follows: Hong Kong covering all of Asia; Warsaw, Poland, covering Eastern and Central Europe; Valparaiso, Chile, covering South America; Puerto Rico, West Indies, covering the Caribbean; Nairobi, Kenya, covering Southern Africa; Dakar, Senegal, covering Western Africa; Casablanca, Morocco, covering Northern Africa; Douala, Cameroon, covering Central Africa; Riyadh, Saudi Arabia, covering the Near- and Middle East.

⁴⁷⁴ Economic and Social Council 2010.

⁴⁷⁵ Manacorda S. & Chappell D. From Cairo to Vienna and Beyond: Contemporary Perspectives on the Dialogue About Protecting Cultural Artefacts from Plunder, in Manacorda S. & Chappell D. 2011. Eds. *Crime in the Art and Antiquities World, Illicit Trafficking in Cultural Property*. New York: Springer: 1

relevant recommendations on protection against trafficking in cultural property from the criminal/penal angle.⁴⁷⁶

UNODC convened the open-ended intergovernmental expert group meeting on 24 to 26 November 2009 in Vienna. The expert group recommended that the Conference of the Parties to the United Nations Convention against Transnational Organized Crime explores ways of using the provisions of the Organized Crime Convention as a legal basis for international cooperation for the purpose of protection against trafficking in cultural property.

In its resolution 2010/19, entitled "Crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking", the Economic and Social Council requested UNODC to work with UNESCO and others to follow up on the expert working group's recommendations, and convene at least one other such meeting and submit resulting practical proposals for their implementation to the 22nd session of the Commission on Crime prevention and Criminal Justice. Further, UNODC was requested to join UNESCO, Interpol and others with respect to awareness-raising, capacity-building and technical assistance activities, and to explore possible analysis and dissemination of data on trafficking in cultural property.

The 12th Crime Congress held on 12 to 19 April 2010, resulted in the Salvador Declaration.⁴⁷⁷ Paragraph 9 of that Declaration urged States to develop effective legislation to prevent, prosecute and punish this crime in any of its forms and to strengthen international cooperation and technical assistance in this area (including the recovery and return of cultural property), bearing in mind relevant international instruments, including the Organized Crime Convention where appropriate.

In October 2010, during the fifth Conference of Parties to the United Nations Convention against Transnational Organized Crime (UNCTO), the Secretariat provided a discussion note on the use of the Organized Crime Convention for the protection against trafficking in cultural property. The Conference of the Parties adopted resolution 5/7, entitled "Combating transnational organized crime against cultural property", in which it urges

⁴⁷⁶ UNODC mandates on illicit trafficking in cultural property. Retrieved 25 October, 2014 from <https://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-mandate.html>

⁴⁷⁷ Salvador Declaration. Retrieved 25 October, 2014 from https://www.unodc.org/documents/crime-congress/12th-Crime-Congress/Documents/Salvador_Declaration/Salvador_Declaration_E.pdf

States parties to use the Organized Crime Convention for broad cooperation in preventing and combating criminal offences against cultural property, especially in returning such proceeds of crime or property to their legitimate owners, in accordance with article 14, paragraph 2, of the Convention.

Pursuant to General Assembly resolution 66/180⁴⁷⁸ and resolution 2010/19⁴⁷⁹ of the Economic and Social Council, UNODC developed draft specific guidelines on crime prevention and criminal justice responses to assist States in better fighting against trafficking in cultural property.

In that resolution, the Economic and Social Council also invited Member States to continue to submit, in writing, comments on the model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property, including views on its potential utility and on whether any improvements to it should be considered, at the earliest possible date, in order to assist the Secretariat in preparing an analysis and a report to be presented to the open-ended intergovernmental expert group on protection against trafficking in cultural property at its next meeting, as well as to the Commission on Crime Prevention and Criminal Justice at its twenty-second session. Furthermore, in its resolution 68/186,⁴⁸⁰ entitled "Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking", the General Assembly requested the United Nations Office on Drugs and Crime to reconvene the intergovernmental expert group on protection against trafficking in cultural property, for Member States to review and revise the draft guidelines, taking into account an updated compendium from the Secretariat of comments made by Member States, with a view to finalizing the guidelines. In line with this resolution, the third meeting⁴⁸¹ of the expert group was held from 15 to 17 January 2014. Pursuant to

⁴⁷⁸UN General Assembly resolution 66/180. Retrieved 25 October, 2014 from https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.1_2012/A_RES_66_180_E.pdf

⁴⁷⁹Resolution 2010/19 of the Economic and Social Council. Retrieved 25 October, 2014 from https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.1_2012/ECOSOC_Res_2010_19_E.pdf

⁴⁸⁰ Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking. UN General Assembly Resolution 68/186. Retrieved 25 October, 2014 from http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/186

⁴⁸¹ The third meeting of the intergovernmental expert group on protection against trafficking in cultural property reconvened by the United Nations Office on Drugs and Crime. Retrieved 25 October, 2014 from <https://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2014.html>

resolution 68/186, the guidelines will be submitted to the Commission on Crime Prevention and Criminal Justice at its twenty-third session and will be brought, after their adoption, to the attention of the Conference of the Parties to the Organized Crime Convention.

4.3.3.2 Functions and Achievements

In response to trafficking in cultural property, UNODC works to harness the potential of the United Nations Convention against Transnational Organized Crime. Many of the provisions of the Convention are relevant in that regard and ultimately empower States parties to rally against transnational crime to protect their common cultural heritage.⁴⁸² UNODC also works in other ways, on the ground, to counter this threat. In 2003, UNODC established the Container Control Programme in partnership with the World Customs Organisation. While initially established to help countries intercept drug shipments, the programme has increasingly assisted in identifying illegal movements of other goods, including cultural property.⁴⁸³ Officers who had been trained as part of the programme were recently able to seize, among other items, two seventeenth- and eighteenth-century canons that had been stolen from the UNESCO World Heritage Site Fort of San Lorenzo in Panama (and which were illegally declared as scrap metal). In the same container, four century-old railroad wheels from the first Panama Canal railroad were discovered being illegally removed. As with the vast amount of other items stolen each and every year, the theft of these artefacts would have represented a historical loss for not only the citizens of the country concerned, but also for humankind in general.⁴⁸⁴

4.3.4 European Union

On a regional level, The Council of Europe has generated the June 1985 *European Convention on Offences relating to Cultural Property*, signed at Delphi on 23 June 1985, although this has remained a dead letter since it was signed only by six States, none of which went on to ratify it.

⁴⁸²Trafficking in cultural property: organized crime and the theft of our past. Retrieved 25 October, 2014 from <http://www.unodc.org/unodc/en/frontpage/2012/October/trafficking-in-cultural-property--organized-crime-and-the-theft-of-our-past.html>

⁴⁸³ *ibid*

⁴⁸⁴ *ibid*.

The “conservation and safeguarding of cultural heritage of European significance” now recognized by Article 167, Treaty on the Functioning of the European Union has led in the past to the adoption of two important instruments: Regulation No. 3911/92 of 9 December 1992 on the export of cultural property outside the European space and Directive 93/7/EEC of the Council of 15 March 1993⁴⁸⁵ on the restitution of cultural property that has illicitly left the territory of a member state; both of these have had subsequent amendments.

The Regulation had been amended on a number of occasions and is now codified in the *Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods*.⁴⁸⁶ This Regulation is founded on the mechanism of export authorization for allowing the transfer of goods out of the EU area (the so-called export licence), leaving one Member State, which is valid in all the other States for transfer to a non-EU country. Although the Regulation is an instrument endowed in general with direct application, some of its provisions necessitate legislative acceptance by the national authorities.⁴⁸⁷

The Directive,⁴⁸⁸ modified in 1997⁴⁸⁹ and in 2001,⁴⁹⁰ is less important for our purposes. It proposes to complete the mechanism of restitution provided by the UNIDROIT Convention in the cases of goods that have been illicitly exported from one or more Member States. Under Article 15, there is an express reservation for the use of sanctions including penal ones, by Member States: “This Directive shall be without prejudice to any civil or criminal proceedings that may be brought under the national laws

⁴⁸⁵ See the annex of the third report on the application of Council Directive 93/7/EEC of 30 July 1993, Retrieved 25 October, 2014 from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CO M:2009:0408:FIN:EN:PDF>

⁴⁸⁶ Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Codified version), in OJEU, L39/1, 10.02.2009.

⁴⁸⁷ *Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods*, Article 9 on *Penalties* states that “The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented”.

⁴⁸⁸ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member States, in OJEC, L74/74, 27.03.1993

⁴⁸⁹ Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997 amending the Annex to Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, in OJEU, L60/59, 1.3.1997

⁴⁹⁰ Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 amending Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, in OJEU L187/43, 10.07.2001.

of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen”.

4.3.5 The International Council of Museums (ICOM)

4.3.5.1 Preliminary notes

In 1946, Chauncey J. Hamlin, President of the American Association of Museums created the International Council of Museums (ICOM) which is devoted to the promotion and development of museums and the museum profession at an international level. ICOM is associated and maintains close links with UNESCO as a non-governmental organisation with consultative status to the United Nations Economic and Social Council.

It carries out part of UNESCO’s programme for museums and its secretariat incorporates the UNESCO-ICOM Museum Information Centre.

The 30,000 members of ICOM in 137 countries represent an active network of international cooperation formed through each country’s National Committee. They collaborate in the regional or international activities of the Organisation: workshops, publications, training, twinning and promotion of museums through International Museum Day on May 18.

ICOM has seven regional organisations: the Asia-Pacific Regional Organisation (ASPAC), the Latin America and the Caribbean Regional Organisation (LAC), the West Africa Regional Organisation (CIAO) and the North Africa Regional Organisation (ICOM/Maghreb), the European Organisation (ICOMEUROP), the Arab Organisation (ICOMARAB), and the Central African Organisation (ICOMAC).

The members of ICOM participate in the work of 25 international committees, which embody the principal action of the organisation:

1. international exchange of scientific information;
2. development of professional standards;
3. adoption of common rules and recommendations;
4. participation in joint projects.

These international committees provide a forum for museum professionals to work together in the development of special interests. The members of the international committees meet annually and regularly publish the results of their efforts.

4.3.5.2 Functions

ICOM, aimed at responding to the problems and needs of the museum profession, has its activities directed around the following themes:

1. re-inforcement of regional co-operative networks;
2. professional training and exchange;
3. promotion of professional ethics;
4. fight against illicit traffic of cultural property;
5. protection of cultural heritage of mankind.

4.3.5.3 Activities of ICOM in the Fight against Illicit Traffic

ICOM has been actively involved in the fight against illicit traffic. The measures it has taken are based mainly on the 1970 UNESCO Convention and on the ICOM Professional Code of Ethics adopted in 1986. The Professional Code, which is adopted by all persons on becoming members of ICOM, is particularly attentive to the problems of illicit traffic and sets down precise ethical rules for acquiring and transferring collections, for co-operation between museums and for making inventories of collections. These general rules are complemented by the work being done by ICOM international committees for the establishment of professional standards within each committee's field. It is the case in particular for the International Committee for Documentation (CIDOC), the International Committee for Museum Security (ICMS), the International Committee for Education and Cultural Action (CECA), and the International Committee for Training of Personnel (ICTOP).

Within the framework of its activity programme (adopted every three years at the General Conference, ICOM has implemented many projects aimed specifically at preventing illicit traffic in cultural property. From 1993-1995, ICOM in collaboration with UNESCO, organized two regional workshops for the fight against illicit traffic: one in Tanzania in 1993 for Southern Africa and another in Mali in 1994 for North and West Africa. The workshops gathered museum, police and customs professionals, and offered an opportunity to create national task forces, develop regional cooperation, and in general mobilize international public awareness.

ICOM publishes a number of titles of relevance to the work of the organisation. In addition, the “*ICOM News*” bulletin is published four times a year and is distributed to all ICOM members. Its column “*Protecting Heritage*” publicizes information on stolen or looted objects.

Publications: ICOM has initiated the publication of a series entitled “*One Hundred Missing Objects*”. Between 1993 and 1995 two volumes were issued, one devoted to Cambodia, the other to Africa. Other editions of this series are being prepared, focusing on Latin America and Europe respectively.⁴⁹¹ Following the publication of these books, several objects were retrieved from the art market and returned to their countries of origin.

A “*Handbook of Standards. Documenting African Collections*” was published by ICOM in September 1996 under its “AFRICOM Programme”. Representing a significant advance in the use of computerized inventories and documentation of collections, the handbook will facilitate and foster exchange of information between English-speaking and French-speaking Africa.

The above activities have initiated important and successful press campaigns which no doubt has increased international public awareness of the problem of illicit traffic in cultural property.

Due to the success of ICOM’s professional network in assisting museums and countries requesting the restitution of stolen or illicitly exported objects, ICOM has become a major partner not only for heritage services but also for INTERPOL and for all actors in this field.

In consonance with the recommendations of museum professionals and the UNESCO Intergovernmental Committee for Return or Restitution, ICOM is, perhaps most importantly, considering the creation of a fund that would provide financial assistance to museums and countries seeking the restitution of cultural objects through legal proceedings.

⁴⁹¹ UNESCO Handbook. *loc.cit*

It is noteworthy to state that under the auspices of the International Council of Museums (ICOM), the Makonde Mask was returned to Tanzania by the Barbier-Mueller Museum, Switzerland thought the agreement refers to the return as being a “donation.”

4.3.6 The Art Market

Paul Bator has suggested that⁴⁹² a licit internal trade in cultural objects was one sure way of stemming the outflow of antiquities. This suggestion has however been aired by an African in 1972 at the University of Ibadan, Institute of African Studies, symposium on Nigerian Antiquities. At the symposium, Bamisaiye’s paper was centered round the issue of licit trade and he stated therein that “*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.*”⁴⁹³

Simon Mackenzie has explained that 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.⁴⁹⁴

“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.”

⁴⁹² Bator, P. 1982. An Essay on International Trade in Art. *Stanford Law Review*. 34: 275.

⁴⁹³ Bamisaiye, A. 1972. Investment Possibilities in Nigerian Art. Special Number, *African Notes, Journal of the Institute of African Studies*, University of Ibadan: 92-94, 93. Quoted by Shyllon F. Implementation... : 28

⁴⁹⁴ Mackenzie, S. 2011. The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market in Manacorda S. and Chappell D. Eds. *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*. New York: Springer: 69-85, 79. Quoted by Shyllon F. *Implementation...loc.cit.*,

Identifying and restituting looted art presents a great challenge to the art market on different levels ranging from commercial, ethical, moral as well as legal.⁴⁹⁵ This is due to the fact that it is a global multi-billion dollar industry where consignors, purchasers, dealers from around the world converge physically and virtually through the sale rooms.⁴⁹⁶

The auction houses now constitute new stakeholders in the struggle against illicit traffic in cultural property. The growing concern for illicit trafficking in cultural property has led part of the trade in such property to accept as morally binding ethical principles of professional practice intended to distinguish between cultural property being illicitly traded and to seek to eliminate such act. The Art Loss Register⁴⁹⁷ and other databases of spoliated artwork and many online resources now exist to search for the provenance of artworks in a bid to achieve the requirement of due diligence.

Due diligence undertaken by Art dealers has a two-fold intention: to vet what is offered for sale so as to be able to convey good title and also to protect their reputation as honest agents in the global market place.

The UNESCO Intergovernmental Committee has adopted the Code of Ethics for dealers in cultural property after being endorsed by the 30th General Conference of UNESCO in 1999. This Code of Ethics states in its Article 1 that

“professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported.”

UNESCO encourages its members to promote and disseminate the Code of Ethics for consideration and acceptance among dealers in cultural objects.⁴⁹⁸

Christie’s, the auction house in London, has a Guideline⁴⁹⁹ for dealing with claims, especially those relating to the Nazi era, when they arise. Their process sidesteps some of the common frustrations of litigation in the areas of costs, delays, risks, technical

⁴⁹⁵ Dugot M. 2012. Nazi- Looted Art Restitution and the Art Market in Renold M., Chechi A. and Bandle A.L. Eds. *Resolving Disputes in Cultural Property/ La Resolution Des Litiges En Matiere De Biens Culturels*. Zurich: Schulthess Medias Juridiques SA: 281

⁴⁹⁶ *ibid*

⁴⁹⁷ Art Loss Register. Retrieved 25 October, 2014 from <http://www.artloss.com/en>

⁴⁹⁸ Legal and Ethical Measures Against Illegal Trafficking in Cultural Property, UNESCO handbook, *op.cit.*

⁴⁹⁹ Christie’s Guideline for Dealing with Nazi-Era Restitution Issues, June 2009. Retrieved 25 October, 2014 from <http://www.christies.com/pdf/services/2010/cristies-guidelines-for-dealing-with-restitution-issues.pdf>

defences, argument over jurisdiction and choice of law or burden of proof. Their aim is to achieve a speedy, fair and just solution to claims by facilitating dialogue and suggesting a sensible way forward with compromise and mutual respect guiding the outcome. Several examples of restituted art can be found on Christie's website.⁵⁰⁰ The American Association of Museums (AAM) also has Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era of November 1999 and amended in April 2011.⁵⁰¹

4.4 The Legal Mechanisms and Practical Tools

The legal mechanisms in place to ensure return and restitution are:

1. Alternative Dispute Resolution Methods
2. UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects
3. Bilateral Agreements - United States Import Control Mechanism

4.4.1 Alternative Dispute Resolution Methods

Resolving cultural heritage disputes through litigation leads to the victory of either the original owner or the current possessor. Cases such as the *Venus of Cyrene*⁵⁰² and the *Odyssey Marine*⁵⁰³ are examples. Using alternatives to litigation leads parties to achieve intermediate solutions whereby the competing interests can be reconciled and common cultural interests safeguarded.⁵⁰⁴ Arbitration is sometimes used *in lieu* of judicial procedure.⁵⁰⁵ So also are Negotiation, Mediation and Conciliation. Arbitration is specifically mentioned as one of the dispute resolution mechanisms by the *UNIDROIT Convention*.⁵⁰⁶ Mediation and conciliation have been introduced by UNESCO recently

⁵⁰⁰ *Christie's Restitution*, Retrieved 25 October, 2014 from

<http://www.christies.com/services/restitution/restituted-art.aspx>

⁵⁰¹ See the American Association of Museums (AAM) Guidelines Retrieved 25 October, 2014 from

http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm

⁵⁰² Case *Venus of Cyrene- Italy and Lybia*, Platform Ar Themis. *loc.cit*

⁵⁰³ *Odyssey Marine Exploration Inc. v. The Unidentified Shipwreck Vessel, Kingdom of Spain, Republic of Peru et al.*, decided September 21, 2011 (US Circuit Court, 11th Cir.)

⁵⁰⁴ Cornu M and Marc-Andre R. 2012. *La mise en forme d'un interet commun dans la propriete culturelle: descolutions negociées aux nouveaux modes possibles de propriete partagee* in Renold M., Chechi A. and Bandle A.L. Eds. *Resolving Disputes in Cultural Property/ La Resolution Des Litiges En Matiere De Biens Culturels*. Zurich: Schulthess Medias Juridiques SA: 2

⁵⁰⁵ Gazzini, I. F. 2004. *Cultural Property Disputes: The Role of Arbitration in Resolving Non-contractual Disputes*, Ardsley New York: Transnational Publishers: xxv. quoted by Renold M., *International Tools: Return, Restitution and Beyond op.cit*: 134-137

⁵⁰⁶ *UNIDROIT Convention, Article 8(2)*; For further discussions on this section see L.V. Prott. 1997. *Commentary on the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. Leicester, Institute of Art and Law. 72; Schneider, M. 1997. *The UNIDROIT Convention on Cultural Property: State of Play and Prospects for the Future*. *Uniform Law Review*: 494 at 496; Shyllon, F. 2000.

in its cultural property restitution process.⁵⁰⁷ WIPO, the World Intellectual Property Organisation, and ICOM, the International Council of Museums, have worked on mediation together and have set up a system enabling the mediation of disputes in the museum sector.⁵⁰⁸ Negotiation, often takes place in cultural heritage matters, be it at the diplomatic interstate level or between museums and claimants.

Examples of some cases resolved by Negotiation include:

1. The painting, “Christ Blessing” by Benozzo Gozzoli, expropriated in 1945 during the Soviet Military Administration, was returned to the heir of Hans Hasso Baron von Veltheim in 2011.
2. Two of the 40 majolica dishes from the mid-16th century, that disappeared from the Museum Foundation’s collection and registered to be lost with the Art Loss Register in 1997, were restituted through Christie’s and the efforts of the Art Loss Register to the Gotha Kunstsammlungen.⁵⁰⁹
3. The gold panel by Tadeo di Bartolo entitled “The Resurrection” was restituted to the heir of Jacques Goudstikker, after Christie’s worked with Larry Kaye (the Goudstikker heir’s legal counsel) and helped act as a bridge with a consignor, who was initially deeply averse to entering into any dialogue on the issue.⁵¹⁰
4. The Jaffe Collection.⁵¹¹

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

⁵⁰⁷ The Rules of Procedure for Mediation and Conciliation in accordance with art. 4, par. 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, Retrieved 20 October, 2014 from <http://unesdoc.unesco.org/images/0019/001925/192534E.pdf>; on this matter see, Delepierre S., *Resolution des differends internationaux en matiere de biens culturels: le Reglement sur la mediation et al conciliation de l’UNESCO*, in Renold M.A, Chechi A., Bandle A.L. Eds. 2012. *Resolving Disputes in Cultural Property / La Resolution des Litiges en Matere de Biens Culturels, Studies in Art Law*, , Geneve-Zurich-Bale: Schulthess. vol. XXIII: 65-80.

⁵⁰⁸ The *ICOM-WIPO Mediation Rules*, Retrieved 20 October, 2014 from <http://icom.museum/programmes/art-and-cultural-heritage-mediation/icom-wipo-mediation-rules/>; on this matter see, S. Slima-Ni-S. Theurich, *The New ICOM-WIPO Art and Cultural Heritage Mediation Program*, in Renold M., Chechi A. and Bandle A.L. *Resolving Disputes in Cultural Property*, *ibid*, pp. 51-64.

⁵⁰⁹ See the Art Loss Register Press Release, The Art Loss Register (“ALR”) successfully recovers two Italian Majolica dishes on behalf of the Castle Friedenstein Foundation in Gotha, Germany more than 65 years after their loss. Retrieved 20 October, 2014 from <http://myemail.constantcontact.com/Press-release-Recovery-of-two-Dishes.html?soid=1101979756048&aid=N4e-jiGWqJs>

⁵¹⁰ See Dugot M., *op.cit.* p.285

⁵¹¹ For a detailed exposition of the case see Christie’s Restitution. *loc.cit*

An example of a case resolved through Mediation is the Shinagawa bell case where there was no discussion of an actual legal obligation to return or repatriate, which actually happened, mainly out of goodwill on both sides.⁵¹²

Alternative Dispute Resolution seeks a more amicable settlement of disputes and helps relationships in future unlike litigation that is an automatic win or lose situation. An arbitrator or a mediator can help the parties achieve the following:⁵¹³

- 1. Loans** - quite often a dispute can be solved through the setting up of a loan; it can be long-term or a short-term loan, accompanied by specific conditions or not. France returned quite recently to Korea a set of ancient and unique manuscript that had been kept at the *Bibliothèque Nationale de France* for a very long time before being discovered there by a researcher; a long dispute followed, with even a non-governmental organisation trying, with no success, to obtain a French court order to return the manuscripts. In the end, France didn't really want to transfer full title to Korea, mainly for political reasons, so it agreed for a short-term five year renewable loan. This arrangement has been condemned as being hypocritical, because it is obvious that France will not claim restitution after the five years expire, but still it is one of the ways a complex dispute can be solved.⁵¹⁴
- 2. Donations with or without conditions** -⁵¹⁵ In the past requests for return have been met by way of donation even after litigation has started. Thus in the case of a garland sarcophagus lent to the Brooklyn Museum, the private lender of the sarcophagus, appeased Turkey, by donating the \$11 million artifact to the American-Turkish Society. The American-Turkish Society subsequently sent the garland sarcophagus back to Turkey, the plaintiff country, where it remains on indefinite loan. Similarly, the Metropolitan Museum of Art, New York, returned the Lydian Hoard collection to Turkey after litigation had commenced in response to the alleged blackmail of a potentially successful lawsuit. The agreement reached after the successful negotiation between Tanzania and the Barbier-Mueller Museum,

⁵¹² Renold M., *International Tools: Return, Restitution and Beyond op.cit.*: 134-137

⁵¹³ *ibid*

⁵¹⁴ See Contel R., Bandle A.L and Renold M.A., *Affaire Manuscripts Coreens – France et Coree du Sud*, Platform ArThemis. *loc.cit*

⁵¹⁵ For instance, see. Bandle A.L, Chechi A., Renold M.A., *Case Adoration of the Magi – Gentili di Giuseppe Heirs and Museum of Fine Arts Boston*, Platform ArThemis *loc.cit*.

Switzerland, under the auspices of the International Council of Museums (ICOM) refers to the return of the Makonde Mask to Tanzania as being a “donation”!⁵¹⁶

3. **Recognition of history of victim’s family or cultural significance of the object at stake-** In the Holocaust art cases, the matter is solved simply by the recognition of the history of the family that had suffered, or of the cultural significance of the object at stake.⁵¹⁷
4. **Copies/replica** – Bandle, Contel and Renold⁵¹⁸ are of the opinion that copies/replica may be a good way to solve restitution disputes. In a very interesting meditation that took place between two Swiss Cantons, Zurich and St. Gallen, relating to mediaeval manuscripts and other cultural objects that had been taken by the victorious army in the 18th century, in the end the parties agreed that Zurich was going to have title, so, it was the actual looters who obtained title after more than 300 years of fights and complaints, but that it was to loan to St. Gallen the manuscripts. And relating to the old ‘terrestrial and celestial globe’ both parties agreed that Zurich would keep the original, but that it would have to make an exact copy of this particular globe and donate it to St. Gallen. So, the litigation was solved by creating a copy of one of the claimed objects.⁵¹⁹

On the other hand, Shyllon⁵²⁰ is of the opinion that being given a copy of an “irreplaceable cultural heritage” is a very poor substitute. He says

“People feel a powerful connection to cultural objects that define their being, and a duplicate cannot satisfy what Anthony Appiah refers to as “the connection to art through identity.”⁵²¹ Besides, among nations the option has always been universally spurned. Thus the report of the 12th Intergovernmental Committee session (25–28 March 2003) reported that on 19 November 2002 a bilateral meeting was held between Turkish and German authorities in Berlin with little result over Turkey’s request for the return of the Boğazköy Sphinx. “Germany proposed

⁵¹⁶ Shyllon F. *16th Session...op.cit*: 430

⁵¹⁷ For instance, see. Bandle A.L –Contel R. –. Renold M.A, *Affaire Valle de la Stour – Heritiers Jaffe et Musee des beaux-arts La Chaux-de-fonds*, Platform ArThemis. *loc.cit*

⁵¹⁸ Bandle A.L –Contel R. –Renold M.A., *Case Ancient Manuscripts and Globe – Saint-Gall and Zurich*, Platform ArThemis *loc.cit*

⁵¹⁹ *ibid*

⁵²⁰ Shyllon F. *16th Session...loc.cit*.

⁵²¹ *Ibid* quoting Appiah, A. 2009 .Whose Culture Is It, Anyway? James A.R. Nafziger and Ann Nicgorski. Eds. *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce*.

keeping the original Sphinx and having a replica made to give to Turkey. Turkey proposed the return of the Sphinx to Turkey and giving a replica to Germany. Neither proposal was accepted.” The truth is that even in this technologically advanced age when a copy is almost indiscernible from the original, only the original has the aura or magic attached to an original work of art.”

5. **Co-ownership**- Lawyers can through negotiation find ways of setting up a form of ‘co-ownership’ where both parties own and share the responsibility of that ownership. It is complicated, but it does happen and work in practice.⁵²² The contested object can be sold to a third party, with an equitable and pre-determined sharing of the proceeds.⁵²³
6. **Purchase** – This can take the form of the simple withdrawal of a claim against the payment of a certain sum of money to the claimant.⁵²⁴ Or the claimant can actually repurchase the object in the event of having the available funds required to do so.
7. **The flourishing of international cooperation agreements** - mainly between for example the claiming State (Italy) and museum.⁵²⁵ The case of the *Euphronios Crater* returned from the *Metropolitan Museum of Art* in New York to Italy, which was a long process. The process started in Switzerland within the Medici warehouse at the Freeport in Geneva which was raided by Italian and Swiss police who found a treasure trove of illicitly excavated objects from Italy. This eventually led to the *Metropolitan Museum* agreeing to return the beautiful Greek crater to Italy, but all of this in the context of a much broader cultural cooperation.⁵²⁶

⁵²² For instance, see Renold C., Chechi A and Renold M.A. *Case Murals of Teotihuacan-Fine Arts Museums of San Francisco and National Institute of Anthropology and History*, Platform ArThemis *loc.cit*

⁵²³ For instance, see. Bandle A.L, Chechi A. and Renold M.A. *Case Road to Calvary – Oppenheimer Heirs and Private Person*, Platform Arthemis *loc.cit*

⁵²⁴ For instance, see the case *Schoeps v. Museum of modern Art*, 594 F.Supp. 2d 461 (S.D. N.Y. 2009). The term of the agreement between the parties remain confidential. Adopted from Renold M., *International Tools: ... loc.cit*

⁵²⁵For instance, see. Chechi A, Bandle A.L and Renold M.A, *Case 15 Archaeological Objects – Italy and Princeton University Art Museum*, Platform ArThemis *loc.cit*; Solidan G., Contel R. and Chechi A. *Case.13 Antiquities – Boston Museum of Fine Arts*, Platform ArThemis *loc.cit*

⁵²⁶ See Contel R., Solidan G and Chechi A. *Case Euphronios Krater and Other Archaeological Objects – Italy and Metropolitan Museum of Arts*, Platform Arthemis. *loc.cit*

According to Renold,⁵²⁷ all of these solutions fall into what specialist have called ‘just and fair solutions’ based on the creativity of those called upon to find a solution to Holocaust looted art.

4.4.2 UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects

The Model Provisions and their explanatory guidelines⁵²⁸ are the result of the work done by the group of experts convened by The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation and the UNIDROIT Governing Council secretariats to bring about uniformity in the definition of undiscovered cultural objects.

Focusing on undiscovered cultural property as well as the methods by which it is enforced domestically and internationally, the Model Provisions were designed to be brief, approachable and intelligible. The principle of inalienability is extended to all cultural property, both discovered and not, or through authorised excavation and otherwise.⁵²⁹

Model Provision 3, very simply and correctly states that undiscovered cultural objects are owned by the states, provided there is no prior existing ownership. So, the principle is state ownership, which would be not a revolution for countries such as Italy or Switzerland, but it would bring quite a change in the law of countries such as France or the UK who have very different systems. There is no gainsaying that harmony between States on this particular matter would really help.

The Model Provisions are intended to serve as a complement to the work of the organs responsible for their commission and the relevant partners and associates because they are aimed at facilitating the application of the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Each state is encouraged to implement it even though it is not a binding legal instrument.⁵³⁰

⁵²⁷ Renold M., *International Tools: ...loc.cit*

⁵²⁸ UNESCO-UNIDROIT *Model Provisions on State Ownership of Undiscovered Cultural Objects*.

Retrieved 27 October, 2014 from

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO-UNIDROIT_Model_Provisions_en.pdf.

⁵²⁹ *ibid*

⁵³⁰ *ibid*

4.4.3 Bilateral Agreements - United States Import Control Mechanism

This is an international framework of cooperation aimed at reducing the incentive for pillage and unlawful trade in cultural objects. This 1983 Convention on Cultural Property Implementation Act enables the United States to implement the 1970 Convention; aims “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” and to enter into bilateral or multilateral agreements. Such agreement is effective for five years and may be extended for additional periods of five years. Bolivia, Cambodia, China, Cyprus, El Salvador, Greece, Guatemala, Italy, Mali and Peru have signed agreements with United States. Only Mali out of the African States Parties to the 1970 Convention has entered into the special bilateral agreement with the United States. The reason for this is attributable to the fact the former President under whose tenure this feat was achieved happens to be very knowledgeable in this field.⁵³¹

4.5 The Practical Tools

There are practical tools that are very helpful in a bid to ensure return and restitution of cultural property. Immediately below are the said tools:

1. Object ID - The Inventory of Cultural Property Items
2. UNESCO – WCO Model Export Certificate
3. Basic Actions concerning Cultural Objects being offered for Sale over the Internet
4. Basic checklist for national legislation by UNESCO
5. Guidelines for proper implementation of national legislation
6. Basic checklist of practical measures

4.5.1 Object ID - The Inventory of Cultural Property Items

Years of research by UNESCO in collaboration with the museum community, international police and customs agencies, the art trade, insurance industry, and valuers of art and antiques led to the creation of Object ID⁵³² as an international standard for describing cultural objects. The contents of the standard were identified by a combination of background research, interviews, and, most importantly, by major international questionnaire surveys. In total, over 1,000 responses were received from Organisations in 84 countries. The findings of these surveys - published in *Protecting*

⁵³¹ Shyllon F. *Legislative and Administrative Implementation...* *loc.cit.*

⁵³² Object ID. Retrieved 20 September, 2014 from <http://archives.icom.museum/object-id/about.html>

*Cultural Objects in the Global Information Society*⁵³³ - demonstrated that there was close agreement on the information needed to describe objects for purposes of identification. Now being promoted by major law enforcement agencies including the FBI, Scotland; INTERPOL; UNESCO; Museums; Cultural heritage Organisations; art trade and art appraisal Organisations and insurance companies, Object ID project was initiated by the J. Paul Getty Trust⁵³⁴ in 1993 and launched in 1997.⁵³⁵ ICOM currently has the worldwide non-exclusive administrative rights on it.⁵³⁶

Object ID is a response by the police to ensure good documentation exists for the protection of art and antiquities. It makes it possible for police officers recover and return objects that have been photographed and adequately described. This will prevent the continuity of the situation the police are faced with where they have in their custody large numbers of objects that have been recovered in the course of operations, but which cannot be returned to their rightful owners because there is no documentation that makes it possible to identify the victims.⁵³⁷

This standard has been enjoying broad based support around the world and has been translated into Arabic, Chinese, French, Russian, and Spanish. Plans are underway for translations into many other languages.⁵³⁸

4.5.2 UNESCO – WCO Model Export Certificate⁵³⁹

Cooperating to combat illicit trafficking in cultural property, the Secretariats of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Customs Organisation (WCO) jointly prepared the Model Export Certificate for Cultural Objects which is specially adapted to the increasing phenomenon of cross border movements of the cultural objects. This model certificate has been recommended by UNESCO and the WCO in its entirety or in part, as the national export certificate

⁵³³ Protecting Cultural Objects in the Global Information Society. Retrieved 29 October, 2014 from <http://archives.icom.museum/object-id/final/index.html>

⁵³⁴ J. Paul Getty Trust. Retrieved 25 October, 2014 from <http://www.getty.edu>

⁵³⁵ In partnership with the United Nations Educational, Scientific and Cultural Organisation (UNESCO); Interpol; the Council of Europe; the International Council of Museums; the Conference for Security and Cooperation in Europe; and the United States Information Agency.

⁵³⁶ *Legal and Practical Measures Against Illicit Trafficking in Cultural Property*. UNESCO Handbook. International Standards Section Division of Cultural Heritage, 2006, p17.

⁵³⁷ Object ID, Why it is needed. Retrieved 25 October, 2014 from <http://archives.icom.museum/object-id/why.html>

⁵³⁸ Object ID, Who is using it?, Retrieved 25 October, 2014 from <http://archives.icom.museum/object-id/who.html>

⁵³⁹ UNESCO - WCO Model Export Certificate, Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/>

specifically for cultural objects as opposed to the same export form currently in use for all other objects and cultural objects.⁵⁴⁰

The joint work of UNESCO and World Customs Organisation (WCO) is based on international legal instruments and trends, and responds to the increase in illicit exports of cultural objects and at the same time, it brings back to mind the practical importance of export certificates devised specifically for cultural objects bearing in mind its nature.

⁵⁴¹

The Model Export Certificate is for the use of customs officers and customs offices at the point of exit from a country and persons wishing to export cultural property. If it is adopted and allowed to operate internationally, it will benefit States and facilitate the work of police and customs officials.⁵⁴² The certificate is available on line⁵⁴³ in Arabic, Chinese, English, French, Russian and Spanish languages for downloading by any state that desires to adopt it for use.

4.5.3 Basic Actions concerning Cultural Objects being offered for Sale over the Internet⁵⁴⁴

At the third annual meeting of the INTERPOL Expert Group on Stolen Cultural Property held at the INTERPOL General Secretariat on 7 and 8 March 2006, it was discussed that States do not have the capacity to fully monitor transactions on cultural property items due to the following challenges:⁵⁴⁵

- a. the sheer volume and diversity of items offered for sale;
- b. the variety of venues or platforms for the sale of cultural objects on the Internet;
- c. missing information that hinders proper identification of objects;
- d. the limited reaction time available owing to short bidding periods during a sale;

⁵⁴⁰ *ibid*

⁵⁴¹ *ibid*

⁵⁴² Why is the UNESCO–WCO Model Export Certificate needed? Retrieved 25 October, 2014 from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/faqs/#c163827>

⁵⁴³ The Model Export Certificate. Retrieved 25 October, 2014 from

<http://www.unesco.org/culture/laws/illicit>

⁵⁴⁴ Basic Actions concerning Cultural Objects being offered for Sale over the Internet. Retrieved 25 October, 2014 from http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/basic-actions-cultural-objects-for-sale_en.pdf

⁵⁴⁵ *ibid*

- e. the legal position of the companies, entities or individuals serving as platforms for the trade in cultural objects over the Internet;
- f. the complex issues related to jurisdiction concerning these sales; and
- g. the fact that the objects sold are often located in a country different from that of the Internet platform.

A recommendation adopted at the meeting led to INTERPOL, UNESCO and ICOM developing a list of Basic Actions to be followed by their member states to counter the Increasing Illicit Sale of Cultural Objects through the Internet.⁵⁴⁶The Member States of INTERPOL and UNESCO and the States with ICOM National Committees are invited to:⁵⁴⁷

1. Strongly encourage Internet sales platforms to post the following disclaimer on all their cultural objects sales pages:
 - “With regard to cultural objects proposed for sale, and before buying them, buyers are advised to:*
 - a. *check and request a verification of the licit provenance of the object, including documents providing evidence of legal export (and possibly import) of the object likely to have been imported;*
 - b. *request evidence of the seller's legal title. In case of doubt, check primarily with the national authorities of the country of origin and INTERPOL, and possibly with UNESCO or ICOM”*
2. Request Internet platforms to disclose relevant information to law enforcement agencies and to cooperate with them on investigations of suspicious sales offers of cultural objects;
3. Establish a central authority (within national police forces or other), which is also responsible for the protection of cultural properties, in charge of permanently checking and monitoring sales of cultural objects via the Internet;
4. Cooperate with national and foreign police forces and INTERPOL as well as the responsible authorities of other States concerned, in order to:
 - a. ensure that any theft and/or any illegal appropriation of cultural objects be reported to INTERPOL National Central Bureau, in order to enable relevant information to be posted on the INTERPOL Stolen Works of Art Database;

⁵⁴⁶ The above-mentioned Basic Actions are neither "Recommendations", nor "Declarations, Charters and similar standard-setting instruments" adopted by the General Conference of UNESCO, nor "Resolutions" adopted by the General Assembly of Interpol.

⁵⁴⁷ Basic Actions concerning Cultural Objects being offered for Sale over the Internet, *loc.cit*

- b. Make information available about theft and/or any illegal appropriation of cultural objects, as well as about any subsequent sale of such cultural objects, from or to national territories, using the Internet;
 - c. Facilitate rapid identification of cultural objects by:
 - i) ensuring updated inventories with photographs of cultural objects, or at least their description, for example through the Object ID standard;⁵⁴⁸
 - ii) maintaining a list of recommended experts;
 - d. Use all the tools at their disposal to conduct checks of suspicious cultural property, in particular the INTERPOL Stolen Works of Art Database and the corresponding INTERPOL DVD;
 - e. Track and prosecute criminal activities related to the sale of cultural objects on the Internet and inform the INTERPOL General Secretariat of major investigations involving several countries.
5. Maintain statistics and register information on the checks conducted concerning the sale of cultural objects via the Internet, the vendors in question and the results obtained;
 6. Establish legal measures to immediately seize cultural objects in case of a reasonable doubt concerning their licit provenance;
 7. Assure the return of seized objects of illicit provenance to their rightful owners.

4.5.4 Basic checklist for national legislation by UNESCO⁵⁴⁹

Member states of UNESCO are expected to have respective national legislation that are made for the purpose of promoting return and restitution of cultural property. The following points which constitute the checklist UNESCO considers as appropriate for Member States to include in their national legislation are:

1. Provide a clear definition of cultural property/objects and/or cultural heritage that are covered within the scope of the legislation;
2. Establish the State's ownership of:
 - a. whatever is deemed appropriate by the national authorities;

and

⁵⁴⁸ The Object ID, which is an international standard for describing art, antiques, and antiquities, as well as a version with supplementary information (endorsed by ICOM, Getty and UNESCO), are available on the ICOM website Retrieved 25 October, 2014 from <http://icom.museum/object-id>.

⁵⁴⁹ Legal and Practical Measures Against Illicit Trafficking in Cultural Property, UNESCO handbook, *op.cit*: 5

- b. cultural property not yet excavated, or illicitly excavated from the national territory.

This provision may help in requesting restitution of these objects domestically or even abroad. For objects illicitly excavated, national legislation may either maintain the State's ownership or permit private ownership (as through the law of finds);

3. Regulate archaeological excavations on national territory (administration, permits, finds, storage, ownership...);
4. Establish a clear legal regime applicable specifically to cultural property that provides a legal answer to issues such as:
 - a. what categories of cultural objects can be traded (if any), and whether a preliminary authorisation by national authorities (Ministry of Culture etc.) is required; and
 - b. what categories of cultural objects may leave and/or enter the national territory, as well as the conditions (authorisation, purpose, storage conditions, insurance etc.), and the time period (temporary or permanent export or import) under which this may take place;
5. Subject any export (and possibly import) of certain categories of cultural objects to a certificate, possibly under the UNESCO-WCO Model Export Certificate for Cultural Objects;
6. Establish a national inventory system of cultural heritage (in particular public and private cultural property whose loss, destruction and/or export would constitute an impoverishment of the national cultural heritage);
7. Recommend or ensure more broadly the making of inventories, and the use of the Object ID standard (to be distinguished from inventorying), to facilitate prompt circulation of information in case of crime;
8. Ensure that antique dealers keep a register of all transactions of cultural objects, including name of seller/buyer, date, description of the object, price, provenance, and export (or import if required) certificate. Such records are to be kept for a reasonable period of time and made accessible to national authorities.
9. Establish and finance national services/units focussed on the protection of cultural heritage, in particular against illicit trafficking, and increase national institutional capacity building in cultural heritage protection, including public

education campaigns and sensitisation on cultural heritage importance, laws and protection measures;

10. Elaborate and require policies for museums and collections that prevent acquisition of stolen, looted, or illegally exported cultural objects and facilitate returns thereof (see for instance the ICOM Code of Ethic for Museums 2004);
11. Impose sanctions (criminal and/or administrative and/or civil) to deter wrongdoers and to serve justice on violators in a manner compatible with the national/local socio-economic situation; and
12. Elaborate specific measures for the protection of underwater cultural heritage.

4.5.5 Guidelines for Proper Implementation of National Legislation⁵⁵⁰

UNESCO expects that once states have followed the checklist above in having a strong national legislation, they should take necessary steps in properly implementing the laws.

For proper implementation, UNESCO requires:

1. adequate human and financial resources, expertise, as well as cooperation and networking with stakeholders (co-interested States, relevant organisations, police forces, customs etc.) at the local, regional, national, and international level;
2. an effective national policy (political, legislative, administrative) with its specific operational units and programs in place;
3. accessibility of the legislation to facilitate better knowledge of it so that potential purchasers and dealers may consult the legislation and thereby perform preventively part of their due diligence exercise. This is possible, in particular, through the
 - a. elaboration of official government web sites on the internet that present national policies and include the legislation; and
 - b. the posting of the legislation on the UNESCO Cultural Heritage Laws Database.⁵⁵¹

⁵⁵⁰ *Ibid.* p.7

⁵⁵¹ UNESCO Cultural Heritage Laws Database. Retrieved 25 October, 2014 from <http://www.unesco.org/culture/natlaws>

4.5.6 Basic Checklist of Practical Measures⁵⁵²

Finally, majority of legal measures manifest as practical measures when implemented. UNESCO therefore expects states and other relevant entities to consider in addition to the legal measures above, the following basic practical and protective measures:

1. Establish and keep up to date inventories of categories of national cultural heritage;
2. Encourage use of the Object ID standard
3. Include national legislation dealing with the protection of all forms of cultural heritage or property, and currently in force, on the UNESCO Cultural Heritage Law Database
4. Provide specialised training to police and customs agents, familiarizing them with the stolen works of art databases, as INTERPOL's and establish a working network among them at the national, regional and international levels;
5. Form and fund specific and active cultural heritage protection units within the government and relevant entities;
6. Protect and police archaeological sites;
7. Encourage contact/cooperation with dealers and recommend them to regularly consult relevant legislation on the UNESCO Cultural Heritage Laws Database as well as stolen cultural property databases, and take a clear position against illicit trafficking by adhering to the UNESCO International Code of Ethics for Dealers in Cultural Property or equivalent professional rules;
8. Undertake regular educational campaigns targeting the public at large to stimulate and develop respect for cultural heritage and raise awareness of laws and issues relating to illicit trafficking;
9. Monitor sales of cultural objects on the Internet; and
10. Ensure broad use of anti-theft and other security measures.

In concluding this chapter one can rightly say that a lot of mechanisms have been put in place in ensuring that the provisions of the 1970 UNESCO Convention and the 1995 UNIDROIT Conventions are actualized. The formulation of national regulations and laws on the protection of cultural property is however not an end in itself but a means to

⁵⁵² UNESCO handbook. *op.cit.*: 14

an end. It is to enable the state parties successfully implement an international policy of control which does not get tangled in the web of national differences.

The next question is 'how much impact have the Conventions, the administrative and practical measures put in place by UNESCO had in Africa?' This question leads us to the next chapter bothering on African participation in the two Conventions.

CHAPTER FIVE

AFRICAN NATIONS ON RETURN AND RESTITUTION OF CULTURAL PROPERTY AND THEIR PARTICIPATION WITHIN THE FRAMEWORK OF THE UNESCO AND UNIDROIT CONVENTIONS

5.0 Introduction

Whether the market nations have ratified and implemented the Conventions and how effective their actions are is one of the major concerns for evaluating the efficacy of the Conventions. The level of participation of African countries in ensuring that their patrimony is preserved for the unborn is equally noteworthy in determining the efficacy of the Conventions in the African milieu in relation to cultural property.

This chapter carries out an overview of Africa as a continent rich in cultural resources; makes an exposition on the law as a tool for social engineering by a consideration of the level of illicit trafficking in African cultural property and the level of participation of Africa nations in the UNESCO and UNIDROIT Conventions. This is done in terms of how the Continent has fared in the protection of her cultural property through the facilities and mechanisms put in place by UNESCO and UNIDROIT, together with their partner institutions.

5.1 Africa: The Continent, Landscape and its People

Africa is the second largest continent after Asia. Its land area is 11.6 million square miles stretching nearly 5,000 miles from Cape Town (South Africa) to Cairo (Egypt) and more than 3,000 miles from Dakar (Senegal) to Mogadishu (Somalia). It is almost three and a half times the size of the continental United States. Its political geography consists of more than 50 modern nations including island republics off its coasts.⁵⁵³

Geographically, Africa is a vast plateau and is the most tropical of all continents, lying astride the equator and extending almost equal distances towards both north and south. The world's largest desert- the vast Sahara- dominates the northern third of the continent. Africa's most significant geological features - the highest and lowest elevations, largest lakes, and source of the world's longest river, formed by unique patterns of "drift"

⁵⁵³ Khapoya V.B. 1998. *The African Experience, An Introduction*. second edition, New Jersey: Prentice Hall: 4

between the African, Somali, and Arabian continental plates- lie along East Africa's Great Rift Valley, our earth's deepest continental crevice.⁵⁵⁴ One end of the Great Rift Valley follows the Red Sea northward from Lake Assai (Ethiopia) to the Dead Sea (Palestine); southward, along the rift between the African and Somali Continental Plates, lie Africa's highest mountains and largest lakes. Whereas, lake Assai lies many hundreds of feet below sea level, such long extinct volcanoes as Mt. Kilimanjaro (19,340 ft.) and Mt. Kenya (17,040) rise thousands of feet higher than the highest peaks in the continental United States. Many mountain ranges throughout the continent (e.g. Ethiopian, Drakensberg, Cameroon, and Atlas Mountains) include peaks between 10,000 and 16,000 feet and support dense populations living in various ecozones between 3,000 and 8,000 feet above sea level.⁵⁵⁵ Africa's great lakes including lake Victoria – Nyanza (the world's second largest fresh water lake, after Lake Superior), Lakes Tanganyika and Nyasa – Malawi (among the four deepest and eight largest in the world), Lakes Turkana, Nakuru, and Rukwa- lie on the floor of the Great Rift Valley, while shallower lakes like Chad and Bangweulu (or the Okavango Swamp) serve savanna regions elsewhere in the continent.⁵⁵⁶

The Nile River, the longest river on earth (more than 4,000 miles) originates from Lake Victoria – Nyanza and derives two – thirds of its water from the Ethiopian Highlands before plunging over several waterfalls downriver (northward) into the rich Nile Delta on the Mediterranean Sea.⁵⁵⁷ Congo- Zaire River, the tenth longest and second most voluminous river (over 2,700 miles), flows from Lake Bangweulu in Central Africa to the Atlantic Ocean. This river is fed by large tributaries such as the Ubangui, Kasai, and Cuango Rivers. From central Africa, we have Zambezi River (about 1,600 miles) flowing eastward into the Indian ocean at the south end of Africa's Great Rift Valley. The Kariba and Cabora Bassa Dams have harnessed hydroelectric power from it without affecting the beautiful Victoria Falls.⁵⁵⁸

The Sahara desert which is almost as large as the continental United States covers much of the northern third of Africa. The Namib and Kalahari deserts of Southern Africa cover

⁵⁵⁴*ibid*

⁵⁵⁵*ibid*

⁵⁵⁶*ibid*

⁵⁵⁷*ibid*

⁵⁵⁸*ibid*: 8

much of modern Namibia and Botswana, and Africa's Horn (especially eastern Ethiopia, northeastern Kenya and Somalia).

In 2013, Africa was home to approximately 1.1 billion people.⁵⁵⁹ Population density has emerged in the rural areas because of favorable local climates, fresh water supplies, cultivable land or useful minerals.⁵⁶⁰ Each of the nation states in Africa is multilingual except for states such as Somalia, Swaziland, Lesotho and Botswana. For example, Nigeria has about two hundred and fifty (250) different language groups, Tanzania has more than one hundred (100), Kenya has over forty (40), etc.⁵⁶¹

5.2 Africa – A Source Continent for Cultural Property

The cradle of humanity and modern humans was traced to Africa through fossils. The home of the world's first civilizations was discovered to be the Egyptian civilization in the Nile valley.⁵⁶² Archaeology in Africa today, is a vital intellectual component in fostering national identity and historical consciousness.⁵⁶³

In Western Africa, as the great 'scramble for Africa' began, the British and French antiquarians were very much interested in unearthing materials equivalent to pre historic materials unearthed in Europe. There were the ancient artifacts from Senegal and stone axes from Ghana. Ceramic works in Senegal, Mali, Niger, Ghana and Cameroon. In Nigeria there were the Benin bronzes, ancient arts of Ife, Iwo Eleru and Igbo - Ukwu art in the Eastern part of the country.

In Northern Nigeria, there existed the Nok statuettes. Esie stone sculptures also exist in Nigeria. The Horn of Africa comprising of Djibouti, Eritrea, Ethiopia, and Somalia, has the longest and possibly most diverse archaeological record in Africa.⁵⁶⁴

⁵⁵⁹World Population Data Sheet 2013 Retrieved 5 July, 2014 from <http://www.prb.org/Publications/Datasheets//2013/2013-world-population-data-sheet/data-sheet.aspx>.

⁵⁶⁰ Khapoya V.B. *op.cit.*, p.8

⁵⁶¹ *Ibid*, p.4

⁵⁶² The writings of the Victorian biologist Thomas Henry Huxley endorsed Charles Darwin's theories of evolution and natural selection published four years before his own work published in 1863 and titled *Man's Place in Nature*. Darwin himself speculated in 1871 in his *Descent of Man* that tropical Africa would prove to be the cradle of humankind. In 1924, *Australopithecus Africanus* was discovered by Raymond Dart and archaeologists established long Stone Age cultural sequences in eastern and southern Africa well before World War II. The late 1940's however heralded Africa's central role in human evolution; Vogel J.O. 1997. Ed. *Encyclopaedia of Pre- Colonial Africa*, London: Sage Publications Ltd :51

⁵⁶³See Vogel J.O, *ibid*

⁵⁶⁴*Ibid* :75

In Southern and East Africa, countries as South Africa, Kenya, Uganda, Tanzania, Zambia, Malawi and part of Zimbabwe, Zaire have contributed immensely to the growth of archaeology.

Archaeology has played an influential role in formulating ideas about African history since the mid-nineteenth century. Africa's archaeological record extending from modern times back for nearly 2.5 million years, is the longest in the world due to the unique ability of archaeology to describe and explain human cultural change over an immensely large period of time. Archaeologists have a vital role to play in the study and interpretation of ancient Africa not only for specialist scholars but also for the whole world.⁵⁶⁵It is in this regard that Cultural Property and varied interest in it, is of paramount value to Africa as a conglomerate nation.

Much of the illegal conduct in cultural objects is carried out for the purpose of supplying the international art market with objects for sale. UNESCO Member State representatives have expressed concern over the presence of cultural objects, which have either been stolen or illegally exported from their country, in auctions and other art markets abroad.

In many countries, however, the police and the relevant governmental bodies lack the specific technical knowledge to block the sale of these objects, or the best practices to recover them. This limitation makes it difficult to respond promptly and directly to threats to cultural heritage around the world.

African countries appear to be the most vulnerable of any group of countries with regard to the displacement of cultural property through stealing and illicit trade.⁵⁶⁶ According to Alain Godonou, former director of the *Ecole du patrimoine africain* (EPA) and Director of UNESCO's Division of Cultural Objects and Intangible Heritage, most African countries have lost 95% of their cultural property.⁵⁶⁷

Brent is of the opinion that the displacement in African art took a large dimension in the 60s and 70s when the African countries were gaining independence from colonial rule.⁵⁶⁸ The offer of hard currency to antiquity thieves have fuelled the plundering. As

⁵⁶⁵*Ibid.*: 51

⁵⁶⁶Shyllon F. 16th Session...*op.cit.*: 433

⁵⁶⁷The Fight Against The Illicit Trafficking Of Cultural Objects The 1970 Convention: Past And Future Information Kit, 15 And 16 March 2011 Paris, UNESCO Headquarters, Clt/2011/Conf.207/6)

⁵⁶⁸Brent, M. 1996. A View Inside the Illicit Trade in African Antiquities in Schmidt, P.R and

far back as 1996, Drewal urged that drastic steps be taken to curb the activities of those plundering Africa's past, otherwise Africa will soon have a "landscape barren of cultural heritage."⁵⁶⁹

The International Council of Museums (ICOM) series *One Hundred Missing Objects* started with *Looting in Africa* in 1994 before *Looting in America*, *Looting in Angkor*, and then *Looting in Europe*. Secondly, the inauguration in 1997, by a group of African museums directors, European and American professionals of the *Red List of African Cultural Objects at Risk* followed subsequently by a *Red List of Latin-American Cultural Objects at Risk*, *Emergency Red List of Iraqi Antiquities at Risk*, and *Red List of Afghanistan Antiquities at Risk* point to the fact that Africa is at the fore front of continents adversely affected by dislocation of cultural property.

Among African countries, Egypt is first in archaeological riches followed perhaps by Nigeria and Mali.⁵⁷⁰

5.3 Cultural Property Law in Africa

Cultural Property protection and identification began in Africa in the colonial period and can be classified into two, namely the Roman law group (former French, Spanish and Portuguese territories) and the common law group (former British Empire).⁵⁷¹ Years after independence, some African countries that had specific heritage laws adopted by the colonial powers have repealed the laws and replaced them by new laws⁵⁷² or still have the laws in existence⁵⁷³ while some others adopted heritage laws immediately or shortly after independence.⁵⁷⁴

Many Africa countries do not have detailed general laws in place for protecting cultural property while some countries have provisions on protection in the grundnorm.

McIntosh, R. J. Eds *Plundering Africa's Past*. Bloomington and Indianapolis: Indiana University Press: 63–78. Cited by Shyllon F. *Looting and Illicit Trafficking in Antiquities in Africa* in Manacorda S. & Chappell D. Eds. *Crime in the Art and Antiquities World... op.cit*: 135(hereinafter *Looting and Illicit Trafficking in Antiquities in Africa ...*)

⁵⁶⁹Drewal, H.J. 1996. Past as Prologues In *Plundering Africa's Past*, *ibid* cited in Shyllon F., *ibid*

⁵⁷⁰ Shyllon F. *Looting and Illicit Trafficking in Antiquities in Africa... loc.cit*

⁵⁷¹ See Shyllon F, Negri V, and Shneider M. 2009. The Role of National and International Legal Instruments in the Protection of African Cultural Goods. Preliminary study proposed for the 2nd Pan African Cultural Congress 5-7 October, Inventory, Protection and Promotion of African Cultural Goods.

⁵⁷² Kenya, Zambia, Togo, Niger fall into this category.

⁵⁷³ Zimbabwe, Togo, Guinea belong here.

⁵⁷⁴ Lesotho, Malawi and Seychelles belong to this category.

Countries like Burkina Faso, Mauritania, Madagascar, Benin, Burkina Faso, Cape Verde, Congo (Brazzaville), Equatorial Guinea, Egypt, Ethiopia, Ghana, Guinea, Guinea-Bissau, Sao Tome and Principe, Seychelles, Somalia, and Uganda enshrine the protection of the cultural heritage in the *grundnorm* for different objectives ranging from establishing and safeguarding national identity, enhancing human dignity to promoting harmonious development of the society.⁵⁷⁵

The Burkina Faso Constitution of 1991⁵⁷⁶ confers a positive right of action in the form of an *actio popularis* on every Burkinabian who detects anyone or any agency harming the country's cultural heritage thus: “*Every citizen shall have the right to initiate an action or to join a collective action under the form of a petition against these acts: harming the public heritage; harming the interests of social communities; harming the environment or the cultural or artistic heritage.*”⁵⁷⁷

The Constitution of the Democratic People's Republic of Ethiopia 1987⁵⁷⁸ states that

“Ethiopians shall have a duty to safeguard and take care of the socialist wealth. Ethiopians shall have a duty to participate in the State and the society's effort to safeguard, collect and use those objects that have a historical interest as well as safe guarding the national heritage and to take care of these objects.”

The Constitution of the Federal Republic of Nigeria 1999⁵⁷⁹ puts the objective of protecting and preserving cultural property thus

*“the State shall: (a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter”*⁵⁸⁰

Cape Verde Law 1981⁵⁸¹ states that:

“The State shall have the fundamental obligation to create and promote favourable conditions for safeguarding its cultural identity both as a base for national consciousness and dignity and as an incentive to a harmonious development of the society. The State shall preserve,

⁵⁷⁵ See Shyllon F, Negri V, and Shneider M, *op.cit.*: 3-4

⁵⁷⁶ Burkina Faso Constitution of 1991, Article 30

⁵⁷⁷ See Shyllon F. 1999. Constitutional Provisions for the Preservation of Cultural Heritage in Africa. *Art, Antiquity and Law*: Vol. 4. Issue 1: 65-68

⁵⁷⁸ Constitution of the Democratic People's Republic of Ethiopia 1987, Article 55.1

⁵⁷⁹ Constitution of the Federal Republic of Nigeria 1999, Article 21

⁵⁸⁰ The chapter refers to Chapter 2 of the Constitution which deals with Fundamental Objectives and Principles of State Policy

⁵⁸¹ Cape Verde Law 1981, Article 16.1

defend and develop the cultural heritage of the Cape Verdian People.”

The Guinea Bissau Constitution states that:

“It is the imperative duty of the State to create and promote favorable conditions for the safeguarding of cultural identity in its role as the fulcrum of national conscience and dignity as well as a stimulating factor for the harmonious development of society. The State shall protect and safeguard human dignity.”

The above shows that in a way, African countries are aware of and appreciate the need for protecting and preserving their cultural property. Whether they are putting measures in place to achieve this or not, is food for thought.

5.4 Displacement of Cultural Property in Africa

This section deals with the quantitative and qualitative wealth of a number of African nations facing the challenges of Cultural Property displacement.

5.4.1 Egypt

Over the centuries, Egypt has been largely affected by the illegal antiquities trade and illicit excavation. At Heathrow Airport London in April 2002, one of the largest hauls of illicit antiquities ever found was impounded. Out of a total of 113,000 objects held at Heathrow, Egypt recovered 56,000. Egypt, between years 2000 and 2003, under Zahi Hawass as the Secretary General of the Supreme Council of Antiquities SCA,⁵⁸² exerted tremendous effort into recovering antiquities previously smuggled from abroad. To this end, the SCA compiled a catalogue of antiquities taken out of the country since the coming into effect of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The SCA warned that it would refuse to cooperate with museums refusing or failing to return stolen antiquities. Hawass also declared that further measures might be taken, including the rescinding of archaeological permits to missions from countries that failed to cooperate, thus effectively ending their research in Egypt and seriously damaging their ability to conduct Egyptology. Three thousand (3,000) artefacts were recovered by Egypt from this process.

In Paris in 2005, at a meeting of UNESCO’s Intergovernmental Committee for

⁵⁸²The Supreme Council of Antiquities (SCA) is the branch of the Egyptian Ministry of Culture responsible for enforcing Law 117 enacted in 1983 on the Protection of Antiquities.

Promoting the Return of Cultural Property to its Countries of Origin, Hawass made the point that “Egypt had been deprived of five key items of her cultural heritage.”⁵⁸³The five items being:

1. The Bust of Queen Nefertiti – Egyptian Museum, Berlin, Germany.
2. The Zodiac Ceiling painting from the Dendera Temple – Louvre, Paris, France.
3. The statue of Hemiunu, the nephew and vizier of Pharaoh Khufu, builder of the Great Pyramid – Roemer-Pelizaeu Museum, Hildesheim, Germany.
4. The Rosetta stone in the British Museum, London, UK.
5. The Bust of Prince Anchhaf, builder of the Khafre Pyramid – Museum of Fine Arts, Boston, USA.

Since Zahi Hawass took office in 2002 as Secretary General of SCA, The recovery of stolen antiquities and the prosecution of those responsible have had a priority in Egypt. He forced the Louvre museum in Paris to undertake the return of five ancient fresco fragments to Egypt. The announcement came two days after Hawass said he would cease all cooperation with the museum until they were sent back. The Egyptians maintained that the Louvre bought the Pharaonic steles in 2000 even though Louvre knew they had been stolen in the 1980s. The Pharaonic steles are believed to be from a 3,200 year old tomb of the noble, Tetaki, in the Valley of the Kings, near Luxor.⁵⁸⁴

In spite of the appreciable success of Law 117 the looting and illicit trafficking in Egyptian antiquities has continued and a new heritage law is now in place.⁵⁸⁵

5.4.2 Nigeria

The first large scale looting for exportation of Nigeria’s cultural goods took place in 1897 by a British expedition led by Admiral Rawson. Benin Bronzes which presented a record of important events⁵⁸⁶ and are so important in the artistic cultural heritage of Nigeria were carted away from the palace and dispersed among museums all over the

⁵⁸³Home Page of Egyptian Cultural Heritage Organisation. Retrieved 5 November, 2014 from <http://www.e-c-h-o.org/LatestNews.htm>.

⁵⁸⁴ Louvre to return Egyptian frescos. Retrieved 5 November, 2014 from <http://news.bbc.co.uk/2/hi/europe/8299495.stm>

⁵⁸⁵Egyptian Law No. 117 of 1983 as amended by Law No. 3 of 2010 Promulgating the Antiquities Protection Law.

⁵⁸⁶ Greenfield, J, *The Return of cultural treasures*, 2nd ed., Cambridge University Press, Cambridge, 1996, p 121. (hereinafter referred to as *The Return of cultural treasures...*)

world.⁵⁸⁷ This has led to Nigeria having a minority holding of its own art⁵⁸⁸ and as such has on display mere casts and photographs of the pieces that once belonged to Benin.⁵⁸⁹ Recently, a great grandson of one of the soldiers involved in the 1897 expedition returned two of the bronze objects kept in private custody to the Benin people and handed them over to the great grandson of the Oba.⁵⁹⁰

The massive outflow of Nigeria's antiquities can be attributed to the late awareness of the need for legislation to prevent the exportation of art treasures.⁵⁹¹ During the colonial era, the Antiquities Ordinance of 1953⁵⁹² enacted in response to the large scale export trade in antiquities did not curb exportation of antiquities which continued at an alarming rate because the penalties imposed were not stiff and the law enforcement agencies meant to enforce the law were ignorant of the essence of preventing the exportation of these cultural objects and/or were corrupt and this led to a weak enforcement of the law. After independence, looting of Nigeria's antiquities was on a large scale because of the high demand for them in the art market in Europe and America.⁵⁹³ The Nigerian Civil War of 1968 to 1970 also created an avenue for the large scale exportation of cultural goods as the dealers and smugglers followed on the tails of the federal troops and carried away hundreds of art works⁵⁹⁴. Several reports appeared after the war as to the loss of cultural goods⁵⁹⁵ during the war. After the war, the smuggling continued.⁵⁹⁶ The current legislation in Nigeria i.e The National Commission for Museums and Monuments Act,

⁵⁸⁷Eyo. E, Nigeria... *op.cit*: 21; Shyllon. F. 1998. One Hundred Years of looting of Nigeria Art Treasures 1897-1996, *Art, Antiquity and Law*. vol. 3, issue 3:254(hereinafter referred to as One Hundred Years...);Eyo. E and Willett. F. 1980. *Treasures of Ancient Nigeria*: 18; Ezra K.1952. *Royal Art of Benin: the Perls collection*, exhibition catalogue: 16.

⁵⁸⁸Biobaku. B, Opening Address in Alagoa, E. J. & Awe B. Eds. *Nigeria Antiquities*. Special Number *African notes*: 32 quoted by Shyllon. F, 1996. Cultural Heritage Legislation and Management in Nigeria, *International Journal of Cultural Property*. vol. 5, No. 2: 243(hereinafter referred to as Cultural Heritage ...)

⁵⁸⁹Eyo. E. 1968. Preservation of works of Art and Handicraft in colloquium: 1st World Festival of Negro Arts, Dakar (presence Africaine, Paris) p.584; Eyo. E, 'Nigeria'... *op.cit*: 21; Greenfield. J. *The Return of cultural treasures...* *op. cit*: 123; Shyllon F. Cultural Heritage... *op. cit*: 248.

⁵⁹⁰Sowole T., Returned-artefacts: How a Briton exposed weak int'l relation, set govt against Benin royal house. Friday, 27 June 2014. Retrieved 5 November, 2014 from <http://africanartswithtaj.blogspot.it/2014/06/returned-artefacts-how-briton-exposed.html>

⁵⁹¹Shyllon .F, One Hundred Years... *op. cit*: 256

⁵⁹²Now Antiquities Act 1953; Laws of the Federation of Nigeria, 1958. Ch 12

⁵⁹³Shyllon. F, One Hundred Years... *op.cit*: 256

⁵⁹⁴*Ibid*, p. 258

⁵⁹⁵ The West African Magazine of 26th September, 1970; the Morning Post 7 April 1971 p 10; the New Nigerian 17 July 1971 p 12; the Daily Times 23 September, 1971.

⁵⁹⁶Adewumi A.A. 2013. A Critique of the Nigerian Legal Framework for the Protection of Cultural Goods from Exportation Abuse. *Unilorin Journal of International and Comparative Law (J.I.C.L)* Vol. 7: 65-101

1979 has not been able to stem the tide of the illicit trafficking as the looting has continued unabated in museums and private collections all over the country.⁵⁹⁷

The Nigerian authorities over the years have not lived up to its role as the protector of the nation's antiquities. This is buttressed by the act of General Yakubu Gowon the then Head of State of Nigeria, in 1973, when he took from the national museum in Lagos a seventeenth century Benin bronze which he presented to Queen Elizabeth II while on a state visit to England. Very few of these bronzes are in Nigeria, whereas many of the finest examples of Benin art are in the British Museum which holds the second largest collection after the Berlin museum.⁵⁹⁸

In 1999, the French bought three Nok and Sokoto terracotta which had been looted and illegally exported from Nigeria and were on ICOM's *Red List of African Cultural Objects at Risk*. After France acknowledged Nigeria's ownership of the antiquities, the then President of Nigeria, Chief Olusegun Obasanjo allowed France, under a very dubious agreement, to keep the items on loan for a period of 25 years which is renewable.⁵⁹⁹

5.4.3 Mali

The plundering of Mali's antiquities before the recent outbreak of war has its genesis in the European collection missions that continued unabated right up to the very end of colonialism. The plundering of archaeological sites affected the regions, where nascent archaeology had brought terracotta statuettes into the limelight. Plundering primarily took place in the Inland Niger Delta, and in the region of Djenne in particular where the first statue was discovered in 1941. The discovery of the statues known as '*Bankoni style*' on the commercial markets led to plundering in the south of Mali.⁶⁰⁰ The increasing demand by museums, galleries, and private collectors in Europe and America for ancient Malian arts made the poor locals to dig for a living which fuelled the illegal excavation. The antiquity dealers employed the services of workers for the large scale

⁵⁹⁷For a detailed account on the lootings in Nigeria see generally, Shyllon F., *One Hundred Years...op.cit.*

⁵⁹⁸ Shyllon F. Looting and Illicit Trafficking in Antiquities in Africa... *op.cit.*: 138; see also Shyllon, F. 1998. One Hundred Years of Looting of Nigerian Art Treasures 1897–1996. *Art, Antiquity and Law*. 3(3): 253–266.

⁵⁹⁹ Shyllon, F. 2003. Negotiation for the Return of Nok Sculptures from France to Nigeria: An Unrighteous Conclusion, (*Art Antiquity and Law*. 8(2): 133–148. Also in *Cultural Heritage Legislation and Management in Nigeria, op.cit*

⁶⁰⁰Shyllon F. Looting and Illicit Trafficking in Antiquities in Africa... *loc.cit.*

excavation. Individuals also engaged in the illicit trade in Malian art. The antique dealers at the intermediary level are located in the important suburbs at Bamako, Mopti and Djenne. These dealers connect with European and American markets through sales galleries, collectors, and museums to effect the distribution of the antiquities. Besides moving the items by air routes, a significant portion of the objects is illicitly exported by road or by rail to Cote d'Ivoire and Senegal. These two neighbouring countries of Mali have sales galleries operated by internationally connected Lebanese dealers.⁶⁰¹

A survey of the Djenne area conducted between 1989 and 1992 found that 375 of the 834 sites discovered had been looted, and when 83 of the sites were revisited in 1996 the number looted had increased from 16 to 49.⁶⁰² Another survey by the same team in 2002 found that 42 of 81 sites recorded in the region of Malian Dia had been damaged.⁶⁰³ The outbreak of war in Mali has however led to massive destruction of its cultural heritage which is outside the scope of our discussion here.⁶⁰⁴

5.4.4 Ghana

In Rotterdam harbor in 1996, a shipment of rare items from Ghana was intercepted. The owner of the goods was a dealer who had established firm business relations with this African country. According to the Embassy of Ghana, he had been involved in smuggling items at least two times before, in 1992 and 1994.⁶⁰⁵ In connection with this particular shipment, questions were asked by a Member of Parliament to the Secretary of Justice.⁶⁰⁶ In her answer to these questions the Minister stated that the cultural historical value of the goods was substantial, and that Ghana had not given export

⁶⁰¹ *ibid*; see also Sidibe S. 1996. The Fight against the Plundering of Malian Cultural Heritage and Illicit Exportation: National Efforts and International Cooperation. In *Plundering Africa's Past*, eds. Schmidt, P.R. and McIntosh, R.J., 79–86. Bloomington and Indianapolis: Indiana University Press.

⁶⁰² Panella C, Schmidt A., Polet J and Bedaux R. 2005. *Le context du pillage*, in Bedaux R, Polet J, Sanogo K and Schmidt A. Eds. *Recherches archéologiques a Diadans le Delta interieur du Niger (Mali): bilan des saisons de fouilles 1998- 2003*. Leiden: CNWS: 18, table 3.2. quoted by Brodie N, Dietzler J and Mackenzie S, *Trafficking in Cultural Objects: an Empirical Overview in Manarcoda S and Visconti A. Eds. Beniculturali e sistemapenale*, Vita E Pensiero, Milano, 2013, p.20

⁶⁰³ *Ibid*. p.21

⁶⁰⁴ Adewumi A.A. 2013. War Time Pains, all Time Pains – Spoilage of Cultural Property in Mali. *Art, Antiquity and Law*, Vol. XVIII, Issue 4: 309-321

⁶⁰⁵ Beurden, J. van. 2001. *Goden, graven en grenzen: Over kunstroof uit Afrika, Azië en Latijns-Amerika*. Amsterdam: KIT Publishers. Cited in Shyllon F., *ibid*

⁶⁰⁶ The written questions in Parliament were raised by MP J. M. Verspaget (Labor Party) on July 11, 1995. The Minister of Justice at the time, W. Sorgdrager, replied on August 26, 1996. See: Aanhangel Handelingen, No. 1627, *vergaderjaar 1995–96*. cited by Tjihuis A.J.G. *The Trafficking Problem: A Criminological Perspective in Manacorda S. & Chappell D. Eds. Crime in the Art and Antiquities World... op.cit: 95*

permits for their transport to the Netherlands. Nevertheless, in the end the owner could not be forced to surrender the items. Also, in 1992 a large shipment of items was intercepted by Dutch customs in the Rotterdam harbor. Part of the shipment were 92 historic stone sculptures from the Koma region in Northern Ghana. The Embassy of Ghana threatened the owner with summary proceedings and he surrendered the items to Ghana. However, due to the lack of legislation in the Netherlands, he was able to keep the rest of the smuggled items after he paid the tax based on their real value.⁶⁰⁷ The dealer pointed out that the authentic items were bought from the little villages.

5.4.5 Zimbabwe

The National Museums and Monuments, The National Archives and National Art Gallery are the institutions protecting Zimbabwe's cultural heritage. 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."⁶⁰⁸

Dislocation of Cultural Property from Africa has been shown to follow a pattern of thieves, smugglers, and middlemen connecting the authentic items from illicit excavations, churches, or museums, with the dealers in market countries. It is through a well-connected foreign dealer who ships the items abroad and sells them that they are laundered and placed in the legal market, for example, Belgium, Switzerland, or the Netherlands.⁶⁰⁹

5.5 Participation of African States in the UNESCO and UNIDROIT Conventions

"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

⁶⁰⁷ Tjihuis A.J.G *ibid*

⁶⁰⁸ 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. adapted from Shyllon F., Legislative and Administrative Implementation...: 8

⁶⁰⁹ Gado, B. 2001. The Republic of Niger. In Brodie, N., Doole, J., Renfrew, C. Eds. *Trade in Illicit Antiquities: The Destruction of the World's Cultural Heritage*. Oxford: Oxbow Books: 57-72; Schmidt, P. R., McIntosh, R. J. 1996. *Plundering Africa's Past*. Bloomington: Indiana University Press. Both cited by Tjihuis A.J.G *loc.cit*

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 1July 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."⁶¹⁰

The above quotation reflects the situation of African countries as regards harnessing the benefits available for the protection of cultural property in the area of return and restitution. As at today, fifteen years after the above statement was made by Professor Folarin Shyllon, the five countries who are signatories to the 1995 UNIDROIT Convention as mentioned above are still signatories and have not taken any further step in the matter while Nigeria,⁶¹¹ Gabon⁶¹² and Angola⁶¹³ have ratified the Convention.⁶¹⁴ The African representation of the UNIDROIT Convention can be regarded as 5.6%.

At the first meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects questionnaires were given to all countries present both states parties and non-state parties. Six African countries were in attendance.⁶¹⁵ Nigeria was there as a state party, Cote d'Ivoire as a signatory, Botswana, Cameroon, Ghana and Mauritius as other States present at the meeting. The questionnaires were distributed to all countries, both state parties and non-state parties, before the meeting. Nigeria being the only African State Party present.

Nigeria joined the UNIDROIT Convention in 2007 and by 2012 stated in the questionnaire that efforts were being made towards domestication.⁶¹⁶ Up till now, seven years after, the process has not been concluded. No formal claims for restitution has ever been made by Nigeria and the country cannot estimate the percentage of items stolen

⁶¹⁰Shyllon F. 2000. The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration. *Uniform Law Review*, NS –Vol. 5: 219; Shyllon F, Implementation..., *op.cit*

⁶¹¹Nigeria ratified the Convention on 10/12/2005 and it entered into force on 01/06/2006

⁶¹²Gabon ratified the Convention on 12/05/2004 and it entered into force on 01/11/2004

⁶¹³Angola ratified the Convention on 19/06/2014 and it entered into force on 01/12/2014

⁶¹⁴ STATUS/etat-UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) / Convention d'unidroit sur les biens culturels volés ou illicitement exportés. Last updated, 4 December 2014, retrieved 16 January, 2014 from <http://www.unidroit.org/status-cp>

⁶¹⁵ Answers to the questionnaire relating to the practical operation of the 1995 UNIDROIT Convention. Retrieved 10 November from <http://www.unidroit.org/english/Conventions/1995culturalproperty/1meet-120619/list-answquest-ef.pdf>

⁶¹⁶ *ibid*

each year. Nigeria has no provision on State ownership of cultural property. The provision on exportation in the local legislation⁶¹⁷ allows for exportation abuse⁶¹⁸ and as such needs to be brought in line with the Conventions. No bilateral treaty exists with any other state in respect of cultural property and the country cannot boast of more favourable rules than what the Convention offers. The other African states in attendance though not yet parties to the UNIDROIT Convention are not better placed than Nigeria from their responses to the questionnaires.

From a cursory look at the answers given by African countries there present, it shows that a lot has to be done in the area of ensuring the implementation of the UNIDROIT Convention in Africa as there is nothing to show its relevance in African countries even after seventeen years of its being in force⁶¹⁹ and as a self-executing Convention with its provisions written as rules and without reservations.

As regards the 1970 Convention, thirty African countries are now members. The African representation of the UNESCO Convention can be regarded as 50.0%. The 30 member countries⁶²⁰ are Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Gabon, Guinea, Lesotho, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Swaziland, Tunisia, United Republic of Tanzania, Zambia, and Zimbabwe. Ethiopia,⁶²¹ Ghana, and Kenya are

⁶¹⁷ NCMM Act, Section 25; The National Commission for Museum and Monuments (Export Permits) Regulations (L.N 62 of 1957), Section 2 (2)

⁶¹⁸ See Adewumi A. A. 2013. A Critique of the Nigerian Legal Framework for the Protection of Cultural Goods from Exportation Abuse. *loc.cit*

⁶¹⁹ The UNIDROIT Convention came into force on 1st July, 1998.

⁶²⁰ See List of States Parties to the Convention in alphabetical order, www.unesco.org/eri/la/Convention.asp?KO=13039&language=E&order=alpha, accessed 26 September 2013; see Shyllon F. 2014. Legislative and Administrative Implementation of 1970 UNESCO Convention by African States: The Failure to Grasp the Nettle, *International Journal of Cultural Property*: 21:23–53 (hereinafter called *Legislative and Administrative Implementation...loc.cit.*) There are 55 countries on the continent of Africa. All are members of the AU except Morocco. Morocco withdrew from the Organisation of African Unity (OAU), AU's predecessor, in 1984 following the recognition of Sahrawi Arab Democratic Republic declared by the Polisario Front by the majority of OAU members. Under UNESCO regional grouping, 48 sub-Saharan African countries comprise Group V (a), while seven, namely Algeria, Egypt, Libya, Mauritania, Morocco, Sudan, and Tunisia, are classified as Group V (b).

⁶²¹ Shyllon F, *loc.cit* states that “Ethiopia ratified the 1970 Convention, and the Decree was published in the National Gazette (Federal Negarit Gazeta, 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 the Conventions, Ethiopia is missing. This means that the official 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

among the countries that are not States Parties. There are more French speaking than English speaking African countries as members. Geographically, six out of seven North African countries are States Parties.⁶²² West Africa has a good representation, while Southern Africa is poorly represented.

It has also been discovered that the issue of having comprehensive inventories is a major problem for African countries. Inability to have adequate computerized inventories will make it difficult to prove ownership of cultural objects and make it impossible to benefit from the assistance of INTERPOL and international channels in trying to locate a missing cultural object immediately it is discovered missing. The situation has been summarized in the Report on the Amsterdam Conference of African Museum Directors to the effect that:

“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.”⁶²³

African countries who reacted to UNGA Resolution 3187 of 1973 leading to the establishment of the Intergovernmental Committee have made virtually no good use of the committee. Only Ethiopia has taken a case before the Committee which was in respect of the Makonde Mask.

The protection available for import restrictions on cultural property through Bilateral Co-operation Treaties entered into by the President of the United States pursuant to the UNESCO Convention has only been taken advantage of in Africa by Mali.

The Arbitration option now open to State Parties under the UNIDROIT Convention has also not been utilized by African countries.

It is however noteworthy that almost all African countries that have become members to the UNESCO and UNIDROIT Conventions have not upgraded their national laws to reflect their obligations under the Conventions.

my attention to this situation.”

⁶²² Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia. Sudan is the only non-member.

⁶²³ Leyton H.M, Ed. Report on the Amsterdam Conference of African Museum Directors. Royal Tropical Institute, Amsterdam, 1995

At this juncture the query that comes to mind is “What is the significance of international treaties and Conventions at the domestic level especially treaties on cultural property? How do they become relevant or applicable to a nation? This leads us to the next subheading.

5.6 Treaties and National Legislation

A State is able to enter into relations with other States through its treaty making power⁶²⁴ which is exercisable by the National Assembly as empowered by the Constitution.⁶²⁵

Treaties have been classified by Umozurike⁶²⁶ into self-executing treaties and non-self-executing treaties. “A self-executing treaty”, according to him, “can be applied immediately after conclusion while a non-self -executing treaty must first be enacted into law.”

Under Nigerian law, the idea of a self-executing treaty is inconsistent with the Anglo-Nigerian law on implementation of treaties for the purpose of domestic enforcement by the courts.⁶²⁷

In *Maclaine Watson v. Department of Trade*⁶²⁸ Lord Oliver said:

“...as a matter of constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.”

However, S. 231(4) of the South African Constitution 1996⁶²⁹ also adopts the expression self-executing provision of an international agreement. It states: “Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by

⁶²⁴Akintayo, J. O. 2013. Treaty Making and the 1999 Nigerian Constitution: A Critical Analysis of the Treaty (Making Procedure Etc) Act. *Global Journal of Jurisprudence and International Law*, Vol. 1 No. 1: 80 -129 at 84

⁶²⁵*Ibid.* p.85

⁶²⁶Umozurike, U. O. 1999. *Introduction to International Law*, 2nd ed., Ibadan: Spectrum:168

⁶²⁷Akintayo, J.O., *op.cit.* :93

⁶²⁸*Maclaine Watson v. Department of Trade* [1909] 2 AC 418 at 500

⁶²⁹South African Constitution 1996, Section 231(4)

Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Fitzmaurice and Quast,⁶³⁰ have distinguished between what they described as the “so-called ‘law-making treaties’” (*traités lois*) and ‘contractual treaties’ (*traités-contrats*) but with a qualification that the distinction is not clear cut. The principle that underlies the distinction, according to them, is as follows:

“...the treaties of the first category establish general patterns of behavior for the parties over a certain period of time in certain areas. The treaties belonging to the second category regulate some specific co-operation between States, such as a trans-boundary movement of specific hazardous waste.”

Under Nigerian law, treaties do not become binding until domesticated. For example, In *Abacha v. Fawehinmi*⁶³¹ the Supreme Court considered the significance of section 12 (1) of the 1979 Constitution which is similar with Section 12(1) of the 1999 Nigerian Constitution. Considering the status of the African Charter on Human and People’s Rights 1981 which was enacted into law by the National Assembly in Nigeria in 1983⁶³² the Supreme Court said:

“Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly... Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts.”

The above position notwithstanding, under the Nigerian law, a different view is found in the Treaties (Making Procedure, etc) Act,⁶³³ promulgated under the military era and which states that

1. *Treaties are classified into-*
 - a. *Law making treaties, being agreements constituting rules which govern inter-state relationship and co-operation in any area of endeavor and which have the effect of altering or*

⁶³⁰ Fitzmaurice, M. A., and Quast, A. 2007. *Law of Treaties*. London: University of London Press: 12; see also Brownlie, I. 1979. *Principles of Public International Law*, 3rd ed., Oxford: Oxford University Press: 12.

⁶³¹ *Abacha v. Fawehinmi* [2001] Cases on Human Rights 20: 40-41; See also the decision of the Privy Council in *Higgs & Anor v. Minister of National Security & Ors*. The Times of December 23, 1999

⁶³² The African Charter on Human and People’s Rights (Ratification and Enforcement) Act 1983 became Cap.10 in the Laws of the Federation of Nigeria 1990. It is now Cap A9 LFN 2004.

⁶³³ Treaties(Making Procedure, etc) Act, section 3(1) & (2)

- modifying existing legislation or which affects the legislative powers of the National Assembly;*
 - b. Agreements which impose financial, political and social obligations on Nigeria or which are of scientific or technological import;*
 - c. **Agreements which deal with mutual exchange or cultural and educational facilities.**(emphasis mine)*
2. *The treaties or agreements specified in –*
- a. Paragraph (a) of subsection (1) of this section need to be enacted into law;*
 - b. Paragraph (b) of subsection (1) of this section need to be ratified;*
 - c. Paragraph (c) of subsection (1) of this section **may not need to be ratified.**(emphasis mine)*

Akintayo⁶³⁴ has opined that perhaps the rationale for this provision is that these are routine agreements or treaties that the National Assembly would not have time to discuss. A practice similar to this in the United Kingdom has been commented on by Akehurst⁶³⁵ when he observed that:

“...The modern practice therefore grew up of treating many treaties as binding upon the signature alone. There is much to be said for this practice. Even in the United Kingdom, where the consent of the legislature is not needed for ratification, many treaties which are subject to ratification are never ratified, simply as a result of the inertia inherent in a spirit of administrative machine; treaties are negotiated in a spirit of popular enthusiasm which soon wanes afterwards, so that there is no pressure for ratification.”

The provision of the Treaties Act implies that international agreements which fall into category (c) are to be implemented upon signature without further more. This classification has made insignificant the status of the important agreements which fall within this category. Their legal status in the context of the Nigerian Constitution has become uncertain. Agencies of government and executive authorities would be emboldened to conclude agreements which might not serve the overall best interest of Nigeria if there is no form of legislative oversight.⁶³⁶

⁶³⁴ Akintayo, J. O. *op.cit.*: 125

⁶³⁵ Akehurst, M. 1992. *A Modern Introduction to International Law*, 6th ed., London, Harper Routledge: 126

⁶³⁶ Akintayo, J. O. *loc.cit.*

A good example of the negative import of the provision of the Treaties Act can be seen in the negotiations that took place between Nigeria and France as regards three Nok objects. Nok objects being among the endangered and most sought after African cultural objects, occupies a place at the top of the ICOM Red List of objects⁶³⁷ “*banned from export [and] may under no circumstance be put on sale*” and Nigerian law prohibits their export. Also, the report of the Inter-Ministerial Committee on the Looting of Nigeria’s Cultural Property has it that:

“...they contain large numbers of very high quality, well preserved and exquisitely sculptured antique objects. The extremely sad aspect of it is that the entire Nigerian Museum’s collection of Nok objects is not up to half of this in number and in quality.”⁶³⁸

Despite this awareness, among the objects acquired at the Louvre in anticipation of the new Musee du Quai Branly were three Nok objects. In 1998, two of them were bought for more than 360,000 dollars each from a Belgian art dealer, with the proviso that an agreement from the Nigerian government would be required before actual purchase. Reports had it that President Chirac personally sought approval for the purchase from Nigeria’s then military ruler, General Abdusalami Abubakar and the request was rebuffed on the advice of the National Commission for Museums and Monuments. When Nigeria returned to civilian rule, the French President, Chirac, once again raised the matter with the Nigerian President, Olusegun Obasanjo, who made a formal agreement authorizing the Nok transaction during his State visit to France and symbolically handed the objects over to the French government in February 2000 which was two months before the Louvre display of objects began.⁶³⁹

At the display of the objects at Louvre, the Nigerian embassy,⁶⁴⁰AFRICOM (International Council of African Museums),⁶⁴¹ and commentators⁶⁴² criticized the conduct of Presidents Chirac and Obasanjo.

⁶³⁷ICOM Red List of objects. Retrieved 30 October, 2014 from www.icom.org/redlist/

⁶³⁸ Report of the Inter-Ministerial Committee on the Looting of Nigeria’s Cultural Properties. Ministry of Information and Culture, Abuja, 1996, 26-27. Adapted from Shyllon F. 2003. Negotiations for the Return of Nok Sculptures from France to Nigeria: An Unrighteous Conclusion. *Art, Antiquity and Law*, vol.8 Issue 2: 133-148; Shyllon F. Cultural Heritage Law and Management in Africa, *op.cit.*: 205

⁶³⁹ Shyllon F., Cultural Heritage Law and Management in Africa, *op.cit.*, p.206

⁶⁴⁰ Chronicles. 2009. 9 *International Journal of Cultural Property*, 375 quoted by Shyllon F, *ibid.*

⁶⁴¹ Press Release dated 21st April, 2000. See Shyllon F., *ibid.* for a full picture of the comments.

⁶⁴² Riding, A. Chirac exalts African Art. Legal and (Maybe) Illegal, *New York Times*, 25 November 2000; *Frankfurter Allgemeine Zeitung*, 2 December 2000. Quoted by Shyllon F., *ibid.* Also, Professor Lord Renfrew of Kaimsthorn, Director of the McDonald Institute for Archaeological Research at

A final agreement with France in relation to the Louvre Noks, amounting to a loan of 25 years renewable term was signed in March 2002 by Nigeria's Minister of Culture and Tourism without consultation with the National Commission for Museums and Monuments.

The above Nigerian example shows the danger associated with not having a carefully worded legislation in the national setting protecting cultural property. The above equally bring to limelight the fact that nations concerned with and interested in the UNESCO and UNIDROIT Conventions, must take informed and principled steps, if the benefits of the Conventions must be harnessed.

5.7 National Legislation on Cultural Property in Africa

Twenty-seven legislation of African countries will be considered to see how much they have done nationally in the area of protecting cultural property. This will be discussed by examining seventeen laws of states parties to the 1970 Convention and ten legislation of non-state parties to the 1970 Convention after which a conclusion will be arrived at.

5.7.1 National Legislation of some African States Parties to the Conventions on Return and Restitution of Cultural Property

5.7.1.1 Algeria

Algeria became a party to the 1970 Convention on 24 June 1974. Cultural property discovered during excavations or inadvertently, belongs to the State including all movable objects discovered inadvertently or during excavations in Algerian territorial waters.⁶⁴³ Decree 87-10 of January 1987 sets up the National Agency of Archaeology and the Protection of Sites and Monuments, while Decree 858-279 of November 1985 establishes the National Museums for Antiquities. These laws, however, do not prohibit nor control the importation of cultural objects into the country. Algeria has practical measures in place to prevent and combat illicit trafficking. These are the Sub-Directorate for Cultural Property Security and a central squad for the protection of national cultural heritage attached to the National Security Directorate and charged with operational investigations into various acts against the national cultural heritage:

Cambridge also criticised the actions of the Presidents at a UNESCO Conference held in November 2000 in Paris to mark the 30th Anniversary of the 1970 UNESCO Convention; Ugochukwu Okezie, head of campaigns Civil Liberty Organisation also condemned the act.

⁶⁴³Algeria's Ordinance No. 67-281 of 1967 relating to the excavation and protection of Natural and Historic Sites and Buildings. Available in the UNESCO Database on Cultural Heritage Legislation referred to by Shyllon F, Legislative and Administrative implementation... *op.cit.*, p. 24

the theft of and trafficking in archaeological objects, antiquities, and works of art; damage to and looting of archaeological sites; and artistic forgeries; directing investigations conducted by other judicial police departments and formulating strategies. The squad acts in close cooperation with the Division for the Protection of Cultural Property, the Cultural Property Management and Exploitation Office, the National Archaeology Centre, and museum curators. The national gendarmerie, too, has established heritage inspection units. Bilateral treaty to protect cultural heritage against trafficking has been signed with Argentina for the reciprocal protection of cultural property in the event of trafficking. Algeria is considering concluding two similar bilateral agreements with China and Peru.

5.7.1.2 Egypt

Egypt joined the 1970 Convention on the 5 April 1973. In Egypt, the State owns all cultural objects and no one can own nor sell cultural objects.⁶⁴⁴ Article 7⁶⁴⁵ prohibits trade in antiquities, while Article 8 proscribes possession of antiquities. Only antiquities whose ownership or possession was already established at the time the Act was made are exempted from this rule. Inventories of antiquities in sites and museums are accomplished by two centers of documentation, for Egyptian antiquities and for Islamic and Coptic antiquities through the information center of the Supreme Council of Antiquities. Inventories are done by electronic database systems.

The Law permits a possessor of antiquity to dispose of it provided he or she obtains prior written approval and provided the disposition does not result in exporting it.⁶⁴⁶ The authority reserves the right of preemption in all cases in return for fair compensation. The central police authorities of Egypt support the antiquities police squad or police of antiquities dedicated exclusively to combating trafficking in cultural property. Export restrictions are in place and enforced at all Egyptian airports, ports, and border crossings. Unlawful smuggling of an antiquity outside Egypt or participating in such an act attracts liability of a prison term with hard labor and a fine. Anyone who fortuitously discovers a movable antiquity must notify the nearest administrative authority within 48 hours and safeguard it until the Egyptian Antiquities Authority takes

⁶⁴⁴ Egyptian Law on the Protection of Antiquities (1983), Law 117 as amended by Law No. 3 of 2010 Promulgating the Antiquities' Protection Law, Article 6

⁶⁴⁵ *ibid*, Article 7

⁶⁴⁶ *Ibid*, Article 9

possession of it.⁶⁴⁷ Failure to comply is deemed as unauthorized possession. Article 15 declares that no prescriptive ownership of antiquities shall accrue to any individual or corporate entity by adverse possession from the use of an archaeological site, land, or structure of historic value. Egypt has been able to secure the return of thousands of antiquities smuggled out of the country. Article 35 provides that all antiquities discovered by foreign archaeological missions are state-owned property.

Article 36 confers “all rights of intellectual property and trademark” exploitation on the Supreme Council of Antiquities including “archaeological objects and sites owned by the Council.” According to Shyllon “*the idea is to impose intellectual property rights control on key Egyptian images and monuments, such as the pyramids.*”⁶⁴⁸ Egypt has signed several bilateral agreements with Italy, Greece, and Denmark to protect its cultural heritage against trafficking and is negotiating a major agreement with the United States.

5.7.1.3 Cote d’Ivoire

Cote d’Ivoire became a party to the 1970 Convention in 1990. Before then, it has had a law that subjects all archaeological projects to authorization by the government.⁶⁴⁹ Whoever originates activities either public or private which are authorized by the government leading to the discovery of artefacts should inform the Ministries of Cultural Affairs and Mines and will be personally and financially responsible for the safekeeping of the antiquities, which must not be sold, transferred, or distributed before the government decides upon their permanent status.⁶⁵⁰

5.7.1.4 Democratic Republic of Congo

Democratic Republic of Congo has a law⁶⁵¹ with a unique provision attempting to deter illegal export. It provides that no person living 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

⁶⁴⁷ *Ibid*, Article 24

⁶⁴⁸ Shyllon F. Legislative and Administrative Implementation...*loc.cit*

⁶⁴⁹ The Law of 28 July 1987 relative to the protection of Ivorian cultural heritage

⁶⁵⁰ *Ibid*, Article 37

⁶⁵¹ Democratic Republic of Congo’s (DRC’s) law concerning the protection of cultural property of 1971, Article 34

person acting as agent for some other person even if he or she resides in the DRC.

5.7.1.5 Madagascar

Madagascar joined the Convention in 1989. Madagascar's Order of 6 November 1982 on the Protection, Safekeeping and Preservation of National Heritage protects the country's cultural property. Madagascar has an innovative provision⁶⁵² 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.”

Exportation of Antiquities is prohibited.⁶⁵³ Archaeological excavations cannot be undertaken without the authorisation of the Minister concerned.⁶⁵⁴ The state has the right to ownership of all property discovered during excavations and as a result of research.⁶⁵⁵ Whoever finds cultural objects as a result of excavation is obliged to notify the local authorities within three days following such a discovery.⁶⁵⁶ Any national heritage property acquired in breach of the Order will be confiscated by the state.⁶⁵⁷ Finally, 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.⁶⁵⁸

5.7.1.6 Mali

When Alpha Oumar Konare was President of Mali, he ensured Mali had a proactive legislative and management policy for the protection of Mali's cultural heritage. Before he became President, Konare was head of the national historic and ethnographic heritage division from 1976 to 1978, Minister of Culture from 1978 to 1980. Thereafter, he became the President of ICOM before 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 of cultural objects.

Starting in 1985 his reign heralded the enactment of a series of laws, and two years

⁶⁵² Madagascar's Order of 6 November 1982 on the Protection, Safekeeping and Preservation of National Heritage, Article 2

⁶⁵³ *Ibid*, Article 25

⁶⁵⁴ *Ibid*, Article 39

⁶⁵⁵ *Ibid*, Article 42

⁶⁵⁶ *Ibid*, Article 45

⁶⁵⁷ *Ibid*, Article 49

⁶⁵⁸ *Ibid.*, Article 56

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. This Decree⁶⁵⁹ made all objects of a movable or fixed nature discovered in the course of excavations performed on or in the soil of the public domain the property of the state. Law No. 86-61 controlling traders in cultural objects was promulgated on 26 July 1986, taking a cue from France as one of the few countries controlling the activities of dealers in items of cultural heritage. On 19 September 1986 (Decree No. 999), was promulgated regulating the excavation and marketing of cultural objects. Finally in line with the structure 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.⁶⁶⁰ Thus making Mali the only African country that has taken advantage of the U.S. scheme.

5.7.1.7 Mauritania

Mauritania joined the 1970 Convention on 27 April 1977. Mauritania promulgated the Law relating to the Preservation and Cultural Promotion of the National Prehistorical, Historical and Archaeological Heritage on 31 July 1972. This law considers 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.⁶⁶¹ *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*

⁶⁵⁹ Mali's Decree No. 275 of 1985, regulating archaeological excavations, Article 11.

⁶⁶⁰ See S. Sidibe, "Mali: When Farmers Become Curators", UNESCO's *Courier*, April 2001; Information on Bilateral agreement between Mali and USA. Retrieved 30 October, 2014 from http://www.unesco.org/courier/2001_04/uk/doss22.htm.

⁶⁶¹ The Law relating to the Preservation and Cultural Promotion of the National Pre-historical, Historical and Archaeological Heritage, 1972, Article 1

obligatory upkeep.' In the latter case state aid would be available in the case of large-scale repair work and/or restoration. The law forbids the exportation of antiquities.⁶⁶²

5.7.1.8 Nigeria

Nigeria became a party to the 1970 Convention on 24 January 1972 as its third member country. Up till now, close to nothing has been done to implement the Convention in Nigeria.⁶⁶³ The current legislation for the protection of both moveable and immovable cultural heritage is the National Commission for Museums and Monuments Act 1979. Before this Act, laws⁶⁶⁴ had existed trying to curb the exportation of antiquities but without success. This 1979 Act abolished the Antiquities Commission and the Federal Department of Antiquities set up under the 1953 Act as the agencies of the federal government responsible for the protection and conservation of Nigeria's cultural heritage property and established a new commission, the National Commission for Museums and Monuments, charged with the responsibility for the conservation, preservation, and restoration of the nation's historical, cultural, artistic, and scientific relics. The Act was hurriedly passed and as such adopted most of the existing provisions in previous legislation thereby not making any real impact as would have been expected.⁶⁶⁵

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.⁶⁶⁶

Any individual or body can deal with land in any way they deem fit and as such no provision is made for undiscovered archaeological finds.⁶⁶⁷ Therefore undiscovered archaeological finds are vulnerable to serious threats of destruction from development programmes. The 1979 Act did not provide for the inclusion of the local government in the preservation of cultural heritage.

⁶⁶² See also Shyllon F., *Legislative and Administrative Implementation...*p28

⁶⁶³ *ibid*

⁶⁶⁴ 1938 Order, 1943 Order, 1953 Antiquities Act and the Antiquities (Prohibited Transfers) Act, 1974.

⁶⁶⁵ See generally Shyllon F., *Cultural Heritage Legislation and Management in Nigeria in Cultural Heritage Law and Management in Africa*. 2013. Lagos: Centre for Black and African Arts and Civilization: 33-79; Adewumi, A. A. 2013. A Critique of the Nigerian Legal Framework for the Protection of Cultural Goods from Exportation Abuse, *loc.cit*

⁶⁶⁶ Shyllon F., *Report on the Inter-Ministerial Committee on the Looting of Nigeria's Cultural Properties in Cultural Heritage Law and Management in Africa*, *op.cit.*,pp.153-156

⁶⁶⁷ National Commission for Museums and Monuments Act 1979, Sections 19 and 20

5.7.1.9 South Africa

South Africa joined the Convention on 18 December 2003. Before then, the country had already promulgated a heritage law in line with the requirements of the 1970 Convention. The National Heritage Resources Act, 1999 of South Africa is the most comprehensive heritage legislation in Africa, south of the Sahara. According to the introductory part, 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.⁶⁶⁸ The Act establishes South Africa Heritage Resources Agency⁶⁶⁹ together with its Council to co-ordinate and to promote the management of heritage resources at all levels. Section 8 declares a three- tier system for heritage resources management. The Act introduced the system of heritage inspectors⁶⁷⁰ comprising of members of the South African Police Services and Custom Officials who must all be capable of identifying antiquities about to be exported and confiscate them in the absence of a permit.

In 2005, the National Forum for the Law Enforcement of Heritage-related matters was established to serve as the forum for a close working relationship between law enforcement and heritage officials for the dissemination of information and the sharing of ideas regarding the protection of cultural property. Members of the forum include the South African Police, INTERPOL, SAHRA, ICOM-South Africa, and Customs. At the University of Pretoria, the police undergo training seminars where officers are made aware of the importance of combating heritage-related crimes. They are trained in identification, handling, and storing of heritage objects. At the seminars, a list with the contact information of experts is distributed to the police, in case they find a stolen heritage object, so that they could immediately contact an expert who could identify the object and advise on its correct handling and storage.⁶⁷¹

5.7.1.10 Tanzania

The first legal measure to protect Tanzania's cultural heritage, the Monuments Preservation Ordinance, was promulgated by the British colonial government in 1937. Under this Ordinance, structures of historic significance such as monuments, and sites

⁶⁶⁸ The National Heritage Resources Act, 1999, Preamble

⁶⁶⁹ The National Heritage Resources Act, 1999, Part 2 of Chapter I (Sections 11–26)

⁶⁷⁰ The National Heritage Resources Act, 1999 of South Africa, Section 50(1)

⁶⁷¹ Shyllon F. Legislative and Administrative Implementation...*op.cit.*: 30

of archaeological, scientific, and historic significance were declared and gazetted as reserved areas. In 1957, the government established an agency, the Antiquities Department, to handle the management and conservation of immovable cultural property. In 1964, the Monuments Preservation Ordinance was repealed and replaced by the Antiquities Act which was modified by the Antiquities (Amendment) Act of 1979.

5.7.1.11 Zambia

Zambia joined the 1970 Convention on 21 June 1985. In 1912, the Bushmen Relics Proclamation was introduced to protect relics associated with Africans. 1930 heralded the Archaeological Ordinance which was followed by the Natural and Historical Monuments and Relics Act of 1948. The current law is the National Heritage Conservation Commission Act of 1989 which is an attempt to update and to broaden the scope of what is protected.

Whoever desires to export from Zambia any antiquity or cultural object must apply for an export permit.⁶⁷² The Act provides that no person shall excavate, collect, or export, as the case may be, any ancient heritage, any relic or part thereof, or alter, destroy, damage, or remove from its original site any ancient heritage, national monument, or relic in disregard of its provisions.⁶⁷³ A permit is required to export or excavate. Any person who discovers what appears to be an ancient heritage or relic shall (a) report his discovery to the Commission within fourteen days; (b) suspend his operations in the immediate vicinity of his discovery until thirty days after the delivery of his report, unless the Commission authorises their continuance; and (c) deliver to the Commission as soon as practicable, or request the Commission to examine and remove, any object which is, or appears to be a, relic.⁶⁷⁴

5.7.1.12 Zimbabwe

Zimbabwe became a state party to the Convention on 30 May 2006. The Ancient Monuments Protection Ordinance 1902 and Bushmen Relics Ordinance 1912 were replaced by the Colonial Monuments and Relics Act 1936. The National Museums and Monuments Act 1972 replaced the 1936 Act and has undergone amendments in 1976, 1984, 1990, and 2001. The Act however has very few provisions protecting cultural

⁶⁷² Zambia's National Heritage Conservation Commission Act of 1989, Section 34(1)

⁶⁷³ *Ibid*, Section 40(1)

⁶⁷⁴ *Ibid*, Section 42

goods. It however, prohibits excavation without the consent of the executive director of the National Museums.⁶⁷⁵

5.7.1.13 Burkina Faso

Burkina Faso became a state party to the Convention on 7th July 1987. Its 2004 legislation, *Arrete* 2004 651 MCAT/SG/DPC *portant inscription de Biens Culturels sur la liste Nationale du Patrimoine National* has few provisions protecting cultural goods.

5.7.1.14 Niger

Niger became a state party to the Convention on 16th January, 1973. In 1997, the national assembly in line with the constitution promulgated Law no 19-22 OF 30th June 1997 to determine the basic principles for the protection, conservation and presentation of the national cultural heritage. The law made use of the nomenclature ‘cultural heritage’. It provides that inventory be kept in accordance with regulations.⁶⁷⁶

5.7.1.15 Seychelles

Seychelles deposited the instrument of ratification of the Convention on the 28th May 2005.⁶⁷⁷ Seychelles has the National Monuments Act no 19 of 1980, The National Monuments Act Chapter 140 (subsidiary legislation) of 1991 and The National Monuments (Amendment) Act No.3 of 1999 which repealed some of the provisions of the 1991 Act. There is no legislation domesticating the 1970 Convention.

5.7.1.16 Morocco

Morocco deposited the instrument of ratification on the 3rd day of February 2003. Morocco has Dahir No. 1-06-102 of 18 Jumada I 1427 (15 June 2006) promulgating Law No. 19-05 amending and supplementing Law No. 22-80 on the Conservation of historic monuments and sites, inscriptions, art and Antique. Article 32-2 of the law provides for a general inventory of movable cultural objects to be drawn and updated annually.

⁶⁷⁵ The National Museums and Monuments Act 1972 as amended in 2001, Section 24

⁶⁷⁶ Niger’s Law no 19-22 OF 30th June 1997, Article 8

⁶⁷⁷ The Convention entered into force three months after.

5.7.1.17 Mauritius

Mauritius deposited the instrument of acceptance on the 27th February 1978. Mauritius has National Archives Act chapter 22 of 1999 – 1 February 2000; National Heritage Fund Act 2003. There is no legislation domesticating the 1970 Convention.

5.7.1.18 Swaziland

Swaziland deposited instrument of acceptance on 3 of October, 2003. Swaziland has the National Trust Commission Act 1971, as amended by the King's Order I Council of 1973 as the enactment protecting the State's cultural heritage.

5.7.1.19 Lesotho

Lesotho deposited the instrument of ratification on 17 July 2013. Lesotho has the Historical Monuments, Relics, Fauna and Flora Act of 1967 and the National Heritage Resources Bill of 2011. At the Windhoek workshop on the Prevention and Fight against Illicit Traffic of Cultural Goods,⁶⁷⁸ the principal museum curator of Lesotho reported that 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 and when it comes to the police, customs and immigration they lack knowledge on heritage matters. The Bill of 2011 is a vast improvement on the existing law of 1967.

5.7.2 National Legislation of some African States that are not Parties to the Conventions on Return and Restitution of Cultural Property

5.7.2.1 Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia 1995⁶⁷⁹ made way for The Proclamation to Provide for Research and Conservation of Cultural Heritage in the year 2000. Article 1 establishes the Authority responsible for Research and Conservation of Cultural Heritage. One of the objectives of the proclamation is to protect the cultural heritage against manmade and natural disasters.⁶⁸⁰ Ownership of cultural heritage can be by the state or individuals⁶⁸¹ while undiscovered cultural heritage is owned by the

⁶⁷⁸ UNESCO, Report of the Workshop of Prevention and Fight against Illicit Traffic of Cultural Goods in Southern African Region.

⁶⁷⁹ The Constitution of the Federal Democratic Republic of Ethiopia 1995, Article 55(1)

⁶⁸⁰ The Proclamation to Provide for Research and Conservation of Cultural Heritage 2000, Article 4

⁶⁸¹ *Ibid*, Article 14(1)

state.⁶⁸²

Under the Act, the state has power to expropriate any cultural heritage that is not properly protected, repaired, and restored; or whose custody in a museum is deemed necessary; or which has been confiscated while being illegally taken out of Ethiopia.⁶⁸³

The Act directs that data on Ethiopia's cultural heritage held in other countries shall be collected and publicized while Ethiopia's cultural heritage held illegally in other countries shall be repatriated.⁶⁸⁴

Provisions on exploration and undiscovered cultural heritage are found in Part 3 of the proclamation.

Any person who, after obtaining prior permission, discovers any cultural heritage in the course of excavation connected with mining explorations, building works, road construction, or other similar activities or in the course of any fortuitous event, shall forthwith report the same to the authority, and shall protect and keep same intact until the authority takes delivery.⁶⁸⁵

In Reserved Areas, a permit must be obtained before any building works or road construction or excavations consisting of immovable cultural heritage can be conducted or in an area deemed to be an archaeological site.⁶⁸⁶

The Act provides for the appointment of cultural heritage inspectors authorized to enter at reasonable hours any place where there is any cultural heritage and conduct an inspection to ensure that the cultural heritage is properly maintained and protected.⁶⁸⁷

Penalties are prescribed for violations of various provisions of the Proclamation.⁶⁸⁸ The Act goes further to state that unless a more severe penalty is prescribed by the Penal Code, any person who commits a cultural heritage offence shall be punished with rigorous imprisonment of not less than seven years and not exceeding 10 years. Those who destroy the cultural heritage intentionally will be punished with rigorous

⁶⁸² *Ibid*, Article 14(2)

⁶⁸³ *Ibid*, Article 26

⁶⁸⁴ *ibid*

⁶⁸⁵ Article 41

⁶⁸⁶ Article 42

⁶⁸⁷ Article 43

⁶⁸⁸ Article 45

imprisonment of not less than 10 years and not exceeding 20 years. And officials who destroy or damage cultural heritage or guilty of unlawful enrichment shall be liable to rigorous imprisonment of not less than 15 years and not exceeding 20 years.⁶⁸⁹

5.7.2.2 Benin

The Order on the Protection of Cultural Property of 1 June 1968 forbids exporting cultural property⁶⁹⁰ except the Minister in charge allows such on the condition that the objects in question have an equivalent either in a general form or in a collective form. An immediate declaration to the local administrative authority who will then notify the national authority is obligatory when objects of antiquity are discovered in a building.⁶⁹¹ Discovered but unclassified antiquities are not to be exported without the authorization of the appropriate authority.⁶⁹² Breaches of Articles 32 and 33 are punishable in accordance with the regulations provided for in customs-related matters.

The prior authorization of the minister in charge is required before any person can carry out excavations or surveys on land belonging to him or her or any other person, of objects from the viewpoint of prehistoric, historic, ethnological, artistic, or archaeological interest.⁶⁹³

Benin has Law No. 20 of 2007 on the Protection of Cultural and Natural Heritage which declares as state property the result of archaeological excavations, regular or clandestine.⁶⁹⁴ Under this law, archaeological goods moveable or immovable, discovered in the territorial water of Benin are regarded as state-owned property.⁶⁹⁵

5.7.2.3 Botswana

After independence, by virtue of the provisions of National Museum and Art Gallery Act of 1967, Botswana established the National Museum and Art Gallery in 1968. This legislation however lacked provisions on fundamental museum functions such as collection, acquisition, documentation, de-accessioning, and exhibition. Later, The Monuments and Relics Act 1970 was enacted and then re-enacted with amendments in 2001. This 2001 Act provides that objects discovered as a result of archaeological

⁶⁸⁹ Article 45(2)(a)(b)(c)

⁶⁹⁰ Benin's Order on the Protection of Cultural Property of 1 June 1968, Article 32

⁶⁹¹ *Ibid*, Article 29

⁶⁹² *Ibid*, Article 33

⁶⁹³ *Ibid*, Article 15

⁶⁹⁴ Benin Law No. 20 of 2007, Article 2

⁶⁹⁵ *ibid*, Article 82

excavation cannot be exported from Botswana without the written consent of the minister.⁶⁹⁶

The Act,⁶⁹⁷ in dealing with Rescue Archaeology provides that on the discovery of any artefact, relic, or any other discovery of an archaeological nature, the discoverer and also the owner or occupier of the land shall without delay notify the Commissioner of Monuments and Relics. The discoverer must immediately suspend the excavation or construction until the commissioner has directed whether the excavation or construction can continue; and if so, the manner in which it may continue. The State has the option to acquire the land.

An archaeological and pre-development impact assessment study and an environmental impact assessment study, shall be done by any person wishing to undertake major development, such as construction or excavation, for the purposes of mineral exploration and prospecting, mining, laying of pipeline, construction of roads or dams, or erection of any other structure, which will physically disturb the earth's surface.⁶⁹⁸

“Pre-development impact assessment” has been defined by the Act⁶⁹⁹ as the study by an archaeologist of an area in which development or any ground disturbing activity is to be carried out, to determine the likelihood of the development or activity impacting negatively on any cultural material or evidence that may be present in the area to be disturbed. No construction or excavation can take place until the relevant authority has considered the report and given permission. Approval may be subject to conditions to protect the natural or cultural heritage.

In Botswana, work is in progress on ratifying the Conventions.⁷⁰⁰

5.7.2.4 Namibia

The principal enactments for the protection of cultural property 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 has provision for heritage inspectors with police powers just as it exists in South Africa's

⁶⁹⁶ Section 18(5)

⁶⁹⁷ Section 12

⁶⁹⁸ The Monuments and Relics Act 1970 as amended in 2001, Section 19(2)

⁶⁹⁹ *ibid*

⁷⁰⁰ Shyllon F., Legislative and Administrative Implementation... *op.cit* :9

National Heritage Resources Act of 1999.

Namibia's National Heritage Act 2004 states in its preamble that it seeks to provide for the protection and conservation of places and objects of heritage significance and the registration of such places and objects in the National Heritage Register. The administrative body for the management of Namibia's cultural heritage is the National Heritage Council.

The Act⁷⁰¹ provides for the establishment of Namibian Heritage Register with respect to places and objects of heritage.

All archaeological and paleontological objects and meteorites are the property of the state⁷⁰² and activities likely to endanger archaeological or paleontological sites or meteorite are prohibited.

Remains of all ships that have been situated on the coast or in the territorial waters or the contiguous zone of Namibia for 35 years or more are declared as historic shipwrecks, and articles associated with such ships are historic shipwreck objects.⁷⁰³ The Council is to recommend to the responsible minister that the place where the remains of a ship are located be declared protected place, and an article associated with a ship be declared a protected object.

Each member of the Namibian Police Force and each customs and excise officer is a heritage inspector as well other persons so appointed⁷⁰⁴ and they may at all reasonable times enter upon any land or premises for the purpose of inspecting any protected heritage resource.

Unlike other African legislation, this Act has a provision⁷⁰⁵ that sets out how the council is to perform its educational function. The council is urged among other things to:

- a. *liaise and consult with local authorities and community leaders in relation to the protection, conservation and maintenance of protected places and protected objects and their environment;*
- b. *educate and encourage owners of land and members*

⁷⁰¹ Namibia's National Heritage Act 2004 , Section 2

⁷⁰² *Ibid*; Section 55

⁷⁰³ Section 57

⁷⁰⁴ Section 60

⁷⁰⁵ Section 65

- of the public to report and protect discoveries of places and objects of cultural, artistic, natural, palaeontological, archaeological, historical or scientific interest;*
- c. publish or promote the publication of guidebooks and similar publications, having an educational purpose in respect of all or any parts of Namibia and its heritage;*
 - d. carry out and encourage research into national, regional and local history of Namibia and its heritage, and publish the useful results of the research;*
 - e. encourage public awareness and participation in heritage matters.*

Shyllon⁷⁰⁶ has referred to the suggestion for the involvement of local authorities as being noteworthy.

5.7.2.5 Democratic Republic of the Congo (DRC)

Democratic Republic of the Congo has a law promulgated in 1971 concerning the Protection of Cultural Property. This law has a unique provision⁷⁰⁷ aimed at deterring illegal export. It provides that no person resident abroad who habitually or occasionally purchases objects of antiquity for resale or any person acting as an agent of anyone, whether resident within DRC or not, may collect in the DRC such objects of DRC's origin whether they are classified or not.

5.7.2.6 Ghana

Ghana has the National Museum Decree, 1969 which prohibits export of antiquities without export permit.⁷⁰⁸ Sale of antiquities without a license from the Antiquities board is also prohibited.⁷⁰⁹ Excavation of antiquities should be done after obtaining a permit from the Museum and Monuments board. Failure to comply with the provisions of the board attracts penalty.

5.7.2.7 Kenya

In 1927, Kenya had some coastal sites protected under the Ancient Monuments Preservation Ordinance, and the National Museums of Kenya was also established. This Ordinance was repealed and replaced in 1934 by the Preservation of Objects of

⁷⁰⁶ Shyllon F. Legislative and Administrative..., *op.cit.*: 37

⁷⁰⁷ Democratic Republic of Congo's Law 1971, Article 34

⁷⁰⁸ National Museum Decree, 1969, Section 1

⁷⁰⁹ *Ibid*; section 7

Archaeological and Paleontological Interest Ordinance which protected sites and monuments demarcated and published in the Kenya Gazette. In 1983, Kenya enacted the National Museums Act, and the Antiquities and Monuments Act both for the protection of the Cultural Heritage. The Antiquities and Monuments Act⁷¹⁰ provides that

“[a]ll antiquities which are lying on or under the ground ... or ... objects of archaeological or palaeontological interest ... discovered in a part of Kenya ... shall be the property of the Government.”

In 2006, Kenya repealed the 1983 Laws and enacted consolidating legislation, the National Museums and Heritage Act of 2006, which inter alia provides for the identification, protection, conservation, and transmission of the cultural and natural heritage of Kenya.

Under this new Act,⁷¹¹ all antiquities that are lying in or under the ground, or being objects of archaeological, paleontological, or cultural interest discovered in any part of Kenya after the commencement of the Act “shall be the property of the government.”

Only licensed persons are permitted to deal in antiquities.⁷¹² The Act⁷¹³ authorizes the minister to compulsorily purchase, on the grounds of preservation and display for the public benefit, an antiquity or protected object if he or she considers that it is in danger of being destroyed, injured, or allowed to fall into decay, or of being unlawfully removed.

the National Museums can in writing require any person, within such period not being less than one month as may be specified by the notice, to furnish the authority with full particulars of all objects in his possession which he or she knows or has reason to believe to be antiquities or protected objects.⁷¹⁴

Only on the authority of an exploration license, or an export permit can an antiquity or protected object be removed from Kenya. The Minister may issue an export permit subject to such terms and conditions as he or she may deem fit, or without assigning

⁷¹⁰ Antiquities and Monuments Act of Kenya 1983, Section 24

⁷¹¹ The National Museums and Heritage Act of 2006, Section 46

⁷¹² Section 49

⁷¹³ Section 50

⁷¹⁴ Section 47

any reason refuse to issue any export permit.⁷¹⁵

The Act allows the Minister to appoint heritage wardens for the purpose of enforcing its provisions.⁷¹⁶

Heritage wardens may, with the leave of the Attorney-General, be appointed prosecutor for purposes of prosecuting offences committed under the Act. An antiquity or protected object can be inspected at any reasonable time by the heritage inspectors.⁷¹⁷ A police officer or heritage warden can effect an arrest with or without a warrant.⁷¹⁸ A customs officer is empowered to search without warrant anything intended to be removed from Kenya, or any person intending to leave Kenya on reasonable suspicion of containing or carrying a monument or part thereof, or an antiquity or protected object and seize such objects if found.⁷¹⁹ Any item seized shall be taken before a magistrate and thereafter be forfeited to the government.

5.7.2.8 Malawi

Malawi has Museums Act 1989 and Monuments and Relics Act 1990 aimed at fighting illicit traffic in cultural property.

Provisions for the conservation and preservation of cultural heritage are found in The Monuments and Relics Act 1990. The Act equally provides for the government to make declaration of protected monuments and relics and also acquire rights and trusteeship over monuments and relics for the preservation thereof after entering into agreement with the owners. The procedure to be followed upon the discovery; excavation; removal; trade; export and import of monuments, relics, and collections of cultural and natural heritage is laid down in the Act.

All monuments and relics, whether movable or immovable, lying on or beneath the surface of the ground or in a river, a lake, or other waters, are the absolute property of the government, except privately owned monuments whose owners establish their title thereto.⁷²⁰ Ownership of any land shall not, in itself, entitle the owner of the land to

⁷¹⁵ Section 52

⁷¹⁶ Section 57

⁷¹⁷ Section 58

⁷¹⁸ Section 59

⁷¹⁹ Section 60

⁷²⁰ Monuments and Relics Act 1990, Section 25

dispose of monuments or relics on or under the surface of that land.⁷²¹ No person shall be involved in trade in cultural objects unless he or she has a valid license. He or she must keep a detailed inventory of the stock and daily sale and purchase transactions.⁷²²

Sections 41–48 have detailed provisions on the export of cultural objects. Cultural objects smuggled or otherwise taken out of Malawi shall within the terms laid down in agreements, treaties, and recommendations of international organisations be the duty of the minister in charge of heritage matters to recover. This Minister may also assist in returning those brought into Malawi from other countries.⁷²³

From the country survey of twenty –seven African countries carried out above, only 70.4%⁷²⁴ and 3.7%⁷²⁵ of the selected African states had ratified the UNESCO and the UNIDROIT Conventions respectively.

It is obvious that both states that have ratified the 1970 UNESCO and 1995 UNIDROIT Conventions and States that have not ratified the Conventions are somehow operating on the same level as regards return and restitution of cultural property. It can therefore be said that no African country as at today, has any legislation specifically aimed at implementing the provisions of the 1970 UNESCO and 1995 UNIDROIT Conventions. Some countries have, however, luckily passed laws that can be said to have partially implemented the provisions of the Conventions in some areas. This brings to light the fact that it can be optional for States to actually pass an implementing legislation for the Conventions once there are other avenues of implementing the provisions of the Conventions. For example, Kenya (a non-member) in Antiquities Act 1983 and Egypt (a member) under Egyptian Law 117 of 1983 both declared state ownership of cultural property. Madagascar in her legislation passed in 1982 which was seven years before joining the Convention states that the law is an attempt *totally or partially* to stop looting and illicit trafficking. Mauritania’s legislation enacted in 1972, five years, before membership of the Convention talks about the imprescriptibility of cultural property,

⁷²¹ Section 26(5)

⁷²² Section 36

⁷²³ Section 49

⁷²⁴ The percentage was arrived at as 19 out of the 27 countries considered have ratified the 1970 Convention.

⁷²⁵ This percentage was arrived at as only Nigeria out of the 27 countries considered have ratified the 1995 UNIDROIT Convention.

movable or immovable. In other words, the law recognizes that cultural objects are *res extra commercium*.

The danger in using this approach,⁷²⁶ of not passing an implementing legislation, 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.⁷²⁷

At this point, the query is why have African Countries reacted in this insouciant manner to the Conventions on return and restitution of cultural property bearing in mind that Africa is a source country for the illicit trade in cultural property?

5.8 Failure of African States to participate as expected in the Conventions

Even though African States agitation in UNGA kick started the need to establish the Intergovernmental Committee, only one case involving an African country has come before the Committee since its inception. African countries had been urged to join the 1970 Convention as far back as 1981. At the second session of the Intergovernmental Committee for Return and Restitution, African nations through the African Declaration declared that “the Conventions relating to the protection of cultural property should be ratified as a matter of urgency.”⁷²⁸ The representative of Malawi at the Windhoek workshop equally urged “the need to speed up” the process of joining on non-members.

The national legislation of African countries found in the UNESCO Cultural Heritage Database are far from a reflection of the buoyant provisions of the Conventions. Going by Article 16 of the 1970 Convention, States Parties are to forward to UNESCO as determined by the General Conference, a report on the legislative and administrative provisions they have adopted and other actions taken for the application of the Convention. The report is aimed at illustrating the action taken as well as the progress made and obstacles encountered in implementing the Convention. At the 32nd General Conference of UNESCO in October 2003, the periodicity for reporting was set at a four year interval by 32C/ Resolution 38. Following this, the presentation of States reports took place during the 36th General Conference and from African region, only five states

⁷²⁶Similar to how the United States utilise her Stolen Property Act and Archaeological Resources Protection Act and other laws to combat illicit trafficking in cultural property. The United Kingdom has not passed a new legislation on cultural heritage generally since it became a member of the Convention but uses existing powers under other Acts and a new piece of legislation on criminal import of illicitly exported cultural objects known as Dealing in Cultural Objects (Offences) Act 2003.

⁷²⁷Shyllon F. Legislative and Administrative Implementation...p.12

⁷²⁸IGC, Second Session 1981. UNESCO Doc. CC-811/CONF.203/10 quoted in Shyllon F. *ibid*

out of the twenty-seven state parties sent their reports. These states are Angola, Botswana, Burkina Faso, Mauritius and Nigeria. The content of these reports from the five states however do not reflect any serious or tangible progress.⁷²⁹

Despite the elaborate provisions UNESCO and her partner institutions have put in place on the return and restitution of cultural property to source countries, and the fact that they have been enjoined on several occasions to do so, the failure of African states to embrace the Conventions has persisted and according to Shyllon,⁷³⁰ this situation may be attributed to the following:

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

In an attempt to sample the opinions of some Africans on their knowledge and perception of the subject matter under discussion, unstructured interviews were conducted on randomly selected politicians, lawyers, judges and members of the public within Ibadan metropolis. The information elicited among others buttresses the points as noted by Shyllon above which is expatiated on below:

1. **The failure of African lawyers, judges, politicians and members of the public 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.** Majority of the lawyers, members of the bench, politicians and members of the public that I related with on the topic had no idea about what issues are implicated in the discussions on return and restitution of cultural property. They equally did not see any need to be concerned about these issues because of the influence of western religion and modernity which has devalued our African history to such an extent that

⁷²⁹Examination of the report by Member States and other States Parties on measures taken in application of the Convention. Retrieved 5 November, 2014 from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural->

⁷³⁰*ibid*

African's now view their history "with borrowed eyes".⁷³¹ The lawyers, magistrates and judges couldn't remember handling cases involving theft of cultural property items. The only case found was that of *Commissioner of Police v. Kayanka*.⁷³² The decision of the Ibadan magistrate in this Nigerian case reflects the lack of interest of the legal minds in Africa in heritage matters. The decision in that case might have been otherwise if the magistrate was knowledgeable in cultural heritage law. In this case, an alien indicted for the offence of unlawfully buying and selling antiquities without being an accredited agent of the National Commission for Museums and Monuments contrary to section 21(1)(a) and (b) of the 1979 Act and punishable under section 21(2) of the Act was discharged and acquitted on the ground that the prosecution failed to prove that the items seized were antiquities and ordered that the National Commission for Museums and Monuments should return the artefacts to the accused person. The Commission had to appeal to the High Court for a stay of execution to retain possession of the antiquities. This leads to the conclusion that the knowledge members of the legal profession have about cultural heritage will surely go a long way in determining the quality of judicial decisions in such matters.

2. Political indifference symptomatic of the post-colonial state in Africa- In 2010, Sothesby, a major international auction house in London, announced that it would sell a Benin pendant mask at its February 2011 auction in London. The piece was put on sale by members of the Galway family, who were descendants of Henry Galleway- a British envoy who laid the groundwork for the conquest of Benin. Nigerians at home and abroad rallied together to serve as pressure groups to mount pressure against the sale which made Sothesby and the Galway family to withdraw the sale. It is sad to acknowledge that the Nigerian government especially its cultural officers, did not make a squeak of protest in this successful fight for the dignity of Africa and the restoration of African memory.⁷³³

⁷³¹ The phrase was adopted from the translation given to the words used in Yai O., 2007. Perspectives africaines sur le patrimoine culturel, by Blake J (ed) in Safeguarding Intangible Cultural Heritage: Challenges and Approaches. A collection of Essays. Great Britain: Institute of Art and Law: 14

⁷³² *Commissioner of Police v. Kayanka*. Charge No.MI/602C/91

⁷³³ Schultze K, Update III: Sothesby's cancelled sale of Benin Artefacts, Contemporary Arts in Northern Nigeria, 26 December, 2010, <http://katrinschulze.blogspot.com/2010/12/update-iii-sothesbys->

3. The cost and duration of pursuing cases in foreign courts.

4. The failure of previous attempts to recover cultural objects in foreign courts-

The case of *Federal Republic of Nigeria v. Alain de Montbrison*⁷³⁴ where the Paris Court of Appeal rejected the claim by Nigeria for the return of Nok statuettes illegally exported from Nigeria by a French antique dealer on the grounds of non-extraterritorial application of foreign public law is apt.

5. Erroneous belief that a good domestic legislation could be sufficient-

This point can be buttressed from statements made by speakers from Botswana and Namibia (that have not ratified the Convention) at the Windhoek workshop to the effect that they have enactments that protect cultural objects as if that amounted to membership of the Convention. The representative of Botswana was reported to have 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”!!!⁷³⁵ It is noteworthy to state that the Conventions provide for more than just making requests for restitution.

6. The elongated nature of negotiation for the return of stolen or illegally exported cultural objects.

At the fifth session of the Committee in April 1987, “a member of the Committee remarked that few complaints were received from Africa.”⁷³⁶The 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 and it is the only African case that has come before the committee. African countries can equally point to the fact that Greece’s request before the Intergovernmental Committee, for the return of the Parthenon Sculptures, which goes back to 1984, has not been returned.

At this point, is it good enough to fold our arms and continue to watch the displacement of Africa’s cultural property go on unhindered while we allow the efforts of UNESCO and partner institutions to have no efficacy over our continent? Should the rape of Africa

cancelled-sale-of_26.html. adapted from Ogundiran A.2012. Crises of Culture and Consciousness in the PostColony. What is the Future for Nigeria? Institute of African Studies, University of Ibadan: 28-30

⁷³⁴ *supra*

⁷³⁵ *ibid*

⁷³⁶ IGC, Fifth Session. 1987. UNESCO Doc. 24/C/94 quoted by Shyllon F., Legislative and Administrative Implementation...*op.cit*:15

continue unabated in a way that the future generations are denied of the priceless portion of the inheritance which should epitomize their enduring identity? I do not think so. This leads to the next chapter which proffers recommendations on the way forward out of this predicament.

CHAPTER SIX

SUMMARY, RECOMMENDATIONS AND CONCLUSION

6.1 Summary

The protection of cultural objects is the protection of societies, peoples, and communities.⁷³⁷ The need to combat dislocation of cultural property through plunder, pillage and looting as a result of war resulted in the use of public international legal instruments such as treaties and Conventions. Failure of these instruments to stem the tide of dislocation of cultural property led UNESCO to inaugurate the 1970 UNESCO Convention.

The 1970 UNESCO Convention aimed at ensuring cultural property is preserved within national boundaries by codifying the principle of public international law to the effect that illicitly exported cultural property must be returned to its State of origin. This Convention set out to ensure conformity with national protective regimes for cultural property between nation states in their relationships.

The 1995 UNIDROIT Convention revalidates the international law principle of returning cultural property to its state of origin. This was done from the private law dimension thereby correcting the shortcomings of the 1970 UNESCO Convention. The two Conventions, while augmenting each other, have noticeably removed the unpleasant features in the movement of cultural property across borders and trade in the art market by introducing a moral quality into the art market. The public-private law partnership has led to the formulation of UNESCO-UNIDROIT model law on State ownership of undiscovered cultural objects and also enhanced more interrelationship between public and private international law.

The workings of both Conventions to bring about implementation of their provisions by the non-state actors partnering with UNESCO and UNIDROIT has led to the formulation of various guidelines and policies.

⁷³⁷ Statement made by the Director General of UNESCO, Irina Bokova through a recorded message welcoming participants to the second Meeting of States Parties to the 1970 UNESCO Convention.

Despite this decentralised system of regulation, African States that have lost a large part of objects that qualify as cultural property are yet to allow the efficacy of the Conventions in Africa.

Maximum benefits are derivable from Conventions upon ratification, domestication and implementation. Presently, only 50.0% and 5.6% of African States have ratified the 1970 UNESCO Convention and 1995 UNIDROIT Convention respectively. No African country has any legislation specifically aimed at domesticating the provisions of both Conventions making implementation largely impossible. The efficacy of the Conventions in Africa have therefore being hindered.

The way forward in this situation is therefore the bane of the next subsection.

6.2 Recommendations

Having considered all issues involved in return and restitution of cultural property to their countries of origin and discovering how Africa is faring in this area in relation to the aim of UNESCO for source countries like Africa, when it embarked on the laudable project in this field, proposing the way forward for Africa through recommendations is apt.

The recommendations will be in two parts. The first part will be recommendations to African countries while the second part will be recommendations to UNESCO and UNIDROIT, the international bodies concerned in this issue of return and restitution, as well as their partner institutions.

6.2.1 Recommendations to African countries

'Think globally, but act locally'.⁷³⁸

Widespread lack of awareness of the problem and a lack of priority given to the issue is the major problem of African countries. Positive practical steps must be taken by African governments instead of waiting and expecting society to fix itself.

To feel the impact of the Conventions, African countries have a lot to do internally. The following are hereby recommended:

⁷³⁸ Becerril Ernesto, The Necessary Evolution of the Mexican Law under the New Paradigm of the 1970 UNESCO Convention in order to Strengthen the Fight against the Illicit Trafficking of Cultural Property. Jorge A.S. Ed. 2013. The 1970 Convention New Challenges, Mexico: *Universidad Nacional Autonoma De Mexico*. 45-55 at 54

6.2.1.1 At National Level

1. Making cultural property Protection a priority issue:

Effective combat of displacement of cultural property require resources in the form of money, trained manpower, facilities and logistics. Once the government of a country puts cultural property matters high on its scale of preference in allocation of resources, there will be adequate funds to operate in the sector internally.

2. Improvement of Status of Heritage Treaties/ Conventions

In Africa, especially Nigeria, Cultural property should be removed from the category of treaties which may or may not need to be ratified under the Nigerian Treaties Act. This will ensure that agencies of government and executive authorities would not be emboldened to conclude agreements which might not serve the overall best interest of Nigeria as happened with the three Nok objects. However, it is suggest that the self-executing status that has been accorded under the Nigerian Constitution to the Conventions dealing with labour matters probably because they affect human dignity, should be accorded cultural heritage Conventions as there can be no dignity without identity. This will go a long way in ensuring that the citizens are able to checkmate the fulfilment or otherwise by the government of her obligations under the Conventions.

3. Building coalition among municipal laws

There is a need for all areas of municipal laws to be involved in protecting cultural property due to the peculiar nature of cultural property. All aspects of municipal laws like town planning laws, environmental laws, land use laws and so on should have provisions protecting cultural property.

4. Harmonisation of rules - African states are hereby encouraged to adopt the UNESCO-UNIDROIT Model Provisions on state ownership of undiscovered cultural objects even though it is not a binding document but it provides for state ownership of cultural property as already exists in Egypt and Kenya.

5. Use of Bilateral Agreements: African States should enter into bilateral agreements with other states holding their prized cultural objects. For example, states should consider utilizing the United States mechanism used in initiating bilateral agreements with state parties to the 1970 Convention. Sub-Saharan African countries like Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Niger and Nigeria who like Mali are also on ICOM'S "Red List" of African Archaeological

objects should make use of this opportunity to enjoy the benefits of reducing the influx of its heritage items to the United States.

6. **Utilizing the Alternative Dispute Resolution Methods-** Arbitration, Mediation, Conciliation and Negotiation should be made use of by African states in recovering cultural objects more so when these alternative methods are not affected by the clogs in the wheels of litigation and lead to different outcomes which make for cordial relationships and compromise.
7. **Promoting public awareness through education-** No matter how well-crafted legislation is, its provisions cannot be fully actualized if the people, especially those at the grassroots, are not educated as to its importance. The people need to be sensitized through education and public awareness programs on the negative effects of displacement of cultural property and the need for their restoration. Such avenues to promote public awareness of the advantages that may be derived from the proper placement of cultural property include seminars, use of broadcasting houses, newspaper advertisement and enlightenment and so on. The local people can be educated as to the existence of law prohibiting looting of sites and their attention drawn to the need for protection in the interest of posterity. There must be extensive publicity on the damage caused by destruction of antiquities through dismembering and theft from collections with an explanation of the negative effects of displacement and why it must be prevented and stopped. Television programs and radio broadcasts can be a very successful tool in this area.⁷³⁹ The general public should be sensitized too about the need to build up the old and ancient legal constraint on sale of cultural objects as existed in the olden days which has now been broken down due to westernization.
8. **Enhancing formal education on cultural property-** The study of history is being eroded from the curriculum of schools right from the primary to the tertiary levels in some African countries like Nigeria. It should be noted the schools are the best centers for education of the literate percentage of the populace. The curriculum of schools should be well adjusted to accommodate the values and benefits of cultural property.

⁷³⁹ O'Keefe P. 1997. *Trade in Antiquities, Reducing Destruction and Theft*. London and Paris: Archetype Publications Ltd and UNESCO: 95

9. Organizing trainings and workshops- Government at all levels, policy makers, religious organisations, governmental, non-governmental organisations, civil society leaders and young people must be actively educated through trainings and workshops on the need and importance of protecting and ensuring the return and restitution of cultural property and thereafter involved in the sensitization of the masses and those at the grassroots.

10. Training of law enforcement personnel- knowing fully well that a list of procedures and best practices will help facilitate the work of police forces in the fight against the illicit trafficking of cultural property,⁷⁴⁰ their training should be centered on how to identify, handle and store heritage objects. Other African countries should emulate South Africa's system of sophisticated training scheme for her heritage inspectors in this regard. For national cooperation, other African countries can emulate South Africa which has a National Forum for the Law Enforcement of Heritage related matters (NALEH) established to create a platform for a working relationship between law enforcement and heritage officials which comprise of South African Police Service, Customs, Interpol, South African Heritage Resources Agency, ICOM South Africa and the University of South Africa. This allows for the dissemination of information and the sharing of ideas regarding the protection of cultural property. Also, to ensure the quick identification of suspected objects, the telephone directory of experts in this field should be distributed to the police. Having a brochure on reporting procedures for illegal handling of cultural objects is equally a great idea highly useful for apprehending heritage criminals and probably expedite police processes.

11. Creation of local museums-

The creation of local museums should be encouraged as affinity to the local people is the best guarantee for the protection of cultural material once it is secured by the people. Many of these irreplaceable objects come from the local and remote areas and these people are the best in terms of positioning to guard

⁷⁴⁰ Working Meeting on Model procedure for restitution of cultural objects on sale. 11 February 2014 - Room VIII, UNESCO Headquarters, Paris. Retrieved October 23, 2014 from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/meetings/forums-seminars-and-information-meetings/working-meeting/#c1383040>

against their loss as they understand the meaning and significance of the objects most.

12. Promulgation of proper legislation at the national level- There is no gainsaying the fact that the present African laws are inadequate in protecting cultural objects. Many of these laws were adapted from European laws and as such do not reflect the African realities. African states should utilize the Basic checklist for national legislation by UNESCO in drafting up to date laws for protecting their cultural property.

13. Capacity building of museum professionals - A lot still has to be done in the area of building capacity in museum professionals even though ICCROM (International Centre for the Study of the Preservation and Restoration of Cultural Property) programme *Prevention dans les Musees Africains (PREMA)*(1986-2000); *Ecole du Patrimoine Africain (EPA)*(1998); the Programme for Museums Development in Africa(PMDA)(2000) which in 2004 was renamed Center for Heritage Development in Africa (CHDA) are doing a great work in training, researching, conservation and development of movable and immovable cultural property.

14. Provision of adequate security of museums- it is an open secret that our security measures around the museums in Africa, (with the exception of South Africa) is not tight at all. The situation depicted by the words of Shyllon⁷⁴¹ in 1996 as regards the status in Nigeria of museums, which is the same for many African countries, that: *“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”* still obtains.

African governments must ensure that the security condition of our museums is tightened. Close circuit television monitoring systems and electronic burglary alarm systems should be installed. While well trained security personnel should be made to man the museums.

15. Entrenchment of uniform documentation of cultural objects - African countries are enjoined to ensure that they have a uniform manner of documenting cultural objects and an adequate database of their heritage items which will go a

⁷⁴¹ Shyllon F. *Implementation...op.cit:* 24

long way in assisting the recovery, proper description and identification of cultural object if missing and the onward transmission of it to its country of origin. Making use of the object ID standard of ICOM is hereby promoted.

16. Provision for adequate Compensation to Chance Finders of cultural objects:

African countries should reappraise their national laws to ensure that they contain provisions adequately compensating chance finders of cultural objects. This, it is presumed, will ensure that such finds are relinquished to the government instead of smuggling them out for remuneration.

17. Effective Utilization of Intergovernmental Committee and facilities -

Bearing in mind the fact that the Intergovernmental Committee was established as a result of agitations by African States within UNESCO, one would expect that African States will maximally utilize whatever the Committee has to offer. Unfortunately, the reverse is the case. Little use of the Committee's good offices in the recovery of their expropriated cultural property has however been made by African countries. Tanzania is the only African country that has filed a case in connection with her stolen Makonde mask. African countries are hereby encouraged to benefit from the work of the Committee more so when it deals with cultural property expropriated before the coming into force of the 1970 Convention and 1995 Conventions. In this regard they should facilitate bilateral negotiations under the auspices of the intergovernmental committee.

18. Export control Provisions- The controversies arising from the wording of the export control provisions of both Conventions has led to the bodies drafting *National Legal Control of Illicit Trafficking in Cultural Property*. African countries are hereby enjoined to comply with this document in securing their cultural property from undue exportation.

19. Criminal Sanctions and Criminal Responsibility- International law is currently moving towards a substantial strengthening of penal instruments that could in future lead to a notable intensification of criminal sanctions for illicit activities in the field of cultural property as discussed under UNODC. To move with this trend, the criminal law provisions of African states should be developed by identifying the objects to be protected and the constituent elements of the offences. Also, there should be an extension of *criminal responsibility* from physical persons to *juridical persons*. This will take care of a number of criminological features in this sector (strong group pressures on individual

participants, porosity between licit and illicit markets), as well as some normative peculiarities (a high presence in the sector of deontological codes, supported by a possible attribution of liability to juridical persons).

20. Endowment of professorial Chairs in African Universities

There is need for provision to be made for experts to come into African Universities. It is suggested that if professorial chairs are endowed, there will be more dynamism in the quest for return and restitution of cultural property with the financial assistance of international bodies or private individuals.

6.2.1.2 At Regional Level

21. There should be a move towards harmonisation of laws through the African Union, (or initially through sub- regional groupings like ECOWAS, the Economic Community of West African States), as is being done in the European Union, for example, through the Council Regulation and Directive.⁷⁴² The Commonwealth scheme for Protection of Cultural Heritage⁷⁴³ within the commonwealth is a good step in this direction though not adequate in this regard as it is not obligatory like the European Union Directive.

6.2.2 Recommendations to the International Bodies

Due to the realities facing the African countries as developing countries such as poverty, lack of infrastructure, manpower, awareness and technical know-how, the following are required of the international bodies behind the Conventions to ensure the effectiveness of the Conventions:

1. Establishing a Joint International Fund

The international bodies should ensure that there is an international joint Fund to assist African countries and other source countries in effecting return and restitution of their cultural objects. Poor requesting states can't afford to pay compensation so all countries must be mandated to pay a certain amount regularly into this fund which will be strictly utilised for this purpose. Voluntary contributions from States and private institutions alone will not suffice as

⁷⁴² 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 latest is EU Directive No 60/ 2014 of May 2014 which a recast.

⁷⁴³ The Commonwealth scheme for Protection of Cultural Heritage, 1993

adopted under Recommendation 6 for the establishment of an International fund for training and education projects.⁷⁴⁴ This joint fund advocated for, it is believed, will give efficacy to the UNIDROIT Convention as can be seen from the comments in the questionnaires answered by Cameroon, Ghana and Mauritius that financial aid is needed in participating in the Convention. The Intergovernmental Committee Fund can assist but as at date, no African country has accessed it.

In the same manner the UN Trust Fund created in 1989 has been assisting in reducing the financial burden of court proceedings on states in settling disputes through the International Court of Justice (ICJ), so also this fund advocated for will assist African States in the cost of legal proceedings, in exploiting the alternative dispute resolution claims and also in bringing claims before the Intergovernmental committee.

2. Provision of infrastructure

International bodies should assist the African countries in supplying materials and equipments needed to facilitate the duties these countries are to carry out under the Conventions. As the African countries join the Conventions, the secretariats of UNESCO and UNIDROIT should ensure that assistance is given to immediately back up the theoretical decision of the countries with action. Presently, the most basic facilities for adequate registration and documentation in inventories required for laying claim to ownership of cultural objects are lacking in the majority of African museums. This has made it difficult to prove title of the object and also debars INTERPOL from putting the object on its page as INTERPOL places only objects with a photograph on its page. Not having adequate documentation of objects also debars international channels from having information immediately the theft of cultural objects is carried out. This point is also partly responsible for the answer given by the African countries in the questionnaire filled at the first meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects to the effect that no claim has been reported or made under the 1995 UNIDROIT Convention.

3. Training

⁷⁴⁴ See IGC, Ninth Session, UNESCO Doc. 29/C/REP.12 and IGC Tenth Session, UNESCO Doc.30/C/REP.4

It has been mentioned above that equipments and machines are needed to actualize the dreams of the UNESCO and UNIDROIT Convention and thus African countries must be assisted in this regard. It must be mentioned however that it is not enough to assist in ensuring equipments and machineries are in place, the necessary personnel to do the job must also be provided. It would be a good idea if specialists are sent in from ICOM and INTERPOL regularly to train and retrain officers and officials handling the equipments to ensure that things are working as expected in the African countries that are parties to the Conventions.

4. Extensive follow up on State Parties activities

Trainings alone is not sufficient to build capacity, so stakeholder reviews, meetings and mentored use of data on cultural objects inventoried are also necessary for maximum follow up of the activities going on in the territory of state parties in Africa due to the peculiarities of the continent as a result of colonization. For example since the first meeting of the Special Committee to Review the Practical Operation of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects took place on 19th June 2012, it is not on record whether UNIDROIT has taken any steps to work on the points raised by these countries to the questionnaires issued out to them apart from posting them on their website. In line with this point, the proposal should be made to amend Article 20 of the UNIDROIT Convention that provides for the convening of meeting to review the practical operation of the Convention on the President's own initiative at regular intervals or at the at the request of five Contracting States is currently rather too vague. There should be a specific time frame for this considering the importance of the subject matter.

5. Scholarship facilities for Africans

It is suggested that scholarship should be promoted as incentives for Africans to pursue education in disciplines in cultural heritage. Even though some nations could afford to sponsor their citizens, however because of lack of insight into the need for education in this regard, no scholarship facility is provided. It is expected that if provision could be made by international bodies, there will be a break-through.

6.3 Conclusion

The displacement of cultural property is an enduring and even increasing phenomenon. In the context of globalization dislocation of cultural objects constitutes an international phenomenon that threatens to loot, damage and destroy historic testimony and cultural identities.

UNESCO is not expecting that the past will be undone and every work of art returned to the place where it originated. UNESCO with its program on return and restitution of cultural property to its source countries, is equally not after hindering the trade of cultural artifacts, but rather aiming to ensure, together with the international community, that trade of cultural property be based on legitimate and legal grounds validated by all stakeholders. The main objective is to ensure that the heritage of all people can be appreciated in a balanced manner, in all its richness, with the ability to play a fundamental role as an instrument of sustainable cohesion between societies.

The UNIDROIT Convention has effective provision in place and it has achieved its objectives of putting in place minimal rules on private law. Without implementing these rules, the effectiveness of the Convention can never be achieved. The combined provisions of the 1970 UNESCO and 1995 UNIDROIT Conventions are adequate in ensuring Return and Restitution of Cultural Property. The problem we have is at the National level. The disparity in the National Laws of countries and the poor record keeping methods are germane to the loss of Cultural Property and serve as obstacles to return and restitution.

Lack of cultural conscience amongst the citizens and African nations leading to lack of funding the cultural section to be able to create awareness, prosecute cases and clamour for return and restitution is also a major hindrance. It is clear that the Conventions cannot act retroactively and as such are not fashioned after recovering all the treasures lost in colonial times but the Intergovernmental Committee should be well utilized by African states in this regard. The concern of the Conventions is how to guard jealously and preserve what exist today as the cultural patrimony of source countries to be handed down for the future generation to benefit from so as not to perpetuate the calamity of yesteryears. All hands should therefore be on deck in educating the populace on promoting what is left today as objects of our heritage. African law makers should enact laws or update what exists so as to be able to ensure that the facilities put in place on the international plane are given smooth sail at the national level. This is to prevent the

adage that says “*what people learnt from history is that they fail to learn from history*” from holding sway in Africa and thus prevent the further denigration of Africa’s past, no longer by the West but now by Africans through inaction, the first being colonization.

African states should take steps to ensure international cooperation by taking measures to stabilize frontiers and maintain control over works of art within their territory.

The social capital of Africa has to be strengthened, community based economic growth needs to be fostered, individuals need to be empowered in a bid to improve the living conditions of Africa as Africans pave way for her ingress into sustainable development through joining and fully implementing the provisions of the 1970 UNESCO and 1995 UNIDROIT Conventions.

The success of the Conventions as regards Africa depends on how much energy Africa is willing to put into it as the future of Africa now lies in the hands of Africans. Without any effort, the important, laudable and far-reaching facilities in place at the international level for ensuring return and restitution of cultural property will continue to be of little or no impact.

The query may be raised that what effect will joining the Conventions have when not all market countries have joined? My answer to this is that when your house is in order by making sure all necessary measures as put in place by UNESCO and UNIDROIT have been taken to safeguard a nation’s cultural objects, the market countries will have no illegal or stolen objects to acquire.

African countries should therefore work on a document that will allow for the operation on a day to day basis of the 1970 and 1995 Conventions with its provisions transmitted to all government sectors and not only to the Ministries of Justice and Foreign Trade but also to the religious, educational, agrarian and telecommunication sectors because the issue of displacement of cultural material indicts these sectors. The future of benefits derivable from these Conventions in Africa is hinged on the commitment of local authorities, communities, religious institutions, priests, teachers amongst others.

I therefore conclude by joining in reiterating the urgent admonition that has been sounded repeatedly to the African states that have not joined the UNESCO Convention and the African nations that are yet to become States Parties to the UNIDROIT

Convention to ratify⁷⁴⁵ or accede to the Conventions as a mark of their determination to fight a major scourge of our time – dislocation in cultural property.⁷⁴⁶ After this, the States need to take steps to enact cultural property specific legislations, strengthen their enforcement mechanisms and maintain control over the cultural property within their territories.

⁷⁴⁵ Burkina Faso, Cote d'Ivoire, Guinea, Senegal and Zambia are signatories but have not yet ratified the UNIDROIT Convention.

⁷⁴⁶ 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 H.M.1998. African Museum Directors Want Protection of their Cultural Heritage: Conference on Illicit Trade in Cultural Heritage, Amsterdam (22-24 October 1997), *International Journal Cultural Property*. 7: 261 at 264-265; Africom's Red List. 1998. ICOM News, Issue 2; cf. also ICOM website: www.icom.org/redlist/; ICOM News.1998. Issue 2. 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 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 /Clément, E. Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention. 1997. Paris: UNESCO, 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 Retrieved October 26, 2014 from <http://www.un.org/esa/documents/ares54.htm>. Also the text of the Resolution is reproduced in *Uniform Law Review*, 2000-2: 308; Shyllon F. 2014. The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration. *loc.cit*

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APPENDIX

Questionnaire

1. What do you know about Cultural Property/Heritage?
2. Have you heard about Cultural Property Law?
3. What do you know about it?
4. What do you think it means?
5. Do you know of any Cultural Property item? Where?
6. What do you perceive a national monument to be?
7. Have you visited one before?
8. Have you ever been to a museum before? If yes, which one?
9. Have you ever made use of the facilities at the National Archives? When, where and for what purpose?
10. Do you think Cultural Heritage is worth protecting and conserving?
11. Do you think spoliation of Cultural Property items have any effect on a nation?
12. Do you think Cultural Property has anything to do with a nation's identity?
13. Can you refer to Cultural Property as part of a country's riches?
14. Do you think Cultural Property should be protected from plunder and pillage?
15. How do you think this may be done?
16. Do you know of any legislation on protection of Cultural Property in Nigeria?
17. Do you know of any case?
18. Have you ever tried or been involved as a lawyer in any case that has to do with theft of Cultural Property items?
19. If yes, when and how did the case go?

20. Do you think Cultural Property items should be seen as commodities for sale or as items to be preserved and bequeathed to future generations?
21. Do you think the key players in government should ensure that mechanisms are put in place for the conservation of our Cultural Heritage?
22. Are you aware of any international Convention on protection of Cultural Heritage? If yes, which one?
23. Do you feel African Countries stand to gain by joining International Conventions on protection of our Cultural Heritage?
24. Do you think trafficking in Cultural Property items should be compared with drug trafficking?
25. Do you think Cultural Heritage is worth studying? Where and why?