

**THE RIGHT TO THE RETURN OF AFRICAN CULTURAL HERITAGE:  
A HUMAN RIGHTS PERSPECTIVE**

**Submitted in partial fulfilment of the requirements of the degree  
LLM (Human Rights and Democratisation in Africa)**

**By**

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## DECLARATION

I, **LOLADE OLAKITAN SHYLLON**, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements of the award of the degree LLM in Human Rights and Democratisation in Africa.

Signed .....

Date .....

Supervisor: Prof. Andreas Eshete

Signature .....

Date .....

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## **DEDICATION**

This work is dedicated to my Almighty Father.

To you I owe all I am and all I will ever be.

You are the wind beneath my wings.

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## LIST OF ABBREVIATIONS

AFROMET	Association for the Return of the Maqdala Ethiopian Treasures
AU	African Union
ECOSOC	Economic and Social Council
EU	European Union
IJCP	International Journal of Cultural Property
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNIDROIT	International Institute for the Unification of Private Law
WCO	World Customs Organisation



## **PREFACE**

“Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character.

Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathise with the experience of others. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into our rich oral traditions and customs”.

Preamble, South African National Heritage Resources Act 1999.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the study

'Like land, with which there is a close connection, cultural treasures of Africa belong to a vast family of which many are dead; few are living and countless numbers unborn. They have the status of the sacred and the hallowed'.<sup>1</sup>

African countries have watched as thousands of their prized artworks looted during the colonial era, and in present days, stolen or illegally trafficked; continue to be displayed in Western museums. While these cultural objects serve the financial and aesthetic benefit of the museums and peoples in Europe and North America, they are far removed from the African communities from which they originate, and for whom they have spiritual, religious and cultural significance.<sup>2</sup>

Efforts in the field of public<sup>3</sup> and private international law<sup>4</sup> which have been concerned mainly with preventing the continued theft and trafficking of cultural objects, and not with the restitution of those objects plundered during colonialism, have failed to address the injustices of the past, and unsuccessful, as steady streams of African cultural objects, continue to find their way to the western museums and into the hands of private collectors.

The classification of expropriation as theft, illicit traffic and illegal excavation of cultural objects, for the purposes of their return, has failed to take into account the fact that like land, the concept of ownership of cultural objects is generally unknown to African customary law. What exists is the possession of these objects, by leaders for the benefit of the entire community. In other words, ownership is of the entire community,<sup>5</sup> they are not regarded as 'property' but heritage. They provide deeper understanding into African cultures and traditions of the communities from which they originate and for generations unborn.

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<sup>1</sup> Shyllon, F 'The Right to a Cultural Past: African View Points' in Niec, H (ed) (1998) *Cultural Rights and Wrongs* France and United Kingdom: Institute of Art and Law and UNESCO Publishing, 119.

<sup>2</sup> Shaw, T 'Whose Heritage?' (1986)No.149 *Museum*, 46.

<sup>3</sup> The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 1970.

<sup>4</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995.

<sup>5</sup> Elias, T (1956) *the Nature of African Customary Law Manchester*. Manchester University Press, 156.

## 1.2 Statement of the research problem

Bearing in mind that the Vienna Declaration and Programme of Action of 1993<sup>6</sup> states that all human rights are universal, indivisible, interdependent and interrelated, and its demand that the international community must treat human rights globally in a fair and equal manner, this research seeks to answer the following questions:

- i. To what extent have African states succeeded in their quest for the return of their cultural objects?
- ii. What are the inadequacies in the current international legal regime for the return of cultural objects?
- iii. Can the return of African cultural objects properly be identified as a human right issue and will such identification present better chances for their return?
- iv. In what ways can existing international human rights mechanisms be applied in the quest for the return of African cultural objects?

## 1.3 Objectives of the study

First, this research intends to highlight the manner in which many African cultural objects found their way to the West. Second, it examines the content and adequacy of the current alternatives in international law open to African states, aimed at facilitating the return of cultural objects. Third, it seeks to firmly locate the return of African cultural objects within the human rights discourse by expounding categories of human rights which may be relevant to efforts for the return of African cultural objects. Lastly, it explores the possibility of the use of existing mechanisms within the field of international human rights law, for the return of these objects.

## 1.4 Significance of the study

The theft, illicit trafficking or illegal excavations of cultural objects, is a world wide phenomenon.<sup>7</sup> However, no other continent has experienced or continues to experience the negative effects of this phenomenon like Africa. The role of colonialism in the expropriation of the best of Africa's rich cultural heritage, together with its prevailing economic weakness and consequent inability to effectively protect

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<sup>6</sup> Art. 4.

<sup>7</sup> Shyllon, F 'Private Law Beyond Markets for Goods and Services: The Example of Cultural Objects' (2003) *Uniform Law Review* 511-527, 527.

their theft and trafficking or meet the expense of litigation for their return, puts it in a more vulnerable position than other source nations with the same problem.<sup>8</sup>

At present, African states have had little success in their drive for the return of their cultural objects.<sup>9</sup> This research therefore advocates for a human rights approach to the issue of the return of cultural objects, at the international and national levels by both source nations and market nations. By characterising these rights as human rights and not merely property rights,<sup>10</sup> it is hoped that African states can through the use of existing international human rights mechanisms, advocate for and secure the return of their stolen and illegally trafficked cultural objects, regardless of when they were taken.

## 1.5 Hypotheses

This research advances the view that the difficulty experienced in the return of the cultural objects of African states, is a product of the failure to classify the requests for the return as an appeal for the enforcement of the collective rights of African people and not merely as a plea for the return of stolen or illegally trafficked objects, on grounds of morality. The research therefore puts forward the proposition that properly locating the right to the return of African cultural objects as a right within the human rights discourse could present better opportunities of success for African states, than previous attempts under international law simpliciter.

## 1.6 Literature survey

Previous works on the subject matter of this dissertation consist mainly of books and articles in international journals which reveal that there are two schools of thought with respect to the return of cultural objects; the cultural nationalists and the cultural internationalists.<sup>11</sup> Cultural nationalists believe that cultural objects belong to the government of the State in which it is found, and is therefore part of national cultural heritage. This theory gives nations and not humankind special interest in cultural objects, believing that they are best appreciated within the context of their place of origin.

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<sup>8</sup> 'Source nations' refers to artifact rich nations and 'market nations' are those which create a market for these objects.

<sup>9</sup> The return of African cultural objects has occurred through the goodwill of states and private individuals. See Chapter two.

<sup>10</sup> As will be discussed in chapter three the term 'property' is a western concept which does not take into account the cultural significance of African cultural objects.

<sup>11</sup> These terms were used for the first time by John Merryman in his article 'Two Ways of Thinking About Cultural Property' (1986) 80 *American Journal of International Law*, 831-854.

Internationalists on the other hand regard cultural objects as part of a common human culture, best appreciated when exhibited in places accessible to the wider public than the place of the cultural objects origin. Accordingly, they advocate for free movement and trade in cultural objects.<sup>12</sup>

As an internationalist, Merryman is against the practice by source nations of 'hoarding' cultural objects. He argues that their 'indiscriminate' retention of cultural objects 'beyond any conceivable domestic need', sustains the illicit market in cultural objects, fails to exploit these objects as 'valuable resources of trade' and contributes to the cultural impoverishment of people in other parts of the World'. For him, the illegal sale of a cultural object is justifiable where the country of origin is unable to adequately care for it.<sup>13</sup>

Prott rejects what she sees as the insincerity of the internationalist justification for the retention of the cultural objects of source nations by their inability to care for them. She argues that, if only Western States lobbied as hard for the reduction in agricultural tariffs on goods produced by source nations as they do for liberalisation of trade in their cultural objects, national resources of source nations could be dedicated to the protection and conservation of their cultural heritage.<sup>14</sup>

Bator supports the internationalist idea of a 'common human culture' and that once acquired, cultural objects become part of the essence of the acquiring nation which cares for them. Thus, he opposes the return by Britain of the Elgin Marbles to Greece.<sup>15</sup> According to him, the Elgin Marbles have become part of England's national patrimony. 'All such works of art are part of the national capital: they generate income (by attracting tourists, etc.) and they can produce social and psychological benefits for a country and its inhabitants.'<sup>16</sup>

Greenfield questioning the accuracy of labelling as internationalists, those like Bator who advocate the retention of cultural heritage however acquired asks; 'Is it possible that arguments about 'internationalism' may merely disguise nationalism?' For her, 'while cultural treasures may generate

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<sup>12</sup> Forbes, S 'Securing the Future of our Past: Current Efforts to Protect Cultural Property' (1996) 9 *Transnational Law*, 235-275.

<sup>13</sup> See Merryman, J (n 10 above). See also Merryman, J 'A Licit International Trade in Cultural Objects' (1995) 4 *International Journal of Cultural Property* 21- 31, 31.

<sup>14</sup> Prott, L 'International Movement of Cultural Objects' (2005) 12 *International Journal of Cultural Property* 225-248, 226.

<sup>15</sup> The British Ambassador to the Ottoman Empire, Lord Elgin between 1801 and 1812 removed statues from the Parthenon in Greece and sold them to the British museum. Requests for their return, has not been honoured.

<sup>16</sup> Bator, P 'An Essay on the International Trade in Art' (1982) *Stanford Law Review* 34, 275.

universal inspiration and aspiration they are not universally created, nor can there be international possession'.<sup>17</sup> African treasures, she says, 'represent the sum total and explanation of the reality and the past'.<sup>18</sup>

According to Shyllon, requests for the return of cultural objects taken during colonialism or by subterfuge in the same period or thereafter is not cultural nationalism or retentionism, but the assertion of the right of Africans to have adequate representation of their material culture in concrete terms within their borders. For him, it is those in countries these objects are located, and who continue to insist that by their own laws, Africans have no right to them, that are 'disguising their cultural nationalism and pandering to cultural fascism'.<sup>19</sup>

Studies in the field by cultural nationalists have been preoccupied with applying existing international instruments and advocating for national laws in source nations and market nations to adequately provide for the protection and return of cultural objects respectively. Though some of these works have considered the issue of human rights in respect of the right to return of African cultural objects, such treatment has been limited and very general in nature. At best, they allude to the right to culture without detailed consideration of its normative content or related human rights. Furthermore, none of these studies have explored the use of key international human rights mechanisms as a basis for return.

## **1.7 Methodology**

This dissertation is essentially based on library research. Much reliance is also placed on the review of journal articles, international instruments and internet sources in the field of cultural heritage law as well as on the basic concepts of contemporary human rights norms. Two interviews were also conducted. For indepth understanding of circumstances surrounding the plunder of African cultural objects, and insight into their cultural and spiritual significance to Nigeria and Ethiopia respectively, the specific cases of the Benin bonzes and the Maqdala treasures are recounted.

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<sup>17</sup> Greenfield, J (1989) *The Return of Cultural Treasures* Cambridge: Cambridge University Press, 309-310.

<sup>18</sup> As above, 310.

<sup>19</sup> Shyllon, F (n.1 above) 116.

## **1.8 Limitation of study**

This research focuses on the specific African countries of Nigeria and Ethiopia in respect of their efforts towards the return of their tangible and moveable cultural heritage, and advocates a human rights based solution for the benefit of this countries and the entire continent, as the problem is continent wide. The research therefore does not attempt a historical or exhaustive discussion on the theft or illicit trafficking of cultural objects or their return to African countries. Rather it focuses on the human rights perspective to the requests for their return.

## **1.9 Overview of chapters**

This research consists of five chapters. **Chapter one** provides a brief introduction to the subject matter of the study. **Chapter two** describes the plunder of cultural objects which occurred during colonialism and foreign conquest of African countries, and efforts to secure the return of cultural objects, using Nigeria and Ethiopia as examples. **Chapter three** gives a summary of basic concepts in the field of cultural heritage law, and further examines the content of the current legal framework in international law governing the return of cultural objects. **Chapter four** evaluates the content of various rights in international human rights law which support and can be associated with the right to the return of cultural objects, and the potential use of international human rights mechanisms for the return of African cultural objects. **Chapter five** provides the conclusion and recommendations of the research.

## CHAPTER TWO

### AFRICAN CULTURAL HERITAGE IN CAPTIVITY: THE EXPERIENCE OF ETHIOPIA AND NIGERIA

#### 2.1 Introduction

'Why should the finest Ethiopian manuscripts ever produced be held in the Royal Library in Windsor Castle? ....Why should Nigerian children have to go to London to see the Benin bronzes their ancestors produced?'<sup>20</sup>

This chapter provides the background to how African cultural objects have found their way to museums and private collections in the West, by giving a brief summary of looting of cultural objects in Ethiopia and Nigeria during British punitive expeditions in the nineteenth century. It considers the efforts and requests for the return of these objects by these countries and the level of success that has resulted from this.

#### 2.2 A history of plunder

Through out history, conquering armies have plundered the cultural works of defeated countries.<sup>21</sup> In tracing the history of works of art taken all over the world during the 'age of imperialism,' and today found in Western museums, Merryman, summarises the forms it has taken as aggression, opportunism, partage and accretion, conceding that aggression has had the 'longest and richest history'.<sup>22</sup> The Romans beginning with the sack of Veii in 396 B.C and victory over Pyrrhus in 295 B.C., afterwards displayed looted cultural treasures to secure public admiration and support.<sup>23</sup> In the 5<sup>th</sup> Century Attilas's Huns pillaged Western Europe, Genghis Khan's Mongol hordes pillaged China and Central Asia, just as the Crusaders also did in Constantinople.<sup>24</sup>

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<sup>20</sup> Pankhurst, R 'Some Thoughts on Repatriation and Cultural Memory' <<http://www.addistribune.com/Archives/2005/06/10-06-05/Some%20Thoughts.htm>> (accessed 15/10.07).

<sup>21</sup> UNESCO Information Kit on Promoting the Return or Restitution of Cultural Property <<http://unesdoc.unesco.org/images/0013/001399/139969E.pdf>> (accessed on 11/09/2007).

<sup>22</sup> Merryman, J (ed) (2006) *Imperialism, Art and Restitution* Cambridge: Cambridge University Press, 2-10.

<sup>23</sup> As above.

<sup>24</sup> (n. 21 above).



In Africa, the advent of colonialism in the seventeenth and eighteenth centuries was responsible for severe loss of cultural heritage. The introduction of foreign religions by missionaries, led Africans to either destroy or leave to rot their objects, especially those which served spiritual purposes. Other objects were given to colonialists as gifts, either as a mark of hospitality or in exchange for 'Knick-Knacks or gewgaws'. Researchers and archaeologists also removed objects claiming research intentions or for publicising African art. However, it is through plunder, the largest volumes of African objects found their way to the west.<sup>25</sup> Colonialists systematically amassed collections containing items of unique cultural significance for their countries of origin, often in the spirit of intense competition and rivalry amongst them.<sup>26</sup>

### **2.3 The Ethiopian experience: Looting of the Maqdala treasures**

It took 15 elephants and 200 mules to carry off the loot from Ethiopia's old capital, Maqdala. The brutal sacking of the mountain-top city in 1868, Britain's revenge on Emperor Tewodros for taking the British consul and a few other Europeans hostage, razed the city to the ground. The hostages were released unharmed but the battle turned into a massacre and treasure hunt. Tewodros committed suicide and British soldiers stripped his body naked for souvenirs.

They carted off his library and the treasures from a Coptic Christian church nearby. For £4, Richard Holmes, the British army's "archaeologist", acquired the crown of the Abun, the head of the Ethiopian church, and a solid gold chalice from a soldier who had looted them. The booty was collected and auctioned off near Maqdala. Holmes bought 350 illuminated bibles and manuscripts for the British Museum. Other books went to the royal library at Windsor and libraries at Oxford and Cambridge. They are still there, though odd treasures have been returned – usually the less valuable one – as gestures, whenever the British needed to court Ethiopia.<sup>27</sup>

The loot from Maqdala is found today in museums all over Britain and Europe. The British Museum had in its possession, 350 beautifully illuminated Ethiopian manuscripts, which have since been transferred to the British Library. Six other 'exceptionally beautiful' remain at the Royal Library of Windsor Castle. Manuscripts from the loot were sent to the Royal Library in Vienna, the German Kaiser, the Bibliotheque Nationale in Paris, the Bodleian Library in Oxford, Cambridge University

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<sup>25</sup> Shyllon, F 'Unravelling History: Return of Cultural Objects Repatriated and Looted in Colonial Times'. A paper presented at the conference on *Heritage Issues: The Legacy of Conquest, Colonisation and Commerce* at the Willamette University College of Law, Oregon, USA, October 2006. (On file with author).

<sup>26</sup> Greenfield, J (n. 17 above) 91.

<sup>27</sup> 'Let's Have Our Treasure Back Please' *The Economist* July 10 1999. < <http://www.afromet.org/news/archives/000103.html> > (accessed 24/09/07).

Library, the John Rylands Library in Manchester, and several smaller British Libraries.<sup>28</sup> The most famous private collection was bequeathed to Emperor Menilek by the owner, but upon her death the Will was overturned, on the false ground that Menilek had predeceased her.<sup>29</sup> Besides the manuscripts, the loot also included two crowns, a royal cap, and an imperial seal belonging to Tewodros; a golden chalice; ten tabots or altar slabs; a number of processional crosses; two of the Emperor's richly embroidered tents; and pieces of Emperor Tewodros' hair, on display at the National Army Museum in London and the royal drum with which the Emperor issued proclamations.<sup>30</sup>

## **2.4 The return of the Maqdala treasures**

A handful of Maqdala treasures have been returned to Ethiopia since the 1868 punitive exhibition. In the first category, are those returned by the British government piecemeal to maintain cordial relations with Ethiopia, and in the other, are recent returns by private individuals. So far, British Museums which hold by far the largest volumes of the treasures have resisted calls for their return.

### **2.4.1 Early returns of the Maqdala treasures**

In August 1872, Emperor Yohannes IV who succeeded Tewodros, wrote to Queen Victoria and the British Foreign Secretary, requesting the return of two items, a manuscript and an icon. The British government, eager to be on good terms with Yohannes in recognition for his assistance to the British forces during the Magdala campaign, informed the British Museum that it would be a "gracious and friendly act" to yield to the Ethiopian ruler's request. The Museum possessed two looted copies of the requested manuscript and therefore decided to return one.<sup>31</sup> The icon on the other hand could not be found.<sup>32</sup> Again in 1924, during a state visit by Emperor Haile Selassie to England, King George V presented him with Tewodros' crown, and on the eve of her departure after a state visit to Ethiopia in 1965, Queen Elizabeth II presented Emperor Haile Selassie with two items which had been kept at

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<sup>28</sup> Pankhurst, R 'Restitution of Cultural Property: The Case of Ethiopia' (1986) 149 *Museum*, 58.

<sup>29</sup> As above.

<sup>30</sup> Address by Rita and Rita Pankhurst to the British House of Commons July 20 2000. <<http://www.addistribune.com/archives/2000/07/28-07-00/Rita.htm>> (accessed 9/10/07).

<sup>31</sup> Pankhurst, R (n20 above).

<sup>32</sup> As above.

Windsor Castle for close to a century: Tewodros' cap and his imperial seal which she returned 'as a token of our gratitude and esteem'.<sup>33</sup>

#### 2.4.2 Private return of the Maqdala treasures

Since 2002, five objects have been returned from Britain. In January 2002, a Tabot was presented to representatives of the Ethiopian church at a ceremony at St John's Episcopal Church, Edinburgh. Due to religious considerations, on its return the Tabot, was not put on display, but was handed over to the Ethiopian Orthodox church.<sup>34</sup> An amulet was returned in December 2002,<sup>35</sup> and in July 2003 a second Tabot was handed over in Addis Ababa by an Irish doctor who had bought it for an undisclosed sum and immediately returned it to Ethiopia.<sup>36</sup>

A hand-written copy of the Psalms of David was put up for sale by a private collector in September 2003. Members of AFROMET UK spotted it, bought it for £750, and sent it to the Institute of Ethiopian Studies, Addis Ababa University for display in its museum.<sup>37</sup> In May 2004, a Danish Professor, returned a buffalo skin and silver shield belonging to Emperor Tewodros. The shield has now become the single most visited item in Ethiopia.<sup>38</sup> With the exception of the crown, which is believed to have been looted again during the Italian invasion of 1935, all these returned objects remain in Ethiopia.<sup>39</sup>

#### 2.4.3 Efforts for the return of the Maqdala treasures

Recent efforts for the return of the Maqdala treasures have been spearheaded by the Association for the Return of The Maqdala Ethiopian Treasures (AFROMET), launched in April 1999 on the 'solemn occasion of the one-hundred-thirty-first anniversary of the heroic suicide of Emperor Tewodros at

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<sup>33</sup> Pankhurst, R (n 28 above) 59-60.

<sup>34</sup> Second Tabot restored to Ethiopia Second Tabot restored to Ethiopia *AFROMET press release 02 July 03* <<http://www.afromet.org/news/archives/000046.html>> (accessed 9/10/07).

<sup>35</sup> 'Return of amulet puts pressure on British Museum' *The Independent 2 November 2002* <<http://www.afromet.org/news/archives/000007.html>> (accessed 17/10/07).

<sup>36</sup> 'Second Tabot restored to Ethiopia' *AFROMET press release 02 July 03* <<http://www.afromet.org/news/archives/000046.html>> (accessed 9/10/07).

<sup>37</sup> 'Suffragette's Son to Return Holy Book to Ethiopia' *AFROMET press release 16 September 2003* <<http://www.afromet.org/news/archives/000049.html>> (accessed 19/10/07)

<sup>38</sup> 'Ethiopia requests return of looted treasures' *Elginism* October 4 2004. <<http://www.elginism.com/20041004/70/>> (accessed 29/09/07).

<sup>39</sup> Interview with Prof. Pankhurst, Tuesday 23 October 2007.

Maqdala'.<sup>40</sup> With branches in Ethiopia and Britain, the Association has been involved in a vigorous campaign for the return of the Maqdala treasures.<sup>41</sup>

The Association has sent requests for the return of the Maqdala treasures to the University of Edinburgh Library;<sup>42</sup> commanding officers of the British regiments, asking for the return of three pieces of a drum taken at Maqdala;<sup>43</sup> the Queen of England for the six manuscripts in her possession;<sup>44</sup> the British House of Commons; and former Prime Minister Tony Blair.<sup>45</sup> It has also testified before the House of Commons,<sup>46</sup> and made representations to the Special Panel of the University of Edinburgh Library.<sup>47</sup> In January 1995, a motion for the return of the Tabots was 'put down' by Derek Wyatt MP, a supporter of AFROMET.<sup>48</sup> None of these efforts have resulted in the return of the Maqdala treasures by the museums and institutions concerned or by the British government.

Generally, the British response to requests for the return of the Maqdala treasures has been that the law prohibits 'de-accession', of objects from national collections.<sup>49</sup> The Victoria and Albert Museum continues to maintain that the four items on loan from the British treasury and Ministry of Defence, since 1872 and 1868 respectively are 'entirely a matter for the government' and like the British Museum, it cannot 'de-accession' the Maqdala treasures in its possession.<sup>50</sup>

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<sup>40</sup> 'AFROMET launched at Sheraton Addis' <<http://www.afromet.org/news/archives/000014.html>>. (accessed 24/09/07).

<sup>41</sup> Pankhurst, R 'The Ethiopian Millennium - and the Question of Ethiopia's Cultural Restitution' <<http://www.brvillage.co.uk/news-politics-village/87929-ethiopian-millennium-question-ethiopias-cultural-restitution.html>>. (accessed 17/09/07).

<sup>42</sup> 'AFROMET asks for Edinburgh Manuscripts' *AFROMET* December 1 2003 <<http://www.afromet.org/news/archives/000072.html>> (accessed 17/10/07).

<sup>43</sup> 'AFROMET asks for divided drum' *AFROMET* December 1 2003 <<http://www.afromet.org/news/archives/000072.html>> (accessed 17/10/07).

<sup>44</sup> 'AFROMET'S letter to Queen Elizabeth January 27 2004 <<http://www.afromet.org/news/archives/000076.html>> (accessed 17/10/07).

<sup>45</sup> 'Blair Urged to Return Treasures' BBC October 7 2004 <<http://www.afromet.org/news/archives/000100.html>> (accessed 17/10/07).

<sup>46</sup> House of Commons Cultural Property: Return and Illicit Trade Seventh Report, Vol. III < <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmcumeds/59/59.pdf> > (accessed 15/10/07).

<sup>47</sup> 'AFROMET asks for Edinburgh manuscripts' *AFROMET* December 1 2003 <<http://www.afromet.org/news/archives/000072.html>> (accessed 17/10/07).

<sup>48</sup> 'AFROMET motion launched in UK Parliament' *AFROMET Press Release* January 2005 <<http://www.afromet.org/news/archives/000105.html>> (accessed 17/10/07).

<sup>49</sup> Section 3 (4) British Museum Act 1963.

<sup>50</sup> n. 31 above.

In 2005, the University of Edinburgh rejected AFROMET's request for the return of Ethiopian manuscripts in its collection,<sup>51</sup> on grounds that there was no evidence it had the mandate of the Ethiopian people or government or that the objects claimed 'were of major cultural, religious or scientific significance', issues adequately addressed by AFROMET in its statement in support of the request.<sup>52</sup> This was despite the Ethiopian culture minister letter in support of AFROMET efforts and that Ethiopia is a country of 25 million Orthodox Christians, who hold the manuscripts as sacred.<sup>53</sup> A primary concern the panel added, was conservation.<sup>54</sup>

## 2.5 The Nigerian experience: The looting of the Benin bronzes <sup>55</sup>

Following the abolition of slavery at the beginning of the nineteenth century, the British established authority over all the major trading centres except the ancient kingdom of Benin.<sup>56</sup> The insistence of the Benin Kingdom on retaining its sovereignty and trading independence frustrated the profitability of British trade and led to calls for the deposing of the Oba in an attack whose cost was fore planned to be defrayed by the sale of cultural objects plundered. This is evidenced in a report by Acting Consul General, James Philips to Whitehall;

'The whole of the English merchants represented on the river have petitioned the government for aid to enable them to keep their factories (trading posts) open, and last but not least, the revenues of this Protectorate are suffering ... I am certain that there is only one remedy. That is to depose the King of Benin ... I am convinced that pacific measures are now quite useless, and that the time has now come to remove the obstruction ... I do not anticipate any serious resistance from the people of the country - there is every reason to believe that they would be glad to get rid of their King - but in order to obviate any danger, I wish to take up sufficient armed force ... I would add that I have reason to hope that sufficient ivory may be found in the King's house to pay the expenses incurred'.<sup>57</sup>

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<sup>51</sup> University of Edinburgh Press Release February 28 2005 <<http://www.afromet.org/news/archives/000101.html>> (accessed 17/10/2007).

<sup>52</sup> 'AFROMET sets out Edinburgh case' *AFROMET Press Release* November 29 2004 <<http://www.afromet.org/news/archives/000101.html>> (accessed 17/10/07).

<sup>53</sup> 'University criticised for keeping looted manuscripts' *The Scotsman* March 1 2005 <<http://www.afromet.org/news/archives/000108.html>> (accessed 17/10/07).

<sup>54</sup> 'University refuses to return Ethiopian artefacts' *The Herald* March 1 2005 <<http://www.afromet.org/news/archives/000107.html>> (accessed 17/10/07).

<sup>55</sup> Benin bronzes include objects made not only of metal but also wood, ceramics, ivory, leather, beads and cloth. See Ben-Amos, P (1999) *Art, Innovation, and Politics in Eighteenth-Century Benin*, Bloomington and Indianapolis: Indiana University Press, 21.

<sup>56</sup> The British and the Benin Bronzes <<http://www.arm.arc.co.uk/britishBenin.html>>. (accessed 29/08/07)

<sup>57</sup> As above.

Philips informed the Oba of his impending visit, but ignored his request to delay the visit, due to a customary ritual during which foreigners were prohibited from entering the city. This resulted in an attack on the party in which the entire British party, save two were killed, in an ambush orchestrated by an aide of the Oba.<sup>58</sup>

What followed was an invasion of the city by the British, in which the Oba was deposed, the city burnt and thousands of objects in wood, ivory and bronze were looted and taken to London as spoils of war, altering the social, religious and political circumstances surrounding the century old creation of bronzes and other cultural objects which had been carried out under a system of royal patronage and control, centered on the kingship.<sup>59</sup> It is estimated that between 3000 and 5000 Benin works, representing centuries of historical and religious of the Benin Kingdom were taken to England.<sup>60</sup> The Foreign Office sold considerable quantities of the Benin bronzes to defray the costs of the expedition, the largest being acquired by Germany.<sup>61</sup> Colonisation has thus left Nigeria with the smallest collection of the Benin bronzes after Germany (Dahlem in Berlin 4,000 pieces), United Kingdom (British Museum, 700 pieces; Pitt Rivers Museum, Oxford University, 393 objects), and United States of America (Metropolitan Museum of Art, New York, about 200 pieces).<sup>62</sup>

## 2.6 Efforts for the return of the Benin bronzes

Numerous requests have been made by the Nigerian government and the Obas of Benin for the return of their Bronzes.<sup>63</sup> In 1968, when a National Museum was planned for Benin City, an appeal was made through the International Council of Museums (ICOM) at its General Assembly in Paris in 1968, but no reaction was received from any quarters.<sup>64</sup> The museum was therefore left to display lesser objects and mere casts and photographs of the pieces that once belonged to Benin.<sup>65</sup>

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<sup>58</sup> As above.

<sup>59</sup> Freyer, B (1987) *Royal Benin Art In the Collection of the National Museum of the African Art* Washington and London: Smithsonian Institution Press, 45.

<sup>60</sup> Nevadomsky, J 'Casting in Contemporary Benin Art', *African Arts*, Volume XXXVIII, Number 2, 2005.

<sup>61</sup> n.56 above.

<sup>62</sup> Biobaku, S 'Opening Address' in Alagoa, E. and Awe, B *Nigerian Antiquities* Report of a Symposium at the Institute of African Studies University of Ibadan ,20 - 23 April 1972, 14.

<sup>63</sup> See the letter by the late Member of the British Parliament Bernie Grant to the Director of the Art and Gallery Museum, Scotland, dated 10 December 1996 < <http://www.arm.arc.co.uk/about.html>> (accessed 29/08/2007).

<sup>64</sup> Greenfield, J (n.17 above) 123.

<sup>65</sup> Eyo, E 'Nigeria' in "Return and Restitution of Cultural Property: Viewpoints' (1979) 31 *Museum* 19, 21.

A request was made by the Africa Reparations Movement, to the Director of Art Gallery and Museum in Glasgow on behalf of the Oba of Benin, for the return of the Benin Bronzes in its possession. The Director of the gallery in turning down the request stated that their Benin items are on permanent view to the public and their withdrawal from these displays would limit the visitors' understanding of the world'.<sup>66</sup> Again, in the run up to the centenary of the plunder of the Benin bronzes, the Oba of Benin launched a campaign for their recovery. Signatures were collected in support of the course worldwide, posters printed and widely circulated both within and outside Nigeria depicting some of the plundered bronzes with the inscription "We Want Our Treasures Back,"<sup>67</sup> but in the end, nothing came of these efforts.

The effects on the national morale of these unsuccessful attempts for the return of the Benin bronzes cannot be overemphasised. This can be gauged from Nigeria's reaction to the British refusal to release on loan the Benin ivory mask. A Nigerian movie *The Mask* was made in 1980, which indicated the only way of achieving its return was theft from the British Museum.<sup>68</sup> In March 2002, the lower house of Nigerian Parliament, passed a unanimous resolution calling on the President to request the return of all the Benin bronzes by the British Museum to Nigeria.<sup>69</sup>

## 2.7 Conclusion

The limited success achieved in securing the return of Ethiopian and Nigerian cultural objects despite the spirited efforts, typifies the experiences of many other African countries. At the time of granting of independence to former colonies in 1960's the looting of art work as war booty had been firmly been established as contrary to international law, as evidenced by the international agreements in this regard.<sup>70</sup> The position therefore is that, while the plunder of African cultural heritage during colonialism was not in itself a violation of human rights principles as they exist today, their continued retention is. By failing to recognise that the retention of African cultural objects poses no justification in human rights law, but is contrary to its principles, States which continue to cling to them, do so in violation of

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<sup>66</sup> Shyllon, F 'Museums and Universal Heritage: Right of Return and Right of Access' *Lecture delivered in celebration of the International Museum Day at the Women development Centre, Abuja Nigeria, May 18 2007.*(on file with author).

<sup>67</sup> 'Treasure Hunt' *West Africa* November 11-17 1991.

<sup>68</sup> Greenfield (n. 17 above) 141.

<sup>69</sup> Shyllon, F 'Cultural Heritage Legislation and Management in Nigeria' (1996) 5 *International Journal of Cultural Property*, 235.

<sup>70</sup> The Hague Conventions of 1899, 1907 and 1954, and the Washington Pact of 1935.

the human rights of African people.<sup>71</sup> However, rather than seek to readdress this continuing injustice, focus shifted to the creation of legal frameworks for the prevention of theft and illicit trafficking in cultural objects, in present times.

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<sup>71</sup> See further, Chapter four.



## CHAPTER THREE

### FOUNDATIONAL CONCEPTS AND THE INTERNATIONAL LEGAL FRAMEWORK FOR THE RETURN OF CULTURAL HERITAGE

#### 3.1 Introduction

But the cultural heritage is a seamless tapestry that cannot be cut into little squares and shared around internationally.<sup>72</sup>

This chapter gives a summary of key concepts in the field of cultural heritage law, its evolution as a branch of law and the influence of human rights law, albeit minimal, on its development. Thereafter, it gives an overview of the provisions of binding international Conventions which govern the return of stolen and illegally excavated and the restitution of illegally exported cultural objects. Finally an assessment is made of the adequacy of the existing framework.

##### 3.1.1 Defining cultural heritage

There is no universally accepted definition of cultural heritage. A typically 'internationalist definition, 'includes the sorts of things that dealers deal in, collectors collect, and museums acquire and display: principally works of art, antiquities, and ethnographic objects'.<sup>73</sup> From the nationalist perspective, it has been described as encompassing 'those things and traditions which express the way of life and thought of a particular society, which are evidence of its intellectual and spiritual achievements. They represent a particular view of life and witness the history and validity of that view'.<sup>74</sup>

Moving beyond the nationalist - internationalist debate, various international instruments on the subject matter have employed definitions best suited for their purpose, while national laws adopt a variety of definitions.<sup>75</sup> The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention) defines cultural heritage as falling between three

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<sup>72</sup> Coggins, C 'United States Cultural Property Legislation: Observations of a Combatant' (1998) 7 *International Journal of Cultural Property* 52, 63.

<sup>73</sup> Merryman, J 'Cultural Property Internationalism' (2005) 12 *International Journal of Cultural Property* 11-39, 12.

<sup>74</sup> Prott, L 'Problems of Private International Law for the Protection of the Cultural Heritage' (1989) V, *Recueil des cours* 217-317, 224.

<sup>75</sup> For details of the different definitions adopted in national legislation, see the UNESCO Cultural Heritage Laws Database < [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=24840&URLDO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=24840&URLDO=DO_TOPIC&URL_SECTION=201.html) > (Accessed on 05/0907).

categories: movable or immovable property, buildings for the preservation or exhibition of moveable property such as museums and centres containing monuments which hold large numbers of property.<sup>76</sup>

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention) talks of 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 any of the categories listed from paragraphs (a) to (k).<sup>77</sup> The Convention recognises five other categories of objects as necessarily forming part of the cultural heritage.<sup>78</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the UNIDROIT Convention) defines cultural objects 'as those which, on religious or secular grounds are of importance of archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention'.<sup>79</sup>

This research accepts as a starting point, the nationalist definition of cultural heritage and for the specific purposes of its subject matter, the definition of the UNIDROIT Convention with regards cultural objects. However it goes further to proffer that to be satisfactory, any definition of cultural heritage must also reveal the importance heritage plays as an element of cultural identity for traditional or indigenous communities, in the realisation of the right to culture and associated human rights like religion and education. The fact that 'culture' the right to which is recognised by international law precedes both contested terms, indicates its centrality to this branch of law and must therefore be central in its definition, otherwise, its use becomes superfluous. Culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group.<sup>80</sup>

### 3.1.2 Categories of cultural heritage

Cultural heritage can be classified into five main categories. One category includes monuments and sites, whether archaeological or man made, believed to be of special significance. Examples of such

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<sup>76</sup> Art. 1

<sup>77</sup> See Annexure A.

<sup>78</sup> Article 5.

<sup>79</sup> The Annexure contains exactly the same categories in article 1 of the UNESCO Convention, to allow both Conventions work together and encourage their ratification by States. Prott, L 'UNESCO and UNIDROIT a Partnership against Trafficking in Cultural Objects' (1996) 1 *Uniform Law Review* 59-71, 62.

<sup>80</sup> Preamble, UNESCO Universal Declaration on Cultural Diversity [http://www.unesco.org/education/imld\\_2002/universal\\_decla.shtml](http://www.unesco.org/education/imld_2002/universal_decla.shtml) (accessed 28/10/07).

immovables include prehistoric caves with evidence of human life, mountains and lakes or ritual and ceremonial sites. Another category to which this research relates is moveable cultural objects comprising: artworks; objects of pre-historic importance, like human and animal remains; objects of daily life, like clothing; objects of scientific importance like fossil evidence of biological evolution. Together these two categories represent tangible aspects of cultural heritage.<sup>81</sup>

The remaining three categories belong to the realm of intangible heritage. The third category represents Ideas on which new skills and techniques are built, some but not all of which may be covered by intellectual property law rules on copyright, patent and designs protection. A fourth category is that of patterns of knowledge and behaviour embodied in skills, like samurai sword polishing or rituals like initiations or ceremonies. It also encompasses folklore; oral history passed through myths, songs, and words, and music and dance. The final category, which is related to all others mentioned above, is information. For example, the information on how a musical object was used, by whom and on what occasion. This is necessary, as a cultural object is less valuable to the further development of a culture where such information is unavailable.<sup>82</sup>

### 3.1.3 Cultural property or cultural heritage?

The term 'Cultural Property' was first in a legal document in the 1954 Hague Convention, and thereafter in the 1970 UNESCO Convention. However, recent UNESCO instruments on the subject matter have adopted the term Cultural Heritage,<sup>83</sup> and 'Cultural Objects' used in the UNIDROIT Convention, was chosen as a compromise between these two terms.<sup>84</sup> Whilst cultural internationalists prefer, the term 'property', in line with their desire for the free movement of objects between countries, while cultural nationalists prefer 'heritage', reflecting a need to preserve in order to pass on to future generations of a specific culture.<sup>85</sup>

Those that advocate for the use of heritage do so based on two main arguments. First, they assert that the already established field of property law, does not accommodate the five categories of cultural

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<sup>81</sup> n.1 above, 224-226.

<sup>82</sup> As above.

<sup>83</sup> For example the Convention on the Protection of the Underwater Cultural Heritage 2001; Safeguarding of the Intangible Cultural Heritage 2003.

<sup>84</sup> Prott, L (n. 74 above) 226.

<sup>85</sup> For a summary of the cultural internationalist perspectives, see Merryman (n 15 above) and the nationalist response to that article by Prott, L ( n.14 above).

heritage.<sup>86</sup> Second, the term 'property' is seen as an entirely western concept: it connotes ownership and the power to alienate and control to the exclusion of others and has commercial undertones, encouraging theft and illegal trafficking of objects.<sup>87</sup>

Restricting the meaning of culture in this context to 'property', which is not a universally accepted concept in relation to cultural objects, without the central focus being placed on enjoyment of cultural rights, impairs the enjoyment of cultural rights by those 'cultures' which do not recognise it as such. Two cases illustrate this. In *Milirrpum v Nabalco Property limited*<sup>88</sup> the court accepted the unique relationship Australian Aboriginals had with their land. Rather than believing that the land belonged to them, they believed that they belonged to the land and that it had been entrusted to them by their ancestors.<sup>89</sup> In *Mullick v Mullick*,<sup>90</sup> the Privy Council held that a Hindu idol was a legal entity which could not be dealt with as mere chattel, and that its interest was entitled to be represented in court by a 'next friend'.

In both cases, the consideration of the 'objects' in their cultural context and not only as property was crucial for the enforcement of the cultural rights of those concerned. The term heritage on the other hand is neutral, in that, it does not convey a concept exclusively recognised by one culture or legal system, and gives room for individuals and communities to identify for themselves the aspects of their culture they consider to be important and worthy of protection.

Developments in human rights law have however influenced present perceptions on this debate.<sup>91</sup> The growing body of human rights law in the context of both culture and cultural identity and the recent efforts to address the problems faced by indigenous populations in protecting their heritage,<sup>92</sup>

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<sup>86</sup> Prot, L and O'Keefe, P 'Cultural Heritage' or 'Cultural Property'? (1992) 1 *International Journal of Cultural Property*, 307-320, 310.

<sup>87</sup> As above. See also Blake, J 'On Defining Cultural Heritage' (2000) 49 *International and Comparative Law Quarterly* 61, 65.

<sup>88</sup> (1971) 17 F.L.R., 141.

<sup>89</sup> As stated earlier, ownership of land is unknown in most African customary law. See further Elias (n.4 above).

<sup>90</sup> (1925) LR LII Indian Appeals, 245. Also discussed in Duff, P 'The Personality of an Idol' (1927) *Cambridge Law Journal*, 42.

<sup>91</sup> See Chapter four for indepth discussion.

<sup>92</sup> See Final Report on the Protection of the Heritage of Indigenous Peoples, UN Doc.E/CN.4/Sub.2/1995/26.

including the intangible,<sup>93</sup> has led to the emergence of a clearer definition of the concept of cultural identity and expanded the notion of 'cultural heritage' which to a large extent has replaced 'cultural property'.<sup>94</sup> Cultural goods since regarded as 'vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods'.<sup>95</sup>

### 3.2 International instruments for the return of cultural heritage

The International Standards Section of UNESCO has been at the fore of international efforts for the prevention of theft and illicit trafficking of cultural objects, through varied means.<sup>96</sup> The 1954 Hague Convention (and the two optional Protocols) and the 1970 Convention provide for war time and peace time protection of cultural heritage.<sup>97</sup> UNIDROIT was called upon by UNESCO to utilise its experience in the harmonisation of rules of private international law, to prepare a Convention which adequately addresses private law issues related to the protection of cultural heritage.<sup>98</sup> It was at the request of UNESCO that UNIDROIT decided to address the issue in its Work Programme for the period 1987-1989.<sup>99</sup> This culminated in the convening of a Diplomatic Conference in June 1995 ending with the adoption of the Convention. UNESCO took active part throughout the process and continues to actively promote the UNIDROIT Convention as an instrument which supplements its 1970 Convention.<sup>100</sup>

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<sup>93</sup> Patterson, R and Karjala, D 'Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous People' (2003) 11 *Cardozo Journal of International & Comparative Law* 633, 634.

<sup>94</sup> Ziegler, K 'Cultural Heritage and Human Rights' <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1002620](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002620)> (accessed 27/10/07).

<sup>95</sup> Article 8, UNESCO Universal Declaration on Cultural Diversity.

<sup>96</sup> For details of UNESCO efforts, see <[http://portal.unesco.org/culture/en/ev.php\\_URL\\_ID=2633&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php_URL_ID=2633&URL_DO=DO_TOPIC&URL_SECTION=201.html)>. (Accessed 05/09/2007).

<sup>97</sup> Strictly speaking the Hague Convention is merely a treaty between the various state parties. However UNESCO is responsible for various activities under the Convention such as acting as the depository.

<sup>98</sup> Schneider M 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', 2001-3 *Uniform Law Review*, 476- 564, 480.

<sup>99</sup> For more detailed discussion on the lead up to the adoption of the Convention, see Schneider n. 97 above, 482 – 486.

<sup>100</sup> See 'UNESCO and UNIDROIT – Cooperation in the Fight Against Illicit Traffic in Cultural Property' UNESCO Information Note. <<http://unesdoc.unesco.org/images/0013/001399/139969E.pdf>> (Accessed on 05/09/2007).

### 3.3 The Hague Convention 1954 <sup>101</sup>

The 1954 Hague Convention put together in a single binding document, principles on the protection of cultural property in times of armed conflict as provided by The Hague Conventions of 1899, and 1907 and the Washington Pact of 1935.<sup>102</sup> By this Convention, State parties undertake to refrain from activities in their territory and state parties, which expose cultural heritage to destruction and stop their theft, pillaging and vandalism. A State party occupying another is to preserve and safeguard its cultural heritage. Special protection is to be given to cultural property in times of armed conflict by creating refuges to shelter moveable cultural heritage and centres containing monuments and other immovable cultural heritage of great importance. Parties are required to ensure that cultural heritage under special protection is immune from any act of hostility or use for military purposes.<sup>103</sup>

#### 3.3.1 The Protocol to the Hague Convention 1954 <sup>104</sup>

This Protocol prohibits the retention of cultural property as war reparation and places an obligation on State parties to: prevent the export of cultural objects from a territory occupied by it during an armed conflict; take into custody, custody cultural property imported from any occupied territory during an armed conflict; return at the cessation of hostilities to the competent authorities of the territory previously occupied, such cultural property which has been illegally exported into its territory, and pay indemnity to holders in good faith of such property deposited for protection against armed conflict.

#### 3.3.2 The second Protocol to the Hague Convention 1999 <sup>105</sup>

This Protocol, introduces three major measures, to reinforce the effectiveness of the 1954 Hague Convention. First, it introduces a system of 'enhanced protection' for specially designated cultural property, obliging parties to a conflict to ensure their immunity from attack. Second, it requires States to enact laws conferring jurisdiction over offences in the Protocol and allowing extradition in case of

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<sup>101</sup> The Convention was adopted on 14 May 1954 and came into force on 7 August 1956. There are presently 49 State parties. <[http://portal.unesco.org/en/ev.phpURL\\_ID=15391&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.phpURL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html)>. (accessed 05/09/2007).

<sup>102</sup> Preamble to the Hague Convention 1954.

<sup>103</sup> Cultural Heritage subject to special protection is to be marked by an emblem as described in article 16 of the Convention.

<sup>104</sup> The Protocol was adopted on 14 May 1954 and came into force on 7 August 1956 .There are presently 39 State parties. < <http://portal.unesco.org/en/ev.php>> (accessed on 05/09/07)

<sup>105</sup> The Protocol was adopted on 26 March 1999 and came into force on 9 March 2004. There are currently 38 State parties. < <http://portal.unesco.org/en/ev.php>> (accessed 05/09/07)

their breach. Finally, it establishes a Committee for the Protection of Cultural Property in the Event of Armed Conflict for the purpose of implementing the Protocol.<sup>106</sup>

### **3.4 The UNESCO Convention 1970**<sup>107</sup>

This Convention advocates international co- operation to protect cultural heritage of State Parties from illicit import, export and transfer of ownership.<sup>108</sup> Any import, export, export or transfer of ownership contrary to the Convention, is deemed illicit.<sup>109</sup> Exportation from territory of member states without export certificates;<sup>110</sup> acquisition and import of cultural property stolen from a museum, religious or secular public monument or similar institution of State Parties and illegally exported from that State;<sup>111</sup> and compulsory export and transfer of cultural property arising due to foreign occupation are defined as illicit.<sup>112</sup> The major provisions of the Convention are discussed.

#### **3.4.1 Creation of a national body**

State Parties are to establish national bodies to assist in formulation of necessary legislation preventing illicit import, export and transfer of ownership; establish and maintain a national inventory of protected private and public heritage; promote the establishment of institutions for the preservation of cultural heritage; supervise archaeological excavations; formulate in accordance with the principles of the Convention; educate the public on the provisions of the Convention;<sup>113</sup> and ensure that necessary publicity is accorded to the disappearance of cultural objects.

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<sup>106</sup> The first meeting was held on 26 and 27 October 2006 < [http:// portal.unesco.org/culture/en/ev.php-URL\\_ID=32094 & URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=32094 & URL_DO=DO_TOPIC&URL_SECTION=201.html)>. (accessed 08/10/2007).

<sup>107</sup> The Convention was adopted on 14 November and came into force on 24 April 1972. There are currently 113 signatories. <[http://portal.unesco.org/en/ev.php@URLID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php@URLID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html)>. (accessed 05/09/2007).

<sup>108</sup> Art. 2, para. 1.

<sup>109</sup> Art. 3.

<sup>110</sup> Art. 6, para. b.

<sup>111</sup> Art. 7

<sup>112</sup> Art. 11.

<sup>113</sup> Art. 5.

### 3.4.2 Introduction of export certificates

To enable easy identification of illegally exported cultural heritage, Article 6 requires States to introduce export certificates. Furthermore, States are required to expressly prohibit exportation of its cultural property without export certificates and publicise. UNESCO in collaboration with the World Custom Organisation (WCO) in 2005 introduced a model export certificate for cultural objects, for use by State parties in an attempt to create a simple international standard.<sup>114</sup>

### 3.4.3 Restitution provisions

By article 7 b (ii) State Parties, at the request of the State Party of origin, shall recover and return any cultural property imported after<sup>115</sup> the Convention is in force in both States concerned.<sup>116</sup> By article 13 State Parties undertake to: prevent the transfer of ownership of cultural property likely to promote illicit import or export; co-operate in facilitating return of illicitly exported cultural property to its rightful owner; admit actions for recovery of lost or stolen items of cultural property by or on behalf of rightful owners; recognise the right of State Parties to prohibit the export of certain cultural property; and facilitate the return of illegally exported cultural property.

### 3.4.4 International cooperation

Article 9 of the Convention empowers a State party whose cultural objects or ethnological materials are in jeopardy of pillage to seek help from others by participating in an international effort to protect them through the control of import and export. Furthermore, State Parties concerned are to take measures to prevent irremediable injury to the cultural heritage of the requesting State by any means feasible. The United States of America for example has on the basis of this provision, entered into bilateral agreements with State parties.<sup>117</sup>

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<sup>114</sup> The model export certificate and explanatory notes are available at < <http://www.unesco.org/culture/laws/illicit>> (accessed 30/08/2007).

<sup>115</sup> This indicates the non-retroactive nature of the Convention.

<sup>116</sup> As will be discussed, this poses a major problem for the return of African cultural objects.

<sup>117</sup> The US Congress passed an Act in 1983 authorising the President to enter into bilateral agreements imposing import restrictions on cultural objects from nations which request such cooperation. Mali is the only African country to take advantage of this. See further Borodkin L 'The Economics of Antiquities Looting and a Proposed Legal Alternative' (1995) 95 *Columbia Law Review*, 377-395, 389.



### 3.5 The UNIDROIT Convention 1995 <sup>118</sup>

This Convention complements the 1970 UNESCO Convention, and aims to solve the problem created by the application of the rules of private international law of States in issues of return of cultural objects and to stem their illicit trafficking through international cooperation.<sup>119</sup> Rules of private international law, and differences in these rules between common law and civil law countries, creates loopholes often exploited by art traffickers and thieves.<sup>120</sup> The Convention is thus an attempt to create uniform rules, which would operate irrespective of private international rules, and make it possible for private owners to institute claims in respect of their stolen or illegally exported cultural objects.<sup>121</sup> The Convention provides different rules for the restitution of stolen cultural objects and return of illegally trafficked objects.

#### 3.5.1 Restitution of stolen cultural objects <sup>122</sup>

The obligation to return stolen cultural objects is unequivocal.<sup>123</sup> It is irrelevant whether it is private or publicly owned cultural objects or the acquisition was in good or bad faith. Objects illegally excavated or legally excavated but unlawfully retained are deemed stolen, if so provided by the law of the place where the excavation took place.<sup>124</sup> Claims for restitution of stolen objects must be brought within three years of knowledge on the whereabouts of the object and identity of the possessor, and in any case within fifty years of the theft. However, claims for objects forming an integral part of identified monuments or archaeological sites, public collections, or sacred or communal objects of indigenous community, must be brought within three years of knowledge of its location, and identity of the possessor.<sup>125</sup> State parties may make declarations, subjecting claims for restitution of objects forming part of a monument or archaeological site or public collection to a limitation period of 75 years or longer, provided similar claims by that country is subject to the same limitation period.<sup>126</sup>

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<sup>118</sup> The Convention came into force on 1 July 1998. There are presently 29 State Parties <<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>> (accessed 05/09/2007).

<sup>119</sup> Schneider M, (n. 96 above) 574.

<sup>120</sup> See further Prott, L (n. 74 above).

<sup>121</sup> Section 8 of UNIDROIT Convention unlike the UNESCO Convention does not restrict claims to governments.

<sup>122</sup> Art 3 and 4.

<sup>123</sup> Art 3 para. 1.

<sup>124</sup> Art 3 para. 2.

<sup>125</sup> Art. 3 para 3, 4 and 8.

<sup>126</sup> By 31 August 2007, declaration had been made by 7 states (n. 121 above).

A possessor of a stolen cultural object without knowledge it was stolen, and can prove due diligence was exercised in purchase, is entitled to compensation. In determining due diligence, consideration is given to the circumstances of the acquisition such as the price paid and consultation of accessible registers of stolen cultural objects.

### **3.5.2 Return of illegally exported cultural objects** <sup>127</sup>

Illegally exported object are to be returned only where removal from the territory of the requesting state significantly impairs: the physical preservation of the object or its content; the preservation of information of a scientific or historical character; the traditional or ritual use of an object by a tribal or indigenous community; or is of significant cultural importance. There is no obligation to return, in the life time of the object's creator or fifty years after his/her death, except the object was made by a member of a tribal or religious community for its use. Claims for the restitution of illegally exported cultural objects are subject to a three year limitation period from the date of knowledge of the whereabouts of the object and identity of the possessor and in any case, fifty years from the date of the illegal export. A person, who acquires a cultural object after it was illegally exported, is entitled to compensation if he had no knowledge of the circumstances.

### **3.5.3 The option of arbitration**

Article 8 provides recourse to arbitration. This innovation has several advantages: the use of a forum of which neither party to the arbitration are nationals could provide neutrality; the appointment of arbitrators allows for the input of expertise which may be lacking in litigation of cultural heritage issues; and the rules and regulations of the arbitration process could increase the speed and cost effectiveness of proceedings.<sup>128</sup> Also, strict confidentiality which is characteristic of arbitration proceedings and better chances for enforcement stemming from prior consent of parties presents, are added advantages.<sup>129</sup>

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<sup>127</sup> Articles 5, 6 and 7.

<sup>128</sup> Sidorsky, E 'The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration' (1996) 5 *International Journal of Cultural Property*, 19, 32-33.

<sup>129</sup> Shyllon, F 'The Recovery of African Cultural Objects Through the UNESCO and UNIDROIT Conventions and the Role of Arbitration' (2000) *Uniform Law Review* 219-241, 235.

### 3.6 The UNESCO intergovernmental committee

The *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Restitution in the case of Illicit Appropriation* is a permanent intergovernmental body,<sup>130</sup> composed of 22 members,<sup>131</sup> which provides a framework for discussions and negotiations for the return of cultural objects.<sup>132</sup> The Committee which last met in 2005, is an advisory body as its recommendations are not binding.<sup>133</sup> Of the six cases which have been brought to the Committee since its inception in 1978, two have been settled,<sup>134</sup> one has been resolved by litigation,<sup>135</sup> one remains in litigation in a national court and two are outstanding.<sup>136</sup>

#### 3.6.1 The international fund of the intergovernmental committee

*The fund of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, was established in November 2000.<sup>137</sup> Made up of voluntary contributions of States and private partners, it aims to support States in their efforts for the return of their cultural objects and prevent illicit trafficking in cultural objects, through activities such as; verification of cultural objects by experts, their transportation, insurance costs, training of museum personnel.<sup>138</sup> Till date despite appeals for contributions by the Director General of UNESCO,<sup>139</sup> the fund is composed of the singular donation of 29, 342 Euros from Greece since 2002.<sup>140</sup>

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<sup>130</sup> UNESCO Information Kit (n. 24 above).

<sup>131</sup> The initial composition of 20 members was increased by the UNESCO General Conference to 22 at its 28<sup>th</sup> session in Paris, October – November 2005. See 28C/resolution 22.

<sup>132</sup> Art.1&2 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or Restitution in case of Illicit Appropriation.

<sup>133</sup> Secretariat Report of the 13<sup>th</sup> Session, UNESCO Intergovernmental Committee for the Promotion of the Return of Cultural Property and Restitution in the case of Illicit Appropriation. CLT-2005/CONF.202/2. Available at < [http://www.unesco.org/culture/committee/secret\\_report\\_eng.pdf](http://www.unesco.org/culture/committee/secret_report_eng.pdf)>. (accessed 11/09/2007)

<sup>134</sup> As above.

<sup>135</sup> As above.

<sup>136</sup> As above.

<sup>137</sup> As above.

<sup>138</sup> (n. 133 above).

<sup>139</sup> As above.

<sup>140</sup> Secretariat Report (n.87 above) 3.

### 3.6.2 The UNESCO international code of ethics for dealers in cultural property

This Code was adopted by the Intergovernmental Committee and endorsed by the UNESCO General Conference in 1999.<sup>141</sup> The Code of Ethics *inter alia* obliges dealers in cultural objects not to import, export or transfer ownership of objects where there is reason to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported. Dealers who believe that an object is a product of clandestine excavation or illegal export are to deal with the item any further, except with the consent of the country of export, and will take all legally permissible steps to cooperate in the return of the object to the country of export.<sup>142</sup>

### 3.7 Adequacy of the existing framework

There is no doubt that for an international mechanism to be effective, it must have binding force on States who are party to it. However, the problem with this reality is that states which have more to lose by its application can limit this effectiveness by refusing to be party to such instrument. Whilst the UNESCO Convention which is based on return of cultural objects mainly through diplomatic means has 113 signatories to date,<sup>143</sup> the UNIDROIT Convention which provides greater protection especially by allowing for litigation by both governments and private owners of cultural objects, and places an unequivocal obligation for the return of stolen cultural objects and a limited obligation in cases of those illegally exported has merely 29 State parties.<sup>144</sup> This is so, despite the non retroactive nature of the UNIDROIT Convention and its arbitration provisions, which could serve as a middle ground between litigation and voluntary return.

The 'non retroactive principle' of existing international instruments has meant that the thousands of cultural objects plundered during colonialism and the age of imperialism 'continue to have no legal mechanism for the effecting their return,<sup>145</sup> and ensures that the 'ownership' by Western Museums of African cultural objects cannot be questioned through legal means. This has left advocates for their return with no other alternatives but to rely on arguments of morality which has yet borne little fruit. Though the UNIDROIT Convention, makes clear that its adoption of the 'non retroactive principle'

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<sup>141</sup> UNESCO handbook on the Legal and Practical Measures against Illicit Trafficking in Cultural Property <<http://unesdoc.unesco.org/images/0011/001187/118783eo.pdf>> (accessed 15/10/07).

<sup>142</sup> Articles 1 to 4.

<sup>143</sup> 25 of these are African.

<sup>144</sup> Only 7 of which are African. This is probably due to principle of payment of compensation to a bonafide possessor, which many find unjust.

<sup>145</sup> Neither the Hague Convention, the UNESCO 1970 Convention nor the UNIDROIT Convention are retroactive.

does not in any way legitimise any illegal transaction which took place before the entering into force of the Convention,<sup>146</sup> This is of little comfort to countries which have more of their cultural heritage outside than within their country.

Litigation in the courts of the country in which stolen or illegally trafficked objects are found is an option which African states have not utilised, particularly due to the prohibitive financial costs.<sup>147</sup> In any case, successful litigation through existing international instruments is not guaranteed. In *R v Heller*,<sup>148</sup> the Canadian Government as a party to the UNESCO Convention like Nigeria, prosecuted a New York dealer who had imported into Canada a Nok terracotta sculpture illegally exported from Nigeria. The case was lost on the technical ground that the Canadian statute implementing the Convention only applied to objects illegally exported after the entry into force of the Canadian legislation.<sup>149</sup>

The UNESCO Intergovernmental Committee, the only international forum working towards the return of objects and is not restricted by the non retroactive principle has achieved little. Greece's request for the return of the Parthenon Marbles brought before the Committee at its fourth session in 1984 is yet to be resolved.<sup>150</sup> The fund established by the Committee to assist states in the return of their heritage has received only one contribution, presumably because Western states which provide markets for cultural objects and responsible for their plunder during colonialism, would not fund efforts contrary to their interests.

### 3.8 Conclusion

The growing attention given to the recognition and enforcement of cultural rights has provided an entry point for human rights concepts into the domain of cultural heritage law. More emphasis is being placed on the role cultural heritage plays in the expression of cultural identity and the need for ensuring the protection of the cultural heritage of individuals and communities and by extension their cultural rights. However, this recognition has not substantially affected the international legal mechanisms for the protection of cultural objects, which though elaborate, does not address the

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<sup>146</sup> Paragraph 6 of the Preamble and article 10.

<sup>147</sup> Shyllon, F (n.129 above) 221.

<sup>148</sup> (1983) 27 *Alberta Law Reports* (2d) 346.

<sup>149</sup> Shyllon, F (n. 147 above) 221.

<sup>150</sup> Secretariat Report (n. 133 above.)

continuing impairment of the enjoyment of cultural and other related rights by African people, from whom an integral part of their identity was taken during colonial periods and conquests.

An elaboration of the diverse roles cultural objects play in the enjoyment of cultural and other related rights in the African context, thus generates expectations that the human rights concept has the potential of transforming these claims from merely seeking to redress for past wrongs resulting from plunder, or present day wrongful acquisition, to ending or preventing the violation of cultural and other related rights, by the redefinition of claims for the return of African cultural objects as demands for the enforcement of human rights.

## CHAPTER FOUR

### HUMAN RIGHTS NORMS AND MECHANISMS AS A BASIS FOR THE RETURN OF AFRICAN CULTURAL HERITAGE

#### 4.1 Introduction

An ethnographic object without contextual information is an object stripped of meaning.... For the society that produced such an object – removed from its traditional setting of worship and care – it might be an act of desecration. The fundamental right of a people to their cultural heritage has been denied... Their removal steals from a people part of their identity, part of their collective psyche. In view of this some have argued persuasively that the right to a cultural heritage is a fundamental human right.<sup>151</sup>

This chapter examines the content of rights in international human rights law, starting with cultural rights, which can support characterisation of requests for the return of African cultural objects as a demand for the enforcement of the collective rights of African people. It considers the extent to which such characterisation may present a better platform for securing the return of African cultural objects. Finally, the use of existing human rights mechanisms as a basis for return is explored.

#### 4.2 Cultural rights: A broad category of human rights

The debate over whether economic, social and cultural rights are ‘really’ rights was settled long ago.<sup>152</sup> Several assumptions, ‘which on hindsight have been overstated or mistaken’ led to the separation of civil and political rights from economic, social and cultural rights, in two instruments - International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>153</sup> The belief was that civil and political rights impose only negative obligations which are immediate, absolute and therefore justiceable, as opposed to economic social and cultural rights which impose are expensive, realised progressively, impose positive obligations, and therefore of ‘a more political nature’,<sup>154</sup> or ‘a letter to Santa Claus’,<sup>155</sup> not requiring States to face international scrutiny as regards their enforcement.<sup>156</sup>

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<sup>151</sup> Brodie, N et al ‘Stealing History: The Illicit Trade in Cultural Material’ (2000) Mac Donald Institute for Archaeological Research. < [http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit\\_trade.pdf](http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit_trade.pdf)> (accessed 9/10/07)

<sup>152</sup> Steiner, H and Alston, P (1996) *International Human Rights in Context: Law, Politics, Morals* Oxford: Clarendon Press, 261.

<sup>153</sup> Eide, A ‘Economic, Social and Cultural Rights as Human Rights’ in Eide et al (eds) (2001) *Economic Social and Cultural Rights* (2<sup>nd</sup> ed) Netherlands: Kluwer Law International, 23.

<sup>154</sup> As above, 22.

However, beginning with The Proclamation of Tehran 1968,<sup>157</sup> thereafter the Declaration of the Right to Development 1986<sup>158</sup> and the Vienna Declaration and Programme of Action (Vienna Declaration) 1993,<sup>159</sup> and at the regional level, the Limburg Principles,<sup>160</sup> the Maastricht Guidelines,<sup>161</sup> and the Pretoria Declaration on Economic, Social and Cultural rights,<sup>162</sup> the international community has consistently asserted the indivisibility and interdependence of human rights. What remains is to define these rights with precision and identify effective approaches to their implementation.<sup>163</sup>

There is widespread acceptance that cultural rights are the least developed of economic, social and cultural rights, in terms of content and enforceability,<sup>164</sup> and have thus been dubbed 'the Cinderella of the human rights family'.<sup>165</sup> One reason for this has been the vagueness of the term culture, and how to distinguish between 'the narrow' rights which are explicitly phrased as 'cultural' such, as in the ICESCR and UDHR, and 'the broader' human rights that embody various aspects of culture.<sup>166</sup>

In essence, almost all human rights, whether classified as civil and political or economic and social, are linked to culture. Cultural rights, thus form a general category of human rights that relate to the protection of a distinct culture. They are not merely rights that explicitly refer to culture, but include other human rights that protect aspects of culture.<sup>167</sup> These 'associated' rights include the right to

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<sup>155</sup> Orwin, C and Pangle, T 'The Philosophical Foundations of Human Rights' in Plattner, M (ed) (1984) *Human Rights in Our Time* Boulder: Westview Press, 15.

<sup>156</sup> Steiner and Alston (n.152 above).

<sup>157</sup> Paragraph 13.

<sup>158</sup> Articles 1 and 9, General Assembly Resolution 41/128.

<sup>159</sup> Principle 5.

<sup>160</sup> Part 1A, Para 3.

<sup>161</sup> Para 4.

<sup>162</sup> Preamble.

<sup>163</sup> Steiner and Alston, (n. 152 above) 268.

<sup>164</sup> Niec, H 'Casting the Foundation for the implementation of Cultural Rights' in *Cultural Rights and Wrongs* France and United Kingdom: Institute of Art and Law and UNESCO Publishing, 176-189, 178. See also Eide, A ' Cultural Rights as Individual Human Rights' in Eid et al (n185 above) 289.

<sup>165</sup> As above, 176.

<sup>166</sup> N.164 above, 178. See also Donnders, Y (*Towards a Right to Cultural Identity?* School of Human Rights Research Series No 15 Antwerp/Oxford New York: Intersentia, Prott, L; *Understanding One Another on Cultural Rights*' in Niec, H (n.167) above 161-175, 164.

<sup>167</sup> Donders, Y (as above).



freedom of religion, freedom of expression, freedom of association, and the right to education.<sup>168</sup> Buerke<sup>169</sup> and Stavenhagen,<sup>170</sup> also mutually acknowledge the ‘intertwinement’ and connection respectively, of culture with the right to education, freedom of religion, freedom of expression and freedom of association. Thus, the enforcement or otherwise of cultural rights directly affect the enjoyment of its concomitant rights.

### 4.3 The right to cultural heritage

The recognition of the right to cultural heritage as a cultural right, specifically as a category of the right to cultural identity is extensive in literature. The influence of cultural identity on cultural heritage is an understanding of the significance of cultural expressions such as customs and traditions, historical identification and religion, recognised by individuals or communities as part of their cultural heritage and necessary for individual or collective identity and therefore, their dignity.<sup>171</sup>

For Prott, a distinction must be made between general cultural rights such as the right to education and the rights related to the protection of a specific culture on the one hand, and the rights related to cultural resources of universal importance as part of the cultural heritage of mankind on the other.<sup>172</sup> Meyer-Bisch mentions three categories of cultural rights: the right to cultural participation, the right to education and the right to cultural identification, which includes the right to cultural heritage.<sup>173</sup> The Fribourg Colloquium list three categories of cultural rights, the right to cultural identity which includes the right to cultural heritage, the right to participate in cultural life and the right to education,<sup>174</sup> and the Fribourg Group, (an international working group on Culture), in a 1998 Draft Declaration on Cultural

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<sup>168</sup> As above.

<sup>169</sup> Buerke, M ‘The International Law Dimension of Culture and Cultural Rights: Relevance for and Application in the “New” South Africa’ (1995) 20 South Africa Year Book of International Law 126-143, 133.

<sup>170</sup> Stavenhagen, R ‘Cultural Rights a Social Science Perspective’ in Eide et al (n .156 above) 85.

<sup>171</sup> Kamenka, E ‘Human Rights, Peoples’ Rights’ in J Crawford (ed) (1988), *The Rights of Peoples* Oxford: Clarendon 127.

<sup>172</sup> Prott, L ‘Cultural Rights as Peoples’ Rights in International Law’ in Crawford, J (ed) (1988) *The Rights of Peoples’* Oxford: Oxford University Press, 101.

<sup>173</sup> Meyer-Bisch, P (ed. (1993), *Les Droits Culturels, une Catégorie Sous-Développée de Droits de l’Homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l’homme*, Editions Universitaires, Fribourg, Suisse, in Donders, Y (n. 175).

<sup>174</sup> The Eighth Interdisciplinary Colloquium on Human Rights, University of Fribourg 28-30 November, 1991, Meyer-Bisch, P in Donders, Y (n.166 above) 303.

Rights enumerated six categories of cultural rights, the first of which is the right to cultural identity and heritage.<sup>175</sup>

The African Charter in Article 22(1) specifically links cultural identity with heritage and emphasizes the group dimension of human rights,<sup>176</sup> by providing; ‘all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.’ By this provision, it is said, that African States increased the scope of rights recognition to include cultural heritage.<sup>177</sup>

In line with its mandate to promote international cooperation in economic, social and culture fields and the realisation of human rights and fundamental freedoms,<sup>178</sup> the UN General Assembly has since 1972, passed a series of resolutions calling for the ‘Return or Restitution of Cultural Property to the Countries of Origin’. This appears to constitute tacit acceptance of the right to the return of cultural heritage as connected to human rights by the UN.<sup>179</sup>

#### **4.4 Grounding the return of African cultural heritage in human rights discourse**

The nature of cultural rights as rights linked to almost all other human rights, particularly civil and political, provides a multiplicity of rights on which the return of cultural objects can be founded. Those rights which have been identified above as comprising the right to cultural identity and by extension the right to cultural heritage are considered.<sup>180</sup>

##### **4.4.1 The right to culture**

The right to participate in the cultural life, to enjoy its art and to the protection of moral and material interest of literary or artistic production, by the author is guaranteed in international human rights

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<sup>175</sup> See Donders, Y (n166 above) 75. Though never adopted the Declaration contributed to the adoption of the UNESCO Declaration on Cultural Diversity 2001.

<sup>176</sup> Shyllon, F (n.1 above) 111.

<sup>177</sup> Schmidt, P ‘The Human Right to Cultural Heritage: African Applications’ in Schmidt, P and McIntosh, R (eds) *Plundering Africa’s Past* Bloomington: Indiana University Press, 18-28.

<sup>178</sup> Article 13 UN Charter.

<sup>179</sup> Resolution on Return or restitution of cultural property to the countries of origin, A/RES/61/52. All 22 previous resolutions on the subject matter are listed in the preamble.

<sup>180</sup> P. 31 above.

law.<sup>181</sup> This right has been described as ‘nucleus of a rudimentary system’ of cultural human rights,<sup>182</sup> and derives from the inherent dignity and worth of all persons.<sup>183</sup> Cultural life comprises wide forms of creative or expressive activity,<sup>184</sup> and includes ‘the totality of the knowledge and practices, both intellectual and material, of each of the particular groups of a society, and – at a certain level – of a society itself as a whole’.<sup>185</sup>

‘Literary or artistic production’ encompasses tangible aspects of cultural heritage as it includes poems, novels, paintings, sculptures and musical compositions,<sup>186</sup> and the purpose of ‘protection of moral interests’ here is particularly relevant to cultural heritage, as it is to safeguard the personal character of the creation of every human mind and ‘the link between creators and their creations’.<sup>187</sup> This right recognises that individuals and groups may be the ‘author’ of such creations.<sup>188</sup> The right to participation in cultural life is distinguished from intellectual property rights which are temporary and can be revoked or licensed to another person, as opposed to human rights which are ‘timeless expressions of the fundamental entitlements of the human person’.<sup>189</sup>

The right to culture is equally protected at the regional level.<sup>190</sup> The African Charter on Human and Peoples Rights (African Charter) is however unique in that, apart from its recognition of the individual and collective aspects of culture by reference to both ‘culture’ and ‘cultures’, it imposes obligation for the enforcement of cultural rights and values on the State as well as individuals.<sup>191</sup> This demonstrates

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<sup>181</sup> Articles 27 UDHR and 15 ICESCR.

<sup>182</sup> Prott, L and O’Keefe, P (1984) *Law and the Cultural Heritage Vol. 1: Discovery and Excavation* London: Butterworths, 29.

<sup>183</sup> Para 1, General Comment 17, Committee on Economic Social and Cultural Rights.

<sup>184</sup> See Adalsteinsson, R and Thorhallson, P ‘Article 27’ in G Alfredsson and A Eide (eds), (1999) *The Universal Declaration of Human Rights* The Hague: Martinus Nijhoff 575, 576 and O’Keefe, R ‘The “Right to Take Part in Cultural Life” under Article 15 of the ICESCR’ (1998) *47 International and Comparative Law Quarterly* 904, 905.

<sup>185</sup> Guillaun, C ‘Women and Cultural Values: Classes According to Sex and their Relationship to Culture in Industrial Society’ (1976) *6 Cultures* 41, quoted by Prott, L n above, 94.

<sup>186</sup> Para 9 (n. 191 above).

<sup>187</sup> As above, Para 12.

<sup>188</sup> As above, Para 7.

<sup>189</sup> As above, Para 2 and 3.

<sup>190</sup> Articles 14 Protocol of San Salvador, 15 ESC and 22 Charter of the fundamental rights of the European Union.

<sup>191</sup> Articles 17(3) and 29(7). See Buerke, (n. 169 above) 138.

the importance accorded to culture in Africa. This is further evident in the African Cultural Charter,<sup>192</sup> which calls upon African States to take steps to put an end to the despoliation of African cultural property and ensure that cultural assets, in particular archives, works of art and archaeological objects, removed from Africa are returned.<sup>193</sup>

From the above, it is clear that the right to culture protected under international law, has as its main component, the right of participation in cultural life. The exercise of this right which involves the use of tangible as well as intangible aspects of culture, thus encompassing cultural heritage, is inextricably linked to the dignity and worth of the human person. The further recognition of the right of everyone to economic, social and cultural rights indispensable for his dignity and the free development of his personality<sup>194</sup> shows beyond doubt that the infringement of cultural rights could violate the dignity and full cultural development of persons.

The Benin bronzes for example, are not merely cultural objects but part of Nigeria's History. The objects looted included 160 brass heads, recording dynasties back to the twelfth century. When an Oba died, a head was cast in bronze for an altar erected in his memory.<sup>195</sup> During the coronation of the reigning Oba of Benin in 1979, there was dispute as to where to place an item of the coronation paraphernalia. Reference was made to a bronze-cast of a past Oba wearing the same regalia which had survived the 1897 expedition and the matter was resolved.<sup>196</sup> 'Taking away those items is taking away our records or our Soul'.<sup>197</sup>

Thus, the inability of Africans from whom cultural objects have been taken, to fully participate in their 'cultural life, enjoy their art, and benefit from their literary and artistic productions, which lie in western museums, is a continuing violation of their right to culture. They are prevented from living their culture, their history and in essence a dignified life

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<sup>192</sup> <[http://www.africa-union.org/root/au/Documents/Treaties/Text/Cultural\\_Charter\\_for\\_Africa.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/Cultural_Charter_for_Africa.pdf)> (accessed 29/09/07).

<sup>193</sup> Articles 26 and 27

<sup>194</sup> Article 22 UDHR

<sup>195</sup> Greenfield, J (n.17 above) 121.

<sup>196</sup> Memorandum submitted by Prince Akenzua of Benin to the British House of Commons. See Opoku, K 'Opening of the Exhibition "Benin-Kings and Rituals, Court Arts from Nigeria'. <<http://www.culture-and-development.info/issues/benin1.htm>>. (accessed 29/09/2007).

<sup>197</sup> As above.

#### 4.4.2 Freedom of religion

This right is well established in international human rights law and can be exercised individually or in community with others through worship, observance, practice and teaching.<sup>198</sup> It extends to traditional religions or traditional religions analogous in institutional characteristics to traditional religions,<sup>199</sup> and thus extends to African traditional religions. The concept of worship encompasses ritual and ceremonial acts giving direct expression to the belief and practices integral to such acts including the use of ritual formulae and objects and the display of symbols a broad range of acts.<sup>200</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the UN General Assembly in 1981,<sup>201</sup> recognises the right to make, acquire and use materials related to rights and customs.<sup>202</sup>

In the enjoyment of the right to religion, the existence of a state religion does not justify the impairment of the enjoyment of the rights of adherents to other religions.<sup>203</sup> The Declaration on the Right to Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>204</sup> emphasises the obligations of states to protect and promote the religious identities of persons belonging to minorities within their territories. Thus, the reality that some cultural objects claimed by African countries are essential only for minority traditional religions, does not in anyway affect the validity of their claims for the return of their objects, as persons belonging to religious minorities have the right to profess and practice their religion.<sup>205</sup> This right belongs to persons who belong to a group and share the same culture, religion and/or language.<sup>206</sup>

In many parts of Africa, there still exist today, communities which practice African traditional religions, for whom objects taken, no matter how long ago, continue to limit the practice of their religion. In other countries like, Ethiopia, it is the Orthodox Church which finds the return of their Tabots necessary for

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<sup>198</sup> Articles 18 UDHR, 18 ICCPR, 8 ACHPR, 12 ACHR, 9 ECHR.

<sup>199</sup> Para 2, General Comment 18, Committee on Human Rights. HRI/GEN/1/rev.8, 194.

<sup>200</sup> As above, Para 4.

<sup>201</sup> Resolution 36/55 November 25 1981.

<sup>202</sup> Article 3.

<sup>203</sup> n. 199 above, Para 9 and 10.

<sup>204</sup> Resolution 47/35 December 18 1992.

<sup>205</sup> Article 27 ICCPR.

<sup>206</sup> Para 5.1 General Comment 23, Committee on Human Rights. HRI/GEN/1/rev.8, 197.

their spiritual and sacred significance. The Tabots represent the Ark of the Covenant, used by Israelites in carrying the Ten Commandments as they travelled to the Promised Land. The religious significance which these Tabots have for the church is exemplified by the Archbishop of the Ethiopian Orthodox holding back tears on receiving the only returned Tabot.<sup>207</sup> Half a million Ethiopians greeted that Tabots return to Ethiopia.<sup>208</sup>

For Africans, religion is the source of hope in the midst of the poverty, conflict and disease. It is what connects Africans to their ancestors, their Supreme Being and Creator. Thus, continued deprivation of religious groups like the Ethiopian Orthodox Church of its Tabots and traditional African religions of their objects, limits the enjoyment of their right to the use these objects for religious rites central to their religious life, and customs, and by extension their worship and observance, which are central to their spiritual and mental well being, thus violating their right to religion..

#### 4.4.3 The right to education

Education is a fundamental right in the promotion of human rights, as it is a human right in itself and necessary for the enjoyment of other human rights, especially social and economic rights.<sup>209</sup> This right is contained in several international human rights instruments,<sup>210</sup> and two dimensions to this right are the social and the freedom dimension. This research is concerned with the social dimension, making various forms of education available and accessible to all.<sup>211</sup>

The close link between education and culture in the African context is indicated by the inclusion of both rights in the same provision of the African Charter.<sup>212</sup> Education in African culture is central to the purpose of 'the full development of the human personality and the strength of its dignity', as espoused in other international human rights instruments.<sup>213</sup> The African Children's Charter equally indicates the that cultural education must constitute an integral part of overall education when it declares the education of a child must be directed at 'strengthening positive African morals, traditional values and

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<sup>207</sup> '130 years on, Sacred Artifact is Back with Rightful Owners' *The Scotsman* January 29 2002 <<http://www.afromet.org/news/archives/000017.html>> (accessed 24/99/07).

<sup>208</sup> (n. 33 above).

<sup>209</sup> Sepulveda, M et al (2004) *Human Rights Reference Handbook* Costa Rica: University for Peace, 329.

<sup>210</sup> Articles, 26 UDHR, 23 and 13 ICESCR, 17 ACHPR, 28 and 29 CRC, 2 Protocol to ECHR, Article 13 and 14 Protocol of San Salvador.

<sup>211</sup> (As above).

<sup>212</sup> Article 17.

<sup>213</sup> (n. 210 above).

culture', and recognises the right of a child 'to fully participate in cultural and artistic life'.<sup>214</sup> The CESCR has indicated that education in all its forms and at all levels must exhibit the following features: 'availability'; 'accessibility' in that it must be open to all members of society and physically accessible to them; 'acceptability' in that the cultural content be acceptable and 'adaptability' in that it should meet the needs of communities.<sup>215</sup>

Despite the emphasis of the education of children and youth in human rights jurisprudence, the right to education is not limited to children as 'Everyone' has a right to education.<sup>216</sup> It is generally recognised that for academics, education is a continuous process. Thus article 13 (3) and (4) of the ICESCR, recognises the right of members of the academic community 'to pursue, develop and transmit knowledge and ideas through research, teaching, study documentation production creation or writing'.<sup>217</sup>

From the above it is clear that in Africa, the requirement that education, especially for children involve an awareness of cultural and traditional values is regarded as indispensable for the full development of their personality. The African Children's Charter goes further by specifically recognising their right to participate in the cultural and artistic life. The requirements of availability, accessibility, acceptability and adaptability also indicate the integral place of culture in education. The absence of cultural objects such as the Benin bronzes which provide information of both historical and cultural nature, to a Benin child must be considered a violation of the right to an available and accessible education, as it inhibits the full knowledge and thereby participation in the cultural life of her/his community.

While the need for research into ancient civilisations for the benefit of mankind is important, it is not clear why such research must be conducted in the West, in cases where facilities exist in Africa.<sup>218</sup> African academics equally have the right to develop and transmit knowledge and ideas through research on cultural objects, which the retention of cultural objects in the West inhibits.

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<sup>214</sup> Article 11(C) and 12(2)

<sup>215</sup> Para 6.

<sup>216</sup> Article 26.

<sup>217</sup> Para 39.

<sup>218</sup> Abungu, G 'The Declaration: A Contested Issue' *ICOM NEWS* No 1 2004, 5 <[http://icom.museum/pdf/E\\_news2004/p4\\_2\\_004-1.pdf](http://icom.museum/pdf/E_news2004/p4_2_004-1.pdf)> (accessed 15/10/07).

#### 4.4.4 Freedom of expression

The right to seek, receive and impart information and ideas through any media including the form of art, is recognised under international law.<sup>219</sup> The freedom of expression is a right without which other rights are difficult to acquire and defend. As freedom of expression is a foundation for religious and political activities, it is often exercised in concert with the right to freedom of assembly,<sup>220</sup> and religion. The Inter-American Court in an advisory opinion<sup>221</sup> emphasised the dual dimension of freedom of expression which must be guaranteed simultaneously. The individual dimension requires that no one be arbitrarily limited or impeded in expressing his own thoughts which cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas.<sup>222</sup> The other is the social dimension, which implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.<sup>223</sup>

This collective aspect of the right to freedom of expression, is thus inhibited by the fact that African communities are being denied access to cultural information thus violating their freedom of expression.

#### 4.4.5 Freedom of association

Freedom of association is guaranteed in international human rights law,<sup>224</sup> and is closely related to freedom of association.<sup>225</sup> The Inter-American Court has described the freedom of association as ‘the right of the individual to join with others in a voluntary and lasting way for the common achievement of a legal goal’.<sup>226</sup> Freedom of association allows individuals to join together to pursue and further collective interests in groups. The absence of cultural objects limits this right in terms of gathering for cultural activities during which they are used in many African communities.

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<sup>219</sup> Articles 19 UDHR, 19 ICCPR, 9 ACHPR, 10 ECHR and 13, ACHR.

<sup>220</sup> (n. 209 above) 197.

<sup>221</sup> Advisory Opinion No. 5OC-5/85.

<sup>222</sup> Paragraph 31.

<sup>223</sup> As above.

<sup>224</sup> Articles 20 UDHR, 22 ICCPR, 11 ECHR, 16 ACHR, 10 ACHPR.

<sup>225</sup> International Pen v Nigeria (2000) AHRLR 212 (ACHPR 1998)

<sup>226</sup> (n.221 above).



#### 4.5 Effect of redefining the return of African cultural heritage as a human rights issue

Since its creation, the primary aim of the United Nations in the sphere of human rights has been the achievement by the individual of the maximum freedom and human dignity.<sup>227</sup> These core human rights principles are summarised in the UDHR thus; 'All men are born free, equal in dignity and in rights'. The experience of colonised peoples of Africa, exemplified by the plunder of their cultural heritage, however indicates the absence of equality and dignity which operated at that time and continues today. Former colonial masters hold in their museums, the best<sup>228</sup> and most sensitive<sup>229</sup> of former colonised nation's cultural objects. They claim righteousness for giving countries back their independence and financial aid, but continue to hold on to their cultural objects and in effect their history.<sup>230</sup>

It has been argued that respect for cultural rights is a constitutive element of respect for human dignity.<sup>231</sup> Cultural objects have a unifying role in a community or ethnic entity and their removal in many cases, constitute a violation of 'the principles of a State's moral community', which is based on human dignity.<sup>232</sup> The preservation of cultural identity (and by extension the right to a cultural heritage) must therefore be seen as a necessary precondition for the maintenance of human dignity.<sup>233</sup> The right of people to possess the creations of their ancestors with cultural and spiritual significance, is a call for the recognition of their humanity.<sup>234</sup>

Human rights have been a potent force in improving human conditions and is one to which western states have shown great commitment and pride, specifically with regards civil and political rights.<sup>235</sup>

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<sup>227</sup> Article 5, Proclamation of Tehran, [http://www.unhchr.ch/html/menu3/b/b\\_tehern.htm](http://www.unhchr.ch/html/menu3/b/b_tehern.htm) (accessed 28/10/07)

<sup>228</sup> For example, the six Ethiopian manuscripts in the Windsor castle are the best of the 350 manuscripts looted.

<sup>229</sup> For example, the Ethiopian Tabots.

<sup>230</sup> Shaw, T (n.2 above) 46.

<sup>231</sup> Symonides, J 'Cultural Rights' in Symonides, J (ed) (2000) *Human Rights: Concept and Standards* Dartmouth: Ashgate, 176-177.

<sup>232</sup> Fechner, F 'The Fundamental Aims of Cultural Property Law' (1998) 2 *International Journal of Cultural Property*, 376-394.

<sup>233</sup> Burgers, J 'The Right to Cultural Identity', in Berting, J et al (eds) (1990) *Human Rights in a Pluralist World: Individuals and Collectivities* London: UNESCO, 251.

<sup>234</sup> Shyllon F (n.1 above) 116.

<sup>235</sup> Prot, L (n.172 above) 104.

Today, human rights have clearly become 'the idea of our time'.<sup>236</sup> Issues raised as human rights will necessarily receive serious attention.<sup>237</sup> Thus, locating the return of cultural objects within the human rights discourse, refocuses debates on the return of African cultural objects away from internationalist and nationalist positions, to the enforcement of cultural and associated rights of African communities.

#### 4.6 The enforcement of the right to African cultural heritage as peoples' rights

Collective rights or so-called third generation of rights was propounded by Vasak as 'solidarity rights'.<sup>238</sup> It was initially argued that a "people" cannot consist of anything more than the individuals, thus collective rights were viewed as a non-existing concept and considered as rights of all individual human beings.<sup>239</sup> Another criticism was the supposed unenforceability of such rights.<sup>240</sup> However, despite resistance to the idea of collective human rights there is evidence that such right already exists in international law'.<sup>241</sup> Furthermore, the realisation that individual human rights combined with non-discrimination provisions do not sufficiently protect the rights of individuals as members of groups, has increased the acceptance of collective rights.<sup>242</sup> Today, it is clear that 'collective rights are recognised by the international community as rights which are exercised jointly by individuals grouped into communities including *peoples* and nations'.<sup>243</sup>

The concept of 'peoples' is well established under the African human rights system which is partly motivated by 'the fact that entire 'peoples' have been colonised and otherwise exploited in the history of Africa'.<sup>244</sup> The African Charter provides for the rights of peoples' which has been affirmed severally

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<sup>236</sup> Heyns, C and Viljoen, F 'The Impact of United Nations Human Rights Treaties at the Domestic Level' (2001) 23 Human Rights Quarterly, 483-535, 483.

<sup>237</sup> Prot, L (n. 172 above) 100.

<sup>238</sup> Vasak, K 'Pour une Troisième Génération de Droits de l'Homme' in C Swinarski (ed) (1984) *Studies and Essays in International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* Geneva: International Committee of the Red Cross, 837.

<sup>239</sup> Donnelly, J 'Human Rights and Collective Rights' in Berting, J (n. 233 above) 43.

<sup>240</sup> Lillich, R and Hannum, H (1995) *International Human Rights: Problems of Law Policy and Practice*, Boston : Little, Brown and Co, 205

<sup>241</sup> Brems, E (2001) *Human Rights Universality and Diversity* The Hague: Martinus Nijhoff, 73

<sup>242</sup> Donnelly, J 'Third Generation Rights' in Brolman, C et al (1993) *Peoples and Minorities in International Law*, The Hague: Martinus Nijhoff, 91

<sup>243</sup> Sohn, L quoted in Kiwanuka, R 'The meaning of people in the African Charter of Human and Peoples' Rights, (1988) 82 American Journal of International Law, 80.

<sup>244</sup> Heyns, C and Killander, M 'The African Regional Human Rights System' in Gomez, I and Feyter, K (eds) *International Protection of Human Rights: Achievements and Challenges* Deusto: University of Deusto, 509-543, 518.

by the African Commission on Human and Peoples' Rights (the African Commission).<sup>245</sup> In *Jawara v the Gambia*,<sup>246</sup> the African Commission found that the coup d'etat in Gambia had violated the rights to self determination of the peoples' of Gambia and in the *SERAC v Nigeria* case,<sup>247</sup> the rights of peoples' to a satisfactory environment was upheld.<sup>248</sup> Thus the concept of peoples' in the African context refers to the collectivity of individuals whether forming a minority within a State or the entire population of the State. It is within both interpretations that this work seeks the recognition for the right of African people to the return of their cultural heritage.

Early recognition of the right of peoples to its cultural heritage can be found in the Universal Declaration of the Right of Peoples 1976, which asserts the right of a people to its own cultural, artistic and historical wealth.<sup>249</sup> The use of the term wealth rather than heritage suggests that focus was in line with the efforts at the time, to secure the return of cultural objects taken during colonial period to the West.<sup>250</sup>

Article 15 ICESCR has been interpreted as imposing obligations on States in which indigenous peoples exist to protect their productions, as they are 'often expressions of their cultural heritage and traditional knowledge'.<sup>251</sup> Today, the right of indigenous peoples to their cultural heritage has been established under international human rights law by the recently adopted Declaration on the Rights of Indigenous Peoples.<sup>252</sup> The Declaration recognises the right of indigenous peoples to protect manifestations of their culture, including artefacts, and the obligation of States to provide redress through 'restitution of cultural, intellectual, religious and spiritual property taken without their consent or in violation of their customs'.<sup>253</sup> Furthermore, the right of indigenous peoples to practice their spiritual and religious traditions, use their ceremonial objects and to the repatriation of their human remains is recognised.<sup>254</sup>

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<sup>245</sup> Katangese Peoples' Congress v Zaire (2000) AHLR 71 (ACHPR 1995).

<sup>246</sup> (2000) AHLR 107 (ACHPR 2000).

<sup>247</sup> (2001) AHLR 60 (ACHPR 2001).

<sup>248</sup> Article 24 ACHPR.

<sup>249</sup> See < [http://www.algerie-tpp.org/tpp/en/declaration\\_algiers.htm](http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm) > (accessed 29/10/07).

<sup>250</sup> Prott, L (n.172 above)

<sup>251</sup> (n. 183 above,) Paragraphs 8 and 32

<sup>252</sup> A/61/L./67.

<sup>253</sup> Article 11.

<sup>254</sup> Article 12.

Recognition of the right of indigenous peoples' to their cultural heritage opens the door for similar recognition for African peoples', due to the similar history of colonialism and exploitation faced by the two groups, and the fact that that they like African peoples' can only access evidence of their cultural past by visiting Western museums and galleries. Patterson for example in his discussion on ownership and protection of indigenous cultural heritage, has used the term 'indigenous cultures' to encompass on the one hand persons who constitute a recognizable minority in a particular country, and on the other hand, all or a significant portion of the population of countries which gained independence in the second half of the twentieth century.<sup>255</sup>

This proposed recognition of the right to the return of African objects as the enforcement of the human rights of African peoples' therefore aims to take advantage of the fact that the nature of collective rights allows them to be demanded against foreign states as well as the international community.<sup>256</sup> In line with Vasek's view that solidarity rights are rights 'with undetermined subjects and opposing to all centers of power',<sup>257</sup> the recognition of the right to the return of African cultural heritage, can be enforced against States, public or private, national or international bodies, and individuals.

#### **4.7 Exploring the use of human rights mechanisms for the return of African cultural heritage**

There exists at the international, regional and national levels, mechanisms for the enforcement of human rights which can be utilised for the implementation of the return of African cultural heritage. The international community has conferred specific authority on UN human rights institutions to hold states accountable with respect to accepted human rights standards and act on their behalf in line with these standards.<sup>258</sup> Thus the UN General Assembly, empowered to make recommendations to promote and assist in the realisation of human rights,<sup>259</sup> and the Economic and Social Council (ECOSOC) in line with its powers to make recommendations and set up Commissions to promote respect and observance of human rights,<sup>260</sup> are two charter based bodies that can enhance studies into the human rights of the return of cultural objects.

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<sup>255</sup> Patterson, R 'Claiming Possession of the Material Culture of Indigenous Peoples' (2001) *Connecticut Journal of International Law* 283-300, 284.

<sup>256</sup> Donnelly, J (n. 233 above) 72.

<sup>257</sup> Brems, E (n 241 above) 74.

<sup>258</sup> Flood, P (1998) *The Effectiveness of UN Human Rights Institutions* Westport: Praeger, 116.

<sup>259</sup> Article 13 UN Charter.

<sup>260</sup> Article 62 and 68 UN Charter.

Furthermore, the Human Rights Council as empowered by ECOSOC resolution 1235,<sup>261</sup> can set up special procedures, specifically, thematic special rapporteurships and/or a Working Group on the return of African cultural heritage. The Office of the High Commissioner for Human Rights mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in the UN Charter and international human rights instruments,<sup>262</sup> can also provide support to such Working Group.

Having identified cultural rights as comprising of both civil and political and economic social and cultural right, both the Committee on Human Rights (CHR) and the Committee on Economic, Social and Cultural Rights (CESCR), can be involved in the implementation of the right to cultural heritage in its evaluation of cultural and other human rights associated with it in state reports and formulation of general recommendations.

At the regional level, the African Commission on Human and Peoples' Rights (African Commission) could with regard to its promotional mandate, set up working groups and/or a Special Rapporteur on the right to cultural heritage to clarify its meaning in detail, formulate principles on which States may base their legislation and assist in ensuring that member states work towards the return of cultural heritage.<sup>263</sup> The African Union Commission (AU Commission) could formulate a united African policy on the issue of the return of cultural heritage. The Assembly<sup>264</sup> and the Executive Council<sup>265</sup> composed of the Foreign Ministers of African States, could also decide on a common African policy on return. The Committee on Education, Culture and Human Resources, can formulate supervise and coordinate the implementation of programmes.<sup>266</sup> Finally, the African Court of Human and Peoples' Right (African Court), can complete the efforts of the African Commission in concretising State obligations of ensuring the enjoyment of and access to their cultural heritage through its judgments or advisory opinions on the matter.<sup>267</sup>

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<sup>261</sup> ESCOR XLII, Supp 1(E/4393), 17.

<sup>262</sup> GA Resolution 48/141.

<sup>263</sup> Article 45 (1) and (2), African Charter.

<sup>264</sup> Article 9 (1) (a) AU Constitutive Act

<sup>265</sup> As above Article 10.

<sup>266</sup> Articles 14 and 15 AU Constitutive Act.

<sup>267</sup> Articles 3 and 4 African Court Protocol.

## 4.8 Conclusion

The conceptual battle over the universality, indivisibility, interdependence and interrelatedness of all human rights is over, and focus has shifted to their enforcement.<sup>268</sup> The recognition in provisions on cultural and its associated rights relating to cultural heritage, as rights enjoyed by groups and the ability of collective rights to confer obligations on states, public and private or national and international bodies as well as the international community, makes the characterisation for the return African cultural objects as the enforcement of their collective rights the most suitable approach. The recent recognition of the right of indigenous peoples to their cultural heritage, should be extended to Africa, given the analogous effects of colonialism on the cultural heritage of African people. This re-characterisation as a human rights issue, can be implemented through existing international human rights law mechanisms.

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<sup>268</sup> Heyns, C and Viljoen, F (n.226 above) 483.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

'Our reply to British libraries seeking to retain the Maqdala collection is therefore a simple one. It is essentially the African reply... The reply is 'thank you very much indeed for looking after our property... now please return them to us ....'<sup>269</sup>

This chapter presents the summary of the conclusions of this research and offers recommendations on steps to be taken to integrate the right to the return of African cultural heritage into the international human rights discourse.

#### 5.2 Conclusion

African cultural objects represent the rich cultural history and spiritual wealth of a continent historically and contemporarily deprecated. For many years after the advent of colonialism, African art was described as 'childlike' 'grotesque' 'savage' and 'bestial', indicating why the Benin Bronzes, though identified as high quality on arrival in Germany, where housed in the Museum of Primitive Art, Berlin.<sup>270</sup> Their subsequent recognition as major artistic works of mankind as renowned European artists began to draw inspiration from them, made them a source of African pride, a symbol of the richness of African heritage. Indeed it was in their art that Africans were first able to restore in themselves a sense of dignity and achievement.<sup>271</sup>

African countries, as illustrated through the experiences of Nigeria and Ethiopia, want their cultural objects back. These objects apart from symbolising the artistic ingenuity of the African continent, hold cultural and spiritual significance for the communities from which they originate. The field of cultural heritage law though affected by the continued formulation with clarity of cultural rights, has not integrated these concepts into its discourse. Thus, given the importance accorded to human rights as a means of protecting the dignity and worth of all human beings, it is advocated that focus be shifted to the re-characterisation of the return of African cultural objects as a human rights issue.

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<sup>269</sup> Pankhurst, R (n. 39 above).

<sup>270</sup> Shyllon, F (n.1 above) 103.

<sup>271</sup> As above.

The existence of a variety of rights on which the enforcement of the right to cultural heritage of African people, through the return of their cultural objects can be based elicit compelling reasons for their characterisation as human rights. The dignity attached to the ability of a community to define for itself its own cultural identity, and to practice its culture and religion to the fullest possible measure, speaks through the provisions on the right to culture and its associated rights in international human rights law. The affirmation of these same principles by the UN with respect to indigenous peoples, victims of colonialism like Africa, indicates the viability of a human right perspective to the return of African cultural objects.

Africa's heritage is hers to share with the world on her own terms, contrary to the claim that over time they have become part of the heritage of the countries which care for them.<sup>272</sup> The concept of heritage involves more than physical possession of an object for long periods, it involves its use for the purpose it was created or continuously symbolises, in the 'milieu which gave it birth'.<sup>273</sup> Thus, heritage cannot be borrowed. It is a product of the distinct culture of a people: objects wrongfully taken from their place of birth, like the Benin bronzes and Maqdala treasures, remain stolen objects, never acquiring the status of heritage in the receiving country. They remain for eternity, a symbol of an iniquitous history and a falsified reality.

### **5.3 Recommendations**

Strategies to ensure the successful integration of the claims for the return of African cultural heritage as a human rights issue as well as their adequate protection and conservation upon return are identified at the international, regional and national levels.

### **5.4 International level**

In line with suggested delimitation of right to the return of African cultural heritage within the international human rights framework particularly that of the UN, there needs to be an international forum like that established on indigenous people, to provide indepth study into the issue. It is suggested that a Working Group on the return of African cultural heritage be set up by the Human Rights Council, to examine in detail the claim of African people to their heritage, as a precursor to the

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<sup>272</sup> 'Declaration on the Importance and Value of Universal Museums' <[http://icom.museum/pdf/E\\_news2004/p4\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p4_2004-1.pdf)> (accessed 15/10/07).

<sup>273</sup> Shaw, T (n.2 above) 48



establishment of mechanism such as a Commission for the return of African cultural objects to oversee the implementation of the findings of the Working Group.

It is suggested that such Commission, composing of relevant experts and conservation specialists should as part of its mandate engage in the following:

Establish a criterion for determining those objects which need to be returned by western museums to end continuing and future infringement of human rights;<sup>274</sup>

Ensure the provision of technical and financial support by countries and museums which hold these objects is an integral part of the process of return, for their adequate preservation;<sup>275</sup>

Create a mechanism which encourages and supports dialogue between African communities and private museums or individuals who wish to return objects in their possession;

Encourage countries like Britain to amend laws prohibiting public museums from de-accessioning;

Formulate an exhaustive catalogue of actions which African countries should take to ensure the adequate protection and conservation of their objects upon their return.

At the treaty body level, the CDESCR and CHR should request African countries to indicate in their State reports, efforts for the return of cultural objects to the communities from which they originate in fulfilling their obligations under the respective instruments.

## **5.5 Regional level**

Africa at the regional level of the AU must create the conditions necessary for the return of cultural objects in the following ways -

There is yet no existing AU policy on the return of African cultural objects,<sup>276</sup> despite the attention paid to cultural heritage in the African Charter and the African Cultural Charter, and the AU Strategic Plan on Culture 2003-2004's inclusion of the formulation of a white paper on the 'return and restitution

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<sup>274</sup> Shyllon, F n. 66 above, 6.

<sup>275</sup> As above.

<sup>276</sup> Interview with Mr. Gnalega.

of African cultural assets.<sup>277</sup> A common African policy should be formulated by the AU in respect of efforts for the return of cultural objects. To aid this process, a comprehensive inventory of African cultural objects as far as is possible should be prepared, based on information from each Member State.

The AU should establish a Working Group to look into claims by African communities and countries for the return of their cultural basis, which should serve as the basis for the formulation of a common African policy on the issue.

The ongoing EU-Africa dialogue on ‘the issue of cultural goods’, should extend beyond present day protection of cultural objects to the return of African cultural objects looted during colonialism and presently in EU member Countries.<sup>278</sup>

The AU should also encourage member States to ratify existing international conventions on the return of cultural objects, as less than half of African countries have signed any one of these conventions.<sup>279</sup> Despite their non retroactivity, they contain elaborate provisions for the return of cultural objects which may find their way to the West after their return.

It would be necessary for the Africa to harmonise its mechanisms for the protection of cultural heritage. Apart from harmonising laws, protective measures like joint border patrols and training of customs officials on the detection of fake export licenses and smuggling of cultural objects should be embarked upon.

One of the obstacles to return has been the lack of facilities for the protection of cultural objects in their countries of origin and minimal funds in litigating for the return of objects. The AU should set up a fund that would assist African countries in improving security and securing the necessary manpower for the protection of their heritage and litigating for the return of those which find their way to the west. African countries cannot expect western funding for repatriation of their cultural objects, particularly those looted during colonialism

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<sup>277</sup> See Annexure B

<sup>278</sup> See Annexure C.

<sup>279</sup> There are 25 and African signatories to the UNESCO and UNIDROIT Conventions respectively.

## 5.6 National level

Identifying communities for which objects have spiritual or ritual significance is mandatory for purposes of their return. While this at first glance may prove a difficult task considering potential for conflicting claims over the same object. Ethiopia provides a classic example. Spiritual objects: the Tabots were returned to the Orthodox Church from which they were taken. Cultural objects: the Axum obelisk returned by Italy is back in Axum town, where it had stood before it was looted. Objects of national historical value: the book of Psalms and the Shield are in museums.<sup>280</sup>

African countries must take steps to sign all relevant conventions protecting cultural heritage and enact legislation implementing its provisions such as the designation of the nature of cultural heritage to be protected, introduction of export certificates and creation of national bodies to assist in the formulation of necessary legislation for the protection of cultural heritage. In countries where such laws already exist, they should be reviewed to ensure their adequacy.

There should be a national audit of cultural heritage collections of and an inventory of all Nigerian cultural objects outside the country on the basis of information published in museum and auction catalogues and art books.

The opportunity to enter into bilateral negotiations for the return of cultural objects with the US, a major market state has not been utilised by African countries, except Mali. Other countries must follow suit and take advantage of this opportunity.

Ngo's, particularly those involved in cultural rights, should make use of their shadow reports to the CESCRR and the CHR, to indicate the extent to which African governments to implement their obligations to respect of obligations to respect, protect and fulfil rights under the Covenants.

Admittedly national leaders have not always been conscious of the deep attachment their peoples have for their objects. In Nigeria for example, former leaders have given as gift and independently agreed to the loan, cultural objects of cultural objects of great value.<sup>281</sup> It is therefore necessary to sensitise parts of society which do not have an attachment to cultural objects of their value within communities from which they originate.

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<sup>280</sup> Interview with Prof. Pankhurst (n. 39 above).

<sup>281</sup> See Shyllon, F (n.69 above); 'Negotiations for the return of Nok sculptures from France to Nigeria – An unrighteous conclusion' (2003) Vol. VIII, 2 *Art Antiquity and Law*, 119.

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American Convention on Human Rights (ACHR) 1144 UNTS 123

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Professor Richard Pankhurst, Vice-Chair AFROMET, Addis Ababa, Ethiopia.

Mr. Benjamin Gnalega, Culture Department, African Union Commission, Addis Ababa, Ethiopia.

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## ANNEXURE A

### Extract of article 1 UNESCO Convention 1970

- (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 artist 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

## ANNEXURE B

### STRATEGIC PLAN OF THE COMMISSION OF THE AFRICAN UNION

#### Volume 3: 2004-2007 Plan of Action

#### Programmes to Speed Up Integration of the Continent

#### *ACTION AREA 6: CULTURE*

#### *PRIORITY PROGRAMME 23: «CULTURAL RENAISSANCE»*

##### A) OBJECTIVES

- Develop local expertise and skills;
- Strengthen Africa's cultural growth and development in the world, and effective representation of Africa and its material and nonmaterial productions;
- Achieve an African common position in debates on cultural diversity and cultural exception, and strengthen African cultural cooperation;
- Enhance development of cultural industries in Africa;
- Resituate culture and cultural players in development. This should not simply be a dimension of development, but rather a foundation of development;
- Preserve Africa's cultural heritage;
- Consolidate historical memory in Africa fight piracy;
- Support scientific and cultural associations.

##### B) ACTIVITIES

- Up-dating the African Charter within the context of the First African Cultural Congress (February 2005);
  - o "Landmarks" (identification of Africa's cultural embodiment);
  - o "Africa's expertise and know-how in decline " (inventory, revival...) in 2006;
- Promotion of cultural industries;
- Support to the launch of landmark cultural initiatives;
  - o Academy of Languages
  - o "Africa's Heritage" (global initiative including return to Africa of African cultural objects, rehabilitation of historical sites and recognition of and support to "living library");
  - o "Bridge Across the Atlantic": promotion of various initiatives aimed at strengthening cultural and economic ties between Africa and the blackpeople of the Americas;

- o Africa House (Resolution on an Africa House: Paris CM/Res.1606/62 – 1995); London (CM/Res.1548/60);
  - o Humanity Centre.
- Organizing International symposia on the Continent's Historical Figures (Amilcar CABRAL, Patrice LUMUMBA...)

### C) SOME MAJOR EVENTS AND DATES

Days or Years to be celebrated

- 18 May International Heritage Day;
- 21 May World Cultural Diversity Day;
- 25 May Africa Day;
- 9 September African Union Day;
- 16 October International Day for the Abolition of Slavery;
- 30 June Africa Scientific Renaissance Day;
- 2006 African Languages Year 2004.
- Establishment of African Union Publishing House (November);
- 6 – 9 October: First meeting of African and Diaspora Intellectuals;
- November: Meetings of African Experts to identify key African cultural programmes;
- Amilcar CABRAL International Symposium (9 – 12 September, Praia);
- December: Choice of cultural capitals for 2005, 2006, 2007;
- 2004 – 2005 African Union Archives Rehabilitation Programme; 2005
- Establishment of an African cultural policy observatory;
- 1st quarter: Programme for definition of Africa Day celebration in the Diaspora;
- Meeting of the African Culture High Council;
- February 2005: First Pan-African Cultural Congress (Cameroon or DRC);
- April: Meeting of Ministers of Culture (Mauritius);
- July: Assembly of Heads of State (Culture & Education, Khartoum);
- 2nd half 2005: Launch of the African Academy of Languages in Bamako;
- Setting up an International Technical Committee for the launch of “Cultural Landmarks” and “Africa World Heritage” on the Internet;
- Launch of “Living Library” Programme (1st quarter);
- Organization of a Workshop on Africa House (2nd half 2005);
- Setting up an International Technical Committee under AU auspices for establishment of a Museum of Black Civilizations in Dakar;

- Setting up an International Technical Committee under AU auspices for revitalization of the Institute of Black Peoples in Ouagadougou 2006.
- Launch of “the African Culture Fiesta” Day + Afro-vision (1st in South Africa, 2nd in Egypt in 2007);
- Setting up a Technical Committee for establishment of the Centre for Human Studies and launch of the Centre at Ife, Nigeria;
- Dakar 2nd Festival of Negro Arts (June 2006);
- Setting up a Technical Committee for the launch of “Bridge Across the Atlantic” Programme: Launch of the “Slave Route” Programme;
- “African Cultural Goods” Programme: Setting up an African Technical Committee;
- Meeting for creation of a unified Body on Africa’s Intellectual Property;
- Africa Encyclopaedia Seminar (3rd quarter);
- Workshop on establishment of an African Cultural Market;
- Patrice Lumumba International Symposium, Kinshasa; 2007
- July: Central Theme of Summit (Ghana): Scientific Research; Exhibitions and Public Shows
- FESPACO (cinema, Ouagadougou, February 2005);
- FESPAM (Pan-African Music Festival, Brazzaville);
- FESPAD (Pan-African Dance Festival, Kigali);
- Arts Biennial (Dakar, May 2006);
- African Performing Arts Market (Abidjan);
- Exhibition of Africa’s Cultural Industry (Abidjan);
- Carthage (Tunisia) Festivals;

#### White Papers/Reports (2005-2006)

- Cultural diversity (White Paper and Africa Audience)
- Initiation in Africa;
- Piracy of Cultural Works in Africa;
- **Return and Restitution of African Cultural Assets.**

## ANNEXURE C

### **Report of the EU and African experts meeting in Lisbon, Portugal, 4/5 October 2007, on the issue of Cultural Goods**

- 1) The European Union/Africa Ministerial Troika meeting on 15 May 2007 tasked EU and African experts "to meet and to discuss how to facilitate the implementation of the decision and commitments made on the issue of cultural goods in the framework of the EU-Africa Dialogue, including on their legal aspects, and to present respective recommendations to the next Ministerial Troika meeting".
- 2) The report of the Joint Ad Hoc Group of Experts on the Return of Stolen or Illicitly Exported Cultural Goods that was submitted to the 2<sup>nd</sup> Africa-European Union Ministerial Conference in Ougadougou, Burkina Faso, on 28 November 2002, provided a useful basis for deliberations of the Lisbon expert meeting.
- 3) The experts group reconfirmed the stock-taking of relevant agreements included in the "report of the Joint Ad Hoc Group of Experts on the return of stolen or illicitly exported cultural goods", elaborated on 13/14 November 2002.
- 4) The group agreed to encourage all African and EU countries to sign and ratify all relevant international conventions on cultural goods.
- 5) The group welcomed the "terms of reference for the establishment of an inventory of on-going cooperation activities and potential cooperation with regard to cultural goods" as agreed by the EU/Africa Ministerial Troika meeting in December 2004, and the European Commission's offer to finance the drawing up of such an inventory. The group is of the opinion that such an overview which should be urgently undertaken will indeed form a useful basis for further cooperation. It considers that the EU support programme for the African Union could be used in order to permit a swift allocation of the funds needed for the work on the inventory to start on the soonest possible date, unless another appropriate source can be found before the next EU-AU Ministerial Troika Meeting in Accra.
- 6) The working group
  - a) stressing the importance of having a better knowledge of African cultural goods, called for an exchange of information between EU and African countries on existing African cultural goods in EU countries with a view to establish a database,
  - b) identified a number of international and regional legal instruments including the following:

- Protection and Promotion of the Diversity of Cultural Expressions (2005)
- Safeguarding of the Intangible Cultural Heritage (2003)
- Protection of the Underwater Cultural Heritage (2001)
- UNIDROIT Convention on stolen or illegally exported cultural objects (1995)
- Protection of the World Cultural and Natural Heritage (1972)
- Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (1970)
- Protection of Cultural Property in the Event of Armed Conflict (1954)
- Universal Copyright Convention (1952, 1971)

The group also took note of the existence of relevant European guidelines and decisions, including the European Council Directive on the objects unlawfully removed from the territory of a member states; it further agreed to recommend the exchange of experiences and sharing of best practices in this context and the identification of current best practices on the return of stolen or illicitly exported cultural goods and ways of applying these in the EU-Africa context,

c) called for concrete support for the elaboration of legislation on cultural goods in line with all the international relevant instruments in order to facilitate their protection, promotion and to fight against illicit trade in cultural goods,

d) underlining the importance of capacity building in and technical assistance to African countries, the group recommended among others:

- the establishment of an inventory system of cultural goods;
- the training of technical staff for establishing the inventories;
- the setting up of security and safety systems to protect/preserve cultural goods and institutions;
- the promotion of increased awareness among holder/curators and other actors for the protection cultural goods;
- the strengthening of institutional capacities, including for maintaining accurate inventories;
- the enhancing of the capacity of countries and their institutions to implement decisions and international conventions.

e) the group highlighted the importance of strengthening cooperation such as:

- raising public awareness in order to help identify and protect cultural goods;
- encourage programmes of cooperation that allow the exchange and study of cultural goods in their country of origin;
- Strengthen the linkage between culture and development in the context of the African cultural renaissance Programme.

f) the meeting highlighted the crucial necessity to identify specific sources of funding for all activities related to the cooperation in the field of cultural goods, especially in the implementation of the EU-Africa Action Plans.

g) the group took note with satisfaction of the growing number of positive examples of return of cultural goods to their countries of origin over the last years.

h) the group discussed the need for an adequate process to identify areas of progress and make recommendations to facilitate implementation of agreed activities.

7) The group finally recommends that the Ministerial Troika include language both in the Joint EU-Africa Strategy and the respective Action Plan that adequately reflects the importance of this issue and the main contents of this report.