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INTERGOVERNMENTAL COMMITTEE FOR PROMOTING THE RETURN OF CULTURAL PROPERTY TO ITS COUNTRIES ORIGIN OR ITS RESTITUTION IN CASE OF ILLICIT APPROPRIATION

Sixteenth Session

Paris, UNESCO Headquarters, 21-23 September 2010

ORAL REPORT of the RAPPOREUR

INTRODUCTION

The Director General of UNESCO represented by Alain Godonou opened the 16th session with an address. This was followed by the election of Professor Constantin Economides of the Greek delegation as Chairperson. Thereafter, Libya, Mexico, Republic of Korea and Romania were elected Vice-chairpersons. Professor Folarin Shyllon of the Nigerian delegation was elected Rapporteur.

PROMOTION OF BILATERAL RELATIONS

The three cases pending before the Committee were discussed. They are:

- the Parthenon Marbles (Greece, United Kingdom and the British Museum)
- Bogazkoy Sphinx (Turkey, Germany and the Berlin Museum)
- the Makonde Mask (Tanzania, Switzerland and Barbier-Mueller Museum)

The Parthenon Sculptures

In the statements by the delegations of Greece and the United Kingdom old positions were restated. In the adopted Recommendation 1, however, it appears there is hope for future fruitful negotiations. Besides, a consensus emerged: the objects are henceforth to be referred to as Parthenon Sculptures, thus abandoning the old terms of Parthenon Marbles and Elgin Marbles.

The Bogazkoy Sphinx

Both Turkey and Germany agreed to further negotiations on the return of the Sphinx.

The Makonde Mask

The delegation of Tanzania reported the return of the Makonde Mask to Tanzania following successful negotiation with the Barbier-Mueller Museum, Switzerland under the

auspices of the International Council of Museums (ICOM). The agreement talks about the return being a “donation”!

Perhaps we should not waste words with regard to the act being a “donation.” The important thing is that the Mask is in its rightful place. We may also note that in the past requests for return have been met by way of donation even after litigation has started. Thus in the case of a garland sarcophagus lent to the Brooklyn Museum, the lender of the sarcophagus, a private collector, appeased Turkey that was claiming it by donating the eleven-million-dollar artifact to the American-Turkish Society. Subsequently, the American-Turkish Society sent the garland sarcophagus back to Turkey, the plaintiff country, where it remains on indefinite loan. Similarly, the Metropolitan Museum of Art, New York, returned the “Lydian Hoard” to Turkey after litigation had commenced in response to the “blackmail” of a potentially successful lawsuit.

Replicas and Copies

In the course of the discussions of the three cases the use of replicas to assuage the call for return or restitution of cultural property came up. This is a diversionary suggestion. Being given a copy of an “irreplaceable cultural heritage” is a very poor substitute. The connection that people feel to cultural objects that define their being is so powerful and a duplicate cannot satisfy what Anthony Appiah (“Whose Culture Is it, Anyway?”) referred to as “the connection to art through identity”. Besides among nations the option has always been universally spurned. Thus in the report of the twelfth Intergovernmental Committee session (25-28 March 2003) it was reported that on 19 November 2002 a bilateral meeting was held between Turkish and German authorities in Berlin with little result over Turkey’s request for the return of the Boguzkoy Sphinx. “Germany proposed keeping the original Sphinx and having a replica made to give to Turkey. Turkey proposed the return of the Sphinx to Turkey and giving a replica to Germany. Neither proposal was accepted.” The truth is that even in this technologically advanced age when you may be able, at first sight, to tell the copy from the original, only the original has the aura or magic that attaches to an original work of art.

DRAFT RULES OF PROCEDURE ON MEDIATION AND CONCILIATION

The consideration of the Draft Rules of Procedure on Mediation and Conciliation, particularly draft Articles 4 and 7, occupied almost a day. This is rightly so in view of the increasing important role that mediation is playing in the return or restitution of stolen or illegally exported cultural property to its countries of origin.

The issue of the use of alternative dispute resolution methods for the resolution cultural property disputes under the aegis of the Committee first came up for discussion at the third session of the Committee held in Instabul Turkey 9-12 May 1983. Salah Stetie, the Chairperson of the first three sessions of the Committee had commented that “[i]f at the end of ... one year [of negotiation] the Committee felt that the position of the holding country was unjustified, it could extend its good offices or perhaps arbitrate in order to find an acceptable solution.” Several members then took the floor to stress that the method of bilateral negotiations must be respected absolutely. One member stated that it was impossible for his country to accept the idea of “arbitration” on the part of the Committee, for the latter’s role was one of mediation only. “To arbitrate would be to support the position of a particular country”; it was not for the Committee to pass judgment in such a manner, but rather to analyse the reasons for the failure of an attempt to obtain a return or restitution through bilateral channels. The Chairperson was quick to respond that he had used the word “arbitration” “in a general way.” The

Committee could only bring together people of good will eager to find workable solution: "its path was that of mediation and moral pressure."

PREPARATION OF MODEL PROVISIONS DEFINING STATE OWNERSHIP OF CULTURAL PROPERTY

Based on signals given at the 15th session the Secretariats of UNESCO and UNIDROIT formed a committee of experts to produce draft model provisions defining state ownership of cultural property. Many members of the Committee, however, were unhappy that the committee was empanelled without express directive from it. In the end the Committee through Recommendation 3 approved the setting up of the experts committee to prepare draft model provisions with explanatory guidelines to be made available to States to assist them in the drafting or strengthening of national laws.

THE UNESCO CULTURAL HERITAGE LAWS DATABASE

This innovative tool continues to be developed, and it is now an informative tool for States to improve and strengthen their national laws. It is also a boon to researchers. It would be necessary to update the database regularly in order to ensure that it remains the primary resource in the field.

THE UNESCO RETURNED CULTURAL PROPERTY DATABASE

The Secretariat made the revelation of a new database intended to catalogue the return or restitution of cultural property. This should eventually become a moral instrument that would encourage holding States to follow the part of honour, and retribute.

INVENTORIES

Recommendation 6 in part reminds and encourages States to reinforce their national policies regarding inventories of movable cultural heritage, notably concerning museums, cultural institutions, cultural sites in particular of an archaeological nature and places of worship. The absolute importance of this advice cannot be over-emphasised. African countries that tend to be slack on installing the state of the art inventories should take note and act accordingly with utmost speed.

UNIDROIT CONVENTION UNDER ATTACK

Only 30 countries so far have joined the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects after 15 years. Two speakers on behalf of the art market and some delegations spoke in unfavourable terms concerning the UNIDROIT Convention. Certain provisions of the Convention certainly do not endear themselves to the art market and market countries. I am however comforted by the remarks of the Director-General of UNESCO in 1995 who soon after its adoption described the UNIDROIT Convention as a "breakthrough international framework to combat private-sector transactions in stolen art and cultural property" and as "a watershed in our common struggle to defend cultural property." [UNESCO News, Volume 2, No. 5, 20 September 1995].

In spite of the attacks against it the Convention has forced many market countries to endorse UNESCO 1970 Convention. Faced with the choice of ignoring the two

Conventions market countries have in my opinion been persuaded to adopt the lesser evil. For example, the 1999 Report of the Swiss Working Group that considered whether Switzerland should ratify the UNESCO and UNIDROIT Conventions concluded that should Switzerland choose not to ratify, the country would become more attractive as hub for Illicit trade of stolen and illegally exported cultural objects, and “we can reasonably expect that a growing number of shady transactions **will not promote a positive image of Switzerland abroad.**” {Emphasis added}. In the end Switzerland adopted the 1970 Convention in 2003. Other European market countries that had joined the 1970 Convention since 1995 are: France (1997), the United Kingdom (2002), Denmark (2003), Sweden (2003), Germany (2007), Norway (2007), Belgium (2009) and the Netherlands (2009). Of these only Norway (not a particularly huge) art market country is a member of UNIDROIT Convention having joined in 2002. Italy (2000), Spain (2002), Portugal (2003) and Greece (2008) all both source and market countries are members of the UNIDROIT Conventions. Meanwhile, in 1983 the United States joined the 1970 UNESCO Convention, and immediately followed membership with its hugely beneficial 1983 Cultural Property Implementation Act.

Since this Rapporteur is African, he cannot fail to note sadly that only two African countries (Gabon and Nigeria) have joined the UNIDROIT Convention. With regard to the earlier 1970 Convention just twenty seven out of fifty three African countries members of the United Nations are States Parties. By all accounts, African countries appear to be the most vulnerable of any group of countries with regard to stealing and illicit trade in cultural property.

A NEW STANDARD SETTING INSTRUMENT ?

At one point during plenary the issue whether a new standard setting instrument was necessary was briefly discussed. In view of the fact that after forty years there are just one hundred and twenty members of the 1970 Convention, and after fifteen years only thirty States have joined the UNIDROIT Convention we can say that the priority should not be working towards a new instrument but giving efficacy to the 1970 and 1995 Conventions. Efforts should be concentrated on getting more countries to become members of both Conventions. More work remains to be done to convince market States that it is in the interest of the comity of nations that they subscribe to the 1995 Convention.

AWARENESS CAMPAIGN AND LINKS WITH THE ART MARKET

The speakers representing the art trade spoke in discordant notes. While the two speakers from Sotheby's and Christie's were conciliatory and showed empathy for the work of the Committee, other speakers were less understanding. In fact two vigorously attacked the UNIDROIT Convention as if it were a rogue elephant, rather than an instrument that complements the 1970 Convention. “Together the two Conventions”, as Lyndel Prott very well put it; “close many of the loopholes that had prevented courts from combating more forcefully the illegal trafficking of cultural objects.” [UNESCO *Sources*, No. 72, September 1995]. One wonders what the International Code of Ethics for Dealers in Cultural Property 1999 is all about!!! Are these Code of Ethics merely meant to present a positive image of the associations? I cannot but recall the observation of Clemency Coggins that the significance of these self-denying ordinances by museums and art dealers associations is probably that they should have been made at all. [*International Journal of Cultural Property*, No. 4, 1995, 66].

CELEBRATION OF THE 40th ANNIVERSARY OF THE 1970 CONVENTION

It was agreed that the 40th anniversary of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property should be marked at the end of the year. It may be recalled that ten years ago, the 30th anniversary was marked at the UNESCO headquarters with a one day symposium.

PERIODICITY OF THE COMMITTEE'S MEETINGS

There was a protracted debate whether the Committee should meet again next year or wait till 2012. In the end there was consensus that the Committee could meet in 2011, if the Director General of UNESCO provides the wherewithal to hold the meeting. This is reflected in Recommendation 5.

CONCLUSION

Only eight cases have come before the Committee since its inception. Three were solved by mediation, one was concluded by direct return, one was resolved by litigation, one appears to be suspended, and two, the Parthenon Sculptures and the Bogazkoy Sphinx are pending. [Information from the Secretariat]. The success of the Committee cannot however be judged by these meager statistics. On the contrary, the Committee has been one of the most successful committees of UNESCO. The tens of thousands of returns that had taken place these thirty-two years attest to this assertion. Countries and individuals have been persuaded to make returns and restitutions through the influence of the Committee, or what the Committee's first Chairperson called "moral pressure". The databases, codes of ethics, import controls (as under the United States Convention on Cultural Property Implementation Act), improvements in national legislations, mediations; all these and more could not have been achieved without the assiduity and moral authority of the Committee. It is therefore quite proper to celebrate the 40th anniversary of the 1970 Convention. I am also inclined to agree that the time has come for the Committee to meet annually in order to accelerate further development of measures and ideas in combating stealing and illicit trafficking in cultural objects. It would also be helpful in the advancement of the Committee's mission.

FOLARIN SHYLLON
Rapporteur