

Working Paper

Submitted by The Egyptian Delegation to the Conference Meeting of Open Membership Team of Governmental Experts Concerning Protection from Illicit Trading in Cultural Property Held in Vienna from 24 to 26 November 2009

Opening speech:

Considering that Egypt is one of the keenest countries on the protection of cultural property being prone to crimes due to the various variants of such property since time immemorial, whether from Pharaonic, Ptolemaic, Roman, Coptic, Muslim or other civilizations; she expresses its appreciation for such international efforts to combat crimes falling on cultural property and submits this paper to reflect the practical reality and put forward initial proposals that could help find some solutions in this area.

First: Definition of Cultural Property and its Importance for Peoples

The definition of cultural property provided by the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property 1970, is one of the most important definitions in this regard, which could be described as a comprehensive, exclusive one for the concept of cultural heritage, cultural property and archeological items. The Convention defined cultural property as 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. Several categories were added to this definition to include all variants covering the concept of cultural property in a broader and more comprehensive way. It included, for example but without being exclusive, rare collections and specimens of fauna, flora, minerals and anatomy, and objects of pale ontological interest. It also included property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance, as well as products of archeological excavations (including regular and clandestine) or of archeological discoveries. This is of significance for us in this working paper, since the explicit statement of the inclusion of products of clandestine (illicit) excavations in the definition of cultural property, has been of utmost importance for restitution of many archaeological items which were taken out of their countries. The definition stated in the Convention, included also elements of artistic or historical monuments or archaeological sites

which have been dismembered and antiquities, more than one hundred years old, such as inscriptions, coins and engraved seals, etc.

This comprehensively formulated definition for cultural property is indeed one of the best. It has to be approved as binding by member states, so that it would not be violated, misconstrued or made void in substance, whether in local laws or bilateral agreements. Any new proposals in this regard can be accepted if it adds to this definition and can't be accepted if it detracted.

Second: Development of Egyptian Legislation Concerning Criminalization of trafficking and smuggling of cultural property

The legal system for protection of Egyptian antiquities started with the establishment of the modern Egyptian state in the nineteenth century. It started with the decree of 15th August 1835 concerning the procedures for protection of antiquities. The decree emphasized in its preamble the huge wealth of Egyptian antiquities, describing them as the marvels of past centuries. It provided that the Egyptian governmental cabinet decreed the absolute prohibition of export of antiquities in the future.

In March 1869, the bye-laws for "antiquities items" were issued. Those bye-laws included regulatory dispositions for excavations so as to prevent smuggling of Egyptian antiquities.

On 24th of March 1874, the antiquities byelaw was issued, the provisions of this byelaw stipulated that antiquities, not yet discovered – i.e. still unearthed – irrespective of their location, are the property of the government (at that time the term "government" was synonymous with the term "state"). Article 34 of this byelaw stipulated that antiquities seized in a smuggling crime were to be totally confiscated.

Afterwards, several laws and bye-laws were successively issued emphasizing the prohibition of export of antiquities and conferring protection upon them. For example, a decree of 12th August 1897, the second article of this decree stipulated that the judge had to order – in addition to penalties decreed by the law – that all antiquities implied in the breach of law were to be returned back to the government, this is equivalent to restitution in modern legislation,

Then the law No. 14 for the year 1912 was issued in June 1912. The legislator dealt with the issue of smuggling of antiquities which were prohibited to be taken out of Egypt except through a special license-certificate of export in the proposal. Consequently, it became illegal to

take any antiquities out of Egypt, through whatever channel, except through license, this proved highly helpful to get back Egyptian antiquities smuggled abroad during this period, because of the presence of this legislation.

It is noteworthy that article 14 of this law issued on 12/6/1912, prohibited the export of antiquities from Egypt to other countries, except through a special license which only the Antiquities Department was entitled to grant or withhold. The same article stipulated that any antiquity item, which someone would try to get out of Egypt without license, even for the sake of others, would be seized and confiscated for the sake of the government.

Then, the law No. 215 for the year 1951 was issued which provisions makes penalties harsher for theft or smuggling of antiquities. This law prohibited completely taking antiquities out of Egypt, unless there were multiple items similar to them, provided the approval of the Department of Antiquities was granted. This approval should be in writing, based upon the minutes of meetings of committees formed of the director of the concerned museum, one of the museum curators for examination and reviewing, in presence of a representative of the Department of Customs. This means that unavailability of a copy of this license or approval, implies that violation of the law took place and antiquities, in this case, would have been stolen or smuggled from Egypt.

Responding to ever increasing cultural and ideological campaigns against illegal international trade in antiquities and following a decision by the Board of the Egyptian Archaeological Organization on 29th of March 1979, the Minister of Culture issued an important decree, numbered 14 for the year 1979, consisting of one single article stipulating the following:

"Cessation of granting of license to individuals for export of antiquities, irrespective of their source outside the Arab Republic of Egypt".

This state of affairs continued till the promulgation of the law No. 117 for the year 1983, which abolished completely all export of antiquities outside Egypt. Article 9 of this law stipulates that disposal of any antiquity possessed by individuals within the Egyptian territories must be after a written consent from Antiquities Authority provided that such disposal does result in getting this antiquity outside Egypt. Penalties in this law were harsher, concerning protection of antiquities. For smuggling crimes, penalties were imprisonment and fines, not less than 5000

Egyptian pounds and not exceeding 50,000 Egyptian pounds. Licensed trade in antiquities was totally abolished since this law was enacted.

Accordingly, it is quite evident that all antiquities have been regulated by legal controls for exit out of Egypt since 1835 till now. If brought out illegally, they can never be legally owned on the basis of any ground for acquisition of ownership including prescription with lapse of time; since antiquities are not similar in their legal status to other movable items, they are not tradable goods, their holding and disposal were always controlled by restrictions, since private holding is an exception from the general rule of public ownership of antiquities.

Third: Methods of Combating Crimes of Infringement upon Cultural Property in the Egyptian Legislation

Crimes of Infringement upon Cultural Property are summed up in the following:

1. Drilling without a license - illegal excavations.
2. Theft of cultural property.
3. Smuggling.
4. Concealment.

The method of combating these crimes in Egypt is based on several axes parallel to achieve its main goal, which is to prevent crime or reduce its severity especially that most of cultural property in Egypt is mainly antiquities.

The First Axes: Identification of archaeological areas:

Archeological sites and areas in Egypt are identified on an archaeological map since 2002. Most sites have a fence difficult to be infiltrated through, sites and monuments are guarded throughout the day by a special police to protect the antiquities and security personnel of the Supreme Council of Antiquities is responsible for all sites in ancient Egypt and they are receiving training at a high level before their appointment.

The Second Axis: Museum Stores:

Egypt also in the field of control establishes the so-called "museum stores", a new system for preservation of antiquities which are not exhibited rather than the old stores. Such stores are like small museums in the archive of the antiquities they contain and the way they are recorded. They are all secured by warning devices against theft. In order to limit the antiquities that are found in archaeological sites at present and to prevent smuggling, the registration procedures of any antiquity found immediately begin in the same location where it is found, digital photos are taken for such antiquity and its exact specifications are determined and then transported to a museum or warehouses as the case. This is done with the foreign and Egyptian missions evenly. Any foreign mission is not allowed to work without Egyptian inspectors accompanying it.

The Third Axis: Department of Ports:

In the framework of the campaign, the Supreme Council of Antiquities established Department of Ports. 24 units have been set up at airports, land and sea ports, and supplied with qualified archeologists to work in these ports to examine the suspected items as well as any replicas such as Khan Khalily products and other artifacts. They also express the archaeological opinion before they let these items exported.. These units have succeeded in reducing smuggling of antiquities through air, sea and land ports, and with the participation of the security authorities in these ports many attempts to smuggling antiquities out of Egypt have been pre-empt.

The Fourth Axis: Modernization of Legislation:

Intensification of penalties in the draft Law on the Protection of Antiquities which is being discussed this month in the Egyptian parliament is one of the means to combat crime. Minimum and maximum limits for the crimes of smuggling, theft and drilling without a license have been increased. Fines has been doubled and penalties for smuggling crimes became harsher up to life imprisonment, confiscation and a fine up to five hundred thousand pounds, while penalty for crimes of theft and drilling without a license reached to life imprisonment and a fine up to two hundred and fifty thousand pounds as well as the confiscation of tools and vehicles used in those crimes.

The Fifth Axis: A Database:

The Supreme Council of Antiquities established a database since 2003 contains annual data for the crimes of drilling without a license, its places, the accused in these crimes and its results as well as crimes of theft of antiquities and cultural property and following it in cooperation with Interpol in Egypt.

Fourth: Mechanisms for restituting infringed cultural property in the Egyptian Legislation

The Ministry of Culture, represented by the Supreme Council of Antiquities, started an international campaign to restitute stolen Egyptian antiquities, or those illegally taken out of Egypt in previous periods. This campaign had good results, rare antiquity items returned back to Egypt, after long periods of being abroad as the following mechanisms were followed:

First Mechanism:

A new directorate for restitution of antiquities has been established. The mandate of this directorate is to provide a comprehensive survey of all antiquity items illegally taken out of Egypt, as well as antiquities lost from stores and museums. It also receives notifications and reports from Egyptian embassies and consulates abroad about presence of seized or illicitly sold antiquities. It also follows up what is published in catalogues of major auction halls presenting Egyptian antiquities for sale. The Supreme Council for Antiquities succeeded in getting back many antiquities which were smuggled outside the country. Till now, about 5000 antiquity items have been restituted.

Second Mechanism:

To implement the 1970 UNESCO convention, the Supreme Council of Antiquities established the National Committee for restitution of Egyptian antiquities smuggled abroad, chaired by the Minister of Culture and including representative members from concerned agencies, the Public Security, the High Prosecution for Financial Affairs, Office of International Cooperation at the Ministry of Justice, Ministry of Foreign Affairs and the Legal Adviser for the Supreme Council for Antiquities. The mandate of this committee is coordinating national efforts to restitute antiquities smuggled abroad or brought out of the country through other illicit ways and the approaches for their restitution through negotiations,

diplomatic channels or conclusion of agreements for international cooperation with foreign countries, addressing auction halls, museums and other concerned agencies in countries where there are illicitly obtained Egyptian antiquities, cooperating with international organizations concerned with cultural heritage, contributing in various activities for implementation of laws, bye-laws and regulations related to the mandate of the National Committee and acting to develop and update them in conformity with the objectives of the Committee, sharing in preparation of drafts for laws and bye-laws required for protection of the cultural heritage and prevention of its being taken out illicitly abroad , formulating a list of archaeological and significant cultural property, whether public or private, the illicit exit of which would constitute a significant impoverishment of the national cultural and civilization heritage and ongoing updating of this list.

Third Mechanism:

This mechanism is the use of diplomatic channels or direct negotiation with individuals, scientific institutions or museums, which possess antiquities transferred illegally from Egypt. Egypt has succeeded in this way to restore a lot of artifacts smuggled rather than resorting to litigation, which is apart from the length of its procedures it will cost huge sums of money. This method has been applied over the two years 2008 / 2009 with one of the museums of England and resulted in the return of 450 artifacts, and also with the Egyptian Museum in Barcelona and three pieces of rare antique was recovered.

Fourth Mechanism:

Requests for judicial assistance through the Office of the Attorney General should be submitted to the judicial authorities in the same state where the cultural property to be retrieved exists including an explanation of the circumstances in which the antiquity or cultural property was stolen, the perpetrators of these crimes, police investigation and legal evidences.

Fifth Mechanism:

This one may be one of the mechanisms used by Egypt is to impose penalties on museums or scientific institutions possessing stolen antiquities as since 2002 The Permanent Committee of Egyptian Antiquities - an internal committee of the Supreme Council of

Antiquities concerned with enactment of regulations for the protection of archaeological sites, organization of ways of dealing with the foreign missions as well as the establishment of the areas of archaeological activities - decreed to stop dealing scientifically and practically with any museum or scientific institution possessing stolen antiquities through cessation of all archaeological and scientific activities in Egypt and the prevention of scientific cooperation with them. It is not far from the mind the decision taken with the Louvre in Paris after the possession of five wall pieces stolen from a tomb in cemetery Luxor and its announcement of a return.

Fifth: The Difficulties Egypt Faces in Restitution of infringed Cultural Property

- A) There is no provision in the UNESCO Conventions obliges Member States to return stolen cultural property to its country of origin. Its provisions in this regard include approval on the cooperation for recovery and to facilitate the task the State requesting restitution asked for ... etc. These texts are not sufficient for the purpose for which the member States or the majority of them signed that Convention, which is the recovery of their cultural property that were get out illegally from their country of origin for many years, so that Member States should agree to issue a recommendation to recover any cultural property in case its proved that it was transferred illegally.
- B) Slackness in recovery procedures by the State in which the antiquity or cultural property that was transferred illegally is located so that fines must be imposed to urge Member States to activate recovery procedures without delay.
- C) The absence of an international court or executive organization that may be considered as a reference if there is dispute between the Member States to recover the cultural property. Now there is no alternative but resorting to national courts of the State possessing the cultural property, which is of course risky alternative because of slowness of the procedures and the absence of legislation to prevent trafficking in cultural items in addition to the high costs of litigation, which in many cases exceeding the value of the same cultural property if we take into account the value estimated by the world auction halls.
- D) The absence of any provisions balance between the right of the State seized the impact and the holder in good faith.

Sixth: Notes on the Provisions of Draft Model Bilateral Agreement:

A) the Definition mentioned in the first article is broader than the definition contained in the 1970 Convention, by:

1. In the first paragraph of Article I of the definition of cultural property, the words "that are subject to customs control" were added that means that export of cultural property without the approval of State Customs is not allowed, but what makes this text defective is that each State should amend domestic legislation for the export of cultural property to go along with that Convention because if these cultural property were not come under the scope of customs control, it will not be protected by this text. It should be noted here that our Egyptian law does not permit the export of Egyptian cultural property in any form.
2. Paragraph (e) stipulates a new provision for the definition of antiquity; the Convention did not stipulate the passage of more than 100 years of the antiquity as was the case in the 1970 Convention, paving the way to insert the modern monuments within the scope of application of the Convention.
3. Article I of the scope of application of the Convention have not defined a physical element of the crime, which is theft and illegal export. It is better to have a clearer definition of the physical act. It is also proposed to insert excavation crimes in the territory of a State party in the Convention as one of the physical elements of theft crimes because these crimes are usually committed in the form of organized international crimes so that it is important to be within the scope of criminality.
4. It is proposed to delete the last paragraph "after the entry into force" of item 2 of Article I of the Convention, which limited the scope of its application to crimes that will be committed after the entry into force because it limited the application of the Convention on the future crimes and did not regulate the status of crimes committed before the entry into force of the Convention, which would let the perpetrators slip away from the umbrella of this Convention as well as it is envisaged that the physical act of the crimes took place prior to activation of the Convention while it is discovered after the entry into force. In that case the Convention can't be applicable.

B) One of the most important articles of this Convention is the second article of the duties of Member States. That article obliges Member States with many commitments. In the following we clarify the

importance of these commitments made in that article as well as the commentary:

1. Paragraph (b) is an expansion of the scope of criminality, it mentioned, for the first time, the idea of criminalizing of possession of cultural property. It is considered enormous progress compared to previous agreements, which had no reference whatsoever to criminalize the possession in addition to that it is not limited to museums and similar institutions but expanded to include the individuals.
2. Paragraph (c) is considered an implicit recognition of the international dimensions of crimes of infringement on cultural property, which makes combating such crimes more effective if a separate executive body of international character was established to keep pace with the evolution of international crime, as will be mentioned in the recommendations.
3. Paragraph (d) is considered a progress in the field of international cooperation among States to combat such crimes, but it is better to provide a special article for establishing a center dedicated to the database and affiliated to UNESCO like in money-laundering crimes. This article is limited to just an act of aggression, which is theft and did not provide for other criminal acts in the Convention, as will be mentioned in the recommendations.
4. Paragraph (e) is framed in an ambiguous way. The wording must be amended as the concept of the article is that there is an obligation on States not to recognize the possession of cultural property in good faith, as well as that article is limited to stolen cultural property only. It is proposed to delete the word "stolen" to be replaced by "infringed" or refer in the proposed article to identifying the infringement of cultural property, which must be requested a legal interpretation on which.
5. Paragraph (f) obliges member states to provide export certificates form of cultural property which makes export of such property properly. This paragraph in this manner is inconsistent with the provisions of the Egyptian law which prohibits the export of cultural property in any way, then we have reservations on that paragraph as not only the Egyptian law, but international conventions and treaties for the protection of heritage prevent export of cultural property that was illegally transferred from their place of origin. This item, which obliges states to provide a model export certificate, only makes the

original texts void in substance because the export certificate will not be a means to legitimize cultural property transferred illegally from its place of origin. So we propose to amend article obliging the State parties to attach a certificate stating that the cultural property was transferred from its place of origin.

6. Paragraph (g) are contrary to paragraph (e) We suggest deleting it and replace it with the proposal in the margin for adding certain types of crimes committed against the movable cultural property to the list of extraditable crimes covered by the extradition treaty.

7. The second paragraph of that article is a progress in the recovery of infringed cultural property, but it is better if there is obligation of States to complete the recovery process.

C) The third article provides for penalties is considered progress in the fight against illicit trafficking in antiquities being already not reached by any previous treaty. Contrary to the 1970 Convention, it had passed imposing penalties on individuals. We propose to follow imposition of a minimum level of penalties, whether financial or other as indicated in the margin of comment on the article provided for in the Convention.

D) Finally, this convention in its fourth article organized the procedures that the State must follow to recover their infringed cultural property, which is limited to achieve its intended purpose. It did not oblige States to return infringed cultural property exist in its territory. The following is an explanation of criticism addressed to this Convention:

1. The first paragraph of this article is criticized because it requires that restitution requests must be sent through diplomatic channels. It is appropriate to be done by judicial methods to conform to the purpose thereof as mandatory judicial methods are more obligatory than the diplomatic, which are governed by political relations among States or to provide to complete the recovery process through an independent body affiliated to the UNESCO which has a binding judicial status, as will be mentioned in the recommendations.

2. In addition, the condition of that paragraph is unfair, which is to determine the date of export because it is difficult to verify this as it is usually illegal export and then can not determine the date. It is better to delete this condition.

Seventh: Recommendations Proposed by the Egyptian Delegation to make the Convention more effective

1. Preparation of a model convention suitable to be a nucleus for a collective international convention not for a bilateral agreement: It is preferable to incorporate the UNESCO Conventions 1970 and UNIDROIT 1995 in this Convention to be a standard so as not to contradict the texts of agreements with each other, which reduces its effectiveness.
2. Provisions of the international convention should regulate a status of internal protection whereby any infringed cultural property can not be registered in the State where it exists, in addition to non-prescription of a State's right to recover their looted antiquities, which may not be with the acquisition of the cultural property that has been infringed by prescription.
3. Establishment of a body affiliated to UNESCO which competences are to be as follows:
 - a) Create an international database containing all data pertaining to cultural property stolen and exported illegally and that whether by the state owner of the property or the State where the crime was discovered that the availability of such information to all States concerned that crime and publish of international bulletin including specifications of infringed cultural property distributed to all countries so as to seize such property and the perpetrators.
 - b) Investigate the accuracy of the information provided to it by the States on such crimes, expose the perpetrators of those crimes and publish international bulletin such as Red Notices to the INTERPOL with specifications of infringed cultural property and the names of offenders who are found involved in crimes. This is in coordination with States and international police to detect the location of the property and tracing the perpetrators of those crimes.
 - c) To make it easier for the States which are entitled to recover its looted antiquities, such body must, within its competences, receive restitution requests of infringed cultural property from the countries who have the right, examine these requests and take recovery procedures on behalf of that State as well as obliging the other countries where the cultural property is located in its territory to return such property. In order to make the restitution resolutions issued by this body effective, it is proposed to be within its competences to impose penalties for delay on

- the state proved its failure to effect delivery of the property that it was stolen or exported illegally.
- d) Consideration of disputes arising out of the above-mentioned requests of restitution for the adjudication of claims that may arise over the ownership of cultural property which has been infringed by any country, individual or institution as well as the unification and consolidation of legal principles in this area. So this body to be dynamic, any claims brought by individuals or institutions, especially against one of the States may be accepted and vice versa.
 - e) Sentences issued by this body must be binding and could be implemented in any state along the lines of commercial arbitration sentences issued by international institutions.
 - f) The body must have the right to make recommendations to the States concerned to punish criminally before national courts persons found guilty of involvement in crimes of aggression on cultural property within its territory.

Conclusion

The aim of the Egyptian delegation from attending the conference is not mere participation, but it aims at increasing the effectiveness of the dispositions of the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property 1970, as well as amending other dispositions not providing adequate protection. We are submitting this working paper for inclusion in the conference agenda, so that our participation would be effective and our attendance would be active.

Finally, experience and practice are the best masters for those who want to achieve desired aims. Undoubtedly, the delegations sharing in this conference, all of them including renowned professionals in this field, whereas proceeding to implement their proposals, would find out several ideas to supplement the working paper submitted by Egypt, whether by modification or by addition.

